

Case C-909/19

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:

11 December 2019

Referring court:

Curtea de Apel Iași (Court of Appeal, Iași, Romania)

Date of the decision to refer:

3 December 2019

Appellant:

BX

Respondent:

Unitatea administrativ-teritorială D.

Subject matter of the main proceedings

Appeal brought by BX against the judgment of 11 April 2019 of the Tribunalul Vaslui (Regional Court, Vaslui, Romania) dismissing an application for an order requiring the Unitatea administrativ-teritorială D. (Territorial Administrative Unit D.) to pay remuneration for mandatory participation in vocational training courses after normal working hours

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, interpretation is sought of Article 2(1) and (2) and Articles 3, 5 and 6 of Directive 2003/88/EC concerning certain aspects of the organisation of working time, and of Article 31(2) of the Charter of Fundamental Rights of the European Union

Questions referred

1. Is Article 2(1) of Directive 2003/88/EC concerning certain aspects of the organisation of working time to be interpreted as meaning that the period of time during which a worker attends mandatory vocational training courses after completing his or her normal hours of work, at the premises of the training services provider, away from his or her place of work, and without performing any of his or her service duties, constitutes ‘working time’?

2. In the event that the first question is answered in the negative, are Article 31(2) of the Charter of Fundamental Rights of the European Union and Article 2(2), Article 3, Article 5 and Article 6 of Directive 2003/88/EC to be interpreted as precluding national legislation which, while establishing the need for employees to undertake vocational training, does not oblige employers to observe workers’ rest periods in so far concerns the time during which training courses are to be attended?

Provisions of EU law and case-law of the Court of Justice cited

Charter of Fundamental Rights of the European Union (‘the Charter’), Article 31(2);

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Article 2(1) and (2) and Articles 3, 5 and 6;

Judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584; of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82; of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528; of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717; of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609; of 9 September 2003, *Jaeger*, C-151/02, EU:C:2003:437; and of 1 December 2005, *Dellas and Others*, C-14/04, EU:C:2005:728; orders of 11 January 2007, *Vorel*, C-437/05, EU:C:2007:23, and of 4 March 2011, *Grigore*, C-258/10, EU:C:2011:122; judgments of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578; of 9 July 2015, *Commission v Ireland*, C-87/14, EU:C:2015:449; and of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402.

Provisions of national law and national case-law cited

Legea nr. 53/2003 privind Codul muncii (Law No 53/2003 establishing the Labour Code), in the version applicable to the facts at issue. Under the provisions cited, working time includes any period of time during which an employee performs his or her work, remains at his or her employer’s disposal and fulfils his or her tasks and duties, in accordance with the terms of his or her individual contract of employment, the applicable collective employment agreement and/or

the legislation in force. The normal duration of working time is 8 hours per day and 40 hours per week, and work done in excess of that time is regarded as overtime. Overtime is compensated by way of paid leave in the 60 calendar days following the completion of the overtime. In such circumstances, the employee receives the remuneration corresponding to the hours worked in excess of his or her normal working time.

In so far as concerns participation in vocational training courses, when this takes place at the employer's request, all expenses incurred in relation to that participation are to be borne by the employer. Throughout the duration of the vocational training, employees retain all their remuneration rights.

Ordinul ministrului afacerilor interne nr. 96/2016 pentru aprobarea criteriilor de performanță privind constituirea, încadrarea și dotarea serviciilor voluntare și a serviciilor private pentru situații de urgență (Order No 96/2016 of the Minister for Home Affairs approving the performance criteria for the establishment, management and equipment of voluntary and private emergency services), in the version applicable to the facts at issue ('Order No 96/2016'). Pursuant to the provisions of that order, the head of an emergency service must have the specific professional qualification or skills, certified in accordance with the regulations in force, and must obtain approval from the competent authorities. The administrative authorities are under an obligation to give effect to that order.

Ordonanța Guvernului României nr. 129/2000 privind formarea profesională a adulților (Romanian Government Ordinance No 129/2000 concerning vocational training for adults), in the version applicable to the facts at issue. Under that ordinance, with respect to time spent participating in vocational training courses paid for by their employer, employees retain the remuneration rights established in their individual contract of employment in respect of their normal working time.

Legea-cadru nr. 153/2017 privind salarizarea personalului plătit din fonduri publice (Framework Law No 153/2017 concerning the remuneration of staff paid from public funds). Article 21 of that law provides that overtime performed in excess of normal working time and work performed during weekly rest days are to be compensated by way of paid leave in the 60 calendar days following the completion of such work. Where it is not possible to provide compensation by way of paid leave, the overtime performed in excess of normal working time is to be paid by the end of the following month, with an uplift of 75% of the basic remuneration corresponding to the additional hours worked.

Decizia din 12 ianuarie 2010 a Curții de Apel Ploiești (Judgment of 12 January 2010 of the Court of Appeal, Ploiești, Romania), according to which, in the event that they participate in vocational training courses, employees have no right to compensation for the additional hours or to payment of an uplift for overtime. Time spent in vocational training is not included in the calculation of

the employee's working time and, consequently, regardless of the time dedicated to vocational training, the employee is solely entitled to remuneration corresponding to his or her normal working time.

Decizia din 4 octombrie 2016 a Curții de Apel Iași (Judgment of 4 October 2016 of the Court of Appeal, Iași, Romania), according to which an employer must pay a supplement to basic remuneration in respect of overtime performed in excess of normal working time whenever it is demonstrated that, in view of the way in which the employer determined and organised the work, and the continuity and repeatability of a given set of internal rules, the employer has systematically accepted, encouraged or even brought about the performance of overtime. The mere infringement of formal requirements for the performance of overtime cannot provide grounds for relieving an employee of his or her responsibilities towards his or her employer.

Succinct presentation of the facts and the main proceedings

- 1 The appellant and applicant at first instance ('the applicant') is employed by the respondent and defendant at first instance ('the defendant') as a fire-fighter in the Voluntary Emergency Service. The defendant is a territorial administrative body.
- 2 In accordance with certain national provisions, in particular Order No 96/2016, the defendant asked the applicant to attend a vocational training course to qualify as head of the Voluntary Emergency Service. To that end, on 22 February 2017, the defendant entered into a contract with a company specialising in vocational training courses (Euroasia SRL). The ultimate beneficiary of those courses was the applicant. The expenses incurred in relation to that training were borne by the defendant.
- 3 In order to qualify as head of the Voluntary Emergency Service, the applicant was required to complete 160 hours of vocational training. He attended courses between 4 March 2017 and 11 April 2017, in premises away from his own home, according to the timetable drawn up by Euroasia SRL, namely from 3:00 p.m. to 8:00 p.m. Monday to Friday as well as at weekends.
- 4 After the applicant had successfully completed the courses, the defendant requested the competent authorities to issue a notice approving the applicant's appointment as head of the Voluntary Emergency Service within its territory.
- 5 Out of the 160 hours of vocational training undertaken, the applicant completed 124 hours outside his normal working hours. He neither requested nor received any vocational training leave and he requests that he be remunerated for those 124 hours.
- 6 To that end, the applicant brought an action before the Tribunalul Vaslui (Regional Court, Vaslui, Romania), which was dismissed by judgment of 11 April 2019. In essence, that court held that participation in a vocational training course

did not fall within the concept of ‘work’, within the meaning of national legislation, nor that of ‘working time’, within the meaning of Directive 2003/88. In addition, even if it were accepted that participation in such a training course did constitute ‘working time’, given the provisions of Article 21 of Law No 153/2017, payment in respect of additional hours may be made from the budgetary system only where those additional hours have been expressly arranged by a hierarchical superior and only where it is impossible to provide compensation by way of an appropriate period of leave. However, in this case, there was no evidence that any express request had been made for additional hours to be worked.

- 7 The applicant brought an appeal against that judgment before the referring court.

The essential arguments of the parties to the main proceedings

- 8 **The applicant** considers that he is entitled to remuneration for the additional hours worked in order to participate in mandatory vocational training courses outside his working time. He maintains that, if he had not attended the courses outside his hours of work, his employer would have required him to repay his vocational training expenses.
- 9 **The defendant** contends that the applicant’s claims are unfounded because, under national law, overtime performed in excess of the normal duration of working time and work performed during weekly rest days is to be compensated solely by a corresponding period of leave. However, the applicant did not submit any request for the overtime which he claims to have performed to be compensated by way of an appropriate period of leave.

Succinct presentation of the reasons for the reference

- 10 In the referring court’s view, while the remuneration of employees remains a matter of domestic law, in order to resolve the present dispute it is first necessary to establish the legal nature, from the perspective of EU law, of the time that an employee dedicates to vocational training away from his or her normal place of work, at the request and for the benefit of his or her employer and outside his or her normal working hours on weekdays and on weekly rest days.
- 11 **As regards the first question**, in so far as concerns the conditions laid down in Article 2(1) of Directive 2003/88, the court of first instance held that participation in vocational training did not fall within the concept of ‘work’, because during the time he spent in vocational training, the applicant was neither at his place of work nor at his employer’s disposal. However, the referring court notes that the case-law of the Court of Justice is more nuanced, inasmuch as it has been held that the classification as ‘working time’, within the meaning of that directive, of a period during which a worker is present at his or her place of work depends on whether that worker is under an obligation to be at his or her employer’s disposal. The decisive factor is the fact that the worker is required to be physically present at the

place determined by the employer and to remain at the employer's disposal so as to be able to provide the appropriate services immediately, as the need arises.

- 12 It is also clear from the case-law of the Court of Justice that the possibility for workers to manage their time without major constraints and to pursue their own interests is a factor capable of demonstrating that the period of time in question does not constitute working time within the meaning of Directive 2003/88.
- 13 Therefore, referring to the Opinion of Advocate General Bot in *Commission v Ireland* (C-87/14, EU:C:2015:192), the referring court considers that, in keeping with the system established by the EU legislature, the Court of Justice has adopted a two-pillar approach whereby anything not covered by the concept of 'working time' is covered by the concept of 'rest period', and vice versa. That specific interdependent, commutative system invites the conclusion that any time dedicated to vocational training at the employer's request, since it is not time available to the employee, constitutes working time.
- 14 However, that conclusion does not emerge with clarity from the case-law of the Court of Justice: in its judgment in *Commission v Ireland* (C-87/14, EU:C:2015:449), the Court held that 'the fact, referred to by the Commission, that training times A and B are required "by the training programme" and take place in a place determined "by that programme", does not justify the conclusion that [non-consultant hospital doctors] are required to be physically present at the place determined by the employer and to remain there at the disposal of that employer so as immediately to be able to provide appropriate services as the need arises ...'.
- 15 Thus, the Court did not in that case adopt the view of the Advocate General, who considered that 'the refusal to count the training hours of [non-consultant hospital doctors] as "working time" for the purposes of point (1) of Article 2 of Directive 2003/88 is contrary to that directive, as it is predicated on the idea that [non-consultant hospital doctors] are not carrying out their activity or duties for the purposes of that provision when they are undergoing training in accordance with the programme devised by the body approved for that purpose'.
- 16 Thus, according to the referring court, the Court of Justice has taken the view that time dedicated to vocational training for non-consultant hospital doctors does not, apparently, meet the defining requirements of working time within the meaning of Article 2(1) of Directive 2003/88.
- 17 Notwithstanding, in the present case, attendance at the vocational training course, done at the employer's request, after working hours and at premises other than the applicant's home, constitutes an interference in the full and free exercise of the right to rest, since the applicant suffered the geographical and temporal constraints resulting from the need to attend that course. However, that activity was unquestionably part of the performance of the applicant's occupational activities, since it was rendered necessary by the need for the applicant to be approved as head of the emergency service. Consequently, the time dedicated to vocational

training cannot be regarded as meeting the defining requirements of a rest period within the meaning of Article 2(2) of Directive 2003/88.

- 18 The referring court emphasises that Article 13 of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union is not applicable to the present case *ratione temporis*.
- 19 **As regards the second question**, in the event that the Court of Justice finds that time dedicated to training a worker does not fall within the scope of Article 2(1) of Directive 2003/88, the referring court, making reference to paragraphs 40 to 43 of the judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, considers that it must be concluded that Article 31(2) of the Charter and Article 2(2) and Articles 3, 5 and 6 of Directive 2003/88 preclude any interference in a worker's free enjoyment of his or her daily and weekly rest periods, including in so far as concerns tasks that are on the periphery of, ancillary to, or related to the employment relationship, such as tasks relating to vocational training.
- 20 In this respect, the distinction made in that directive between the working time and the rest periods of employees implies a corresponding classification of the employer's substantive obligations, namely the obligation to observe working time, on the one hand, and the obligation to observe rest periods, on the other.
- 21 It is clear from the case-law of the Court that, in the event of an infringement of the obligation to observe the average weekly working time, an employee may rely on EU law to establish the liability of the authorities of the Member State concerned in order to obtain reparation for the loss or damage sustained as a result of the infringement of that provision (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717).
- 22 Romanian law does not offer any solutions in a situation where vocational training courses are attended outside normal working hours, nor does it establish any kind of obligation on the employer regarding time spent in training or any sort of limitation relating to observance of weekly working time.
- 23 In that context, and given that the Member States have an obligation to ensure the effectiveness of the provisions of [Directive 2003/88] and to establish mechanisms to ensure the observance of minimum daily and weekly rest periods for employees, the referring court considers that it is necessary for the Court of Justice to determine whether the provisions mentioned preclude national legislation which, while establishing the need for employees to undertake vocational training, does not oblige employers to observe workers' rest periods in so far concerns the time during which training courses are to be attended.