

**THE LABOUR COURT**  
LANSLOWNE HOUSE  
LANSLOWNE ROAD  
BALLSBRIDGE  
DUBLIN 4  
D04 A3A8



**AN CHÚIRT OIBREACHAIS**  
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**IN THE MATTER OF A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION  
PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN  
UNION**

**AND IN THE MATTER OF THE ORGANISATION OF WORKING TIME ACT 1997**

**AND IN THE MATTER OF COUNCIL DIRECTIVE 2003/88/EC OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL of 4<sup>th</sup> NOVEMBER 2003 CONCERNING CERTAIN ASPECTS OF THE  
ORGANISATION OF WORKING TIME.**

**PARTIES:**

**MG**

**COMPLAINANT**

**AND**

**DUBLIN CITY COUNCIL**

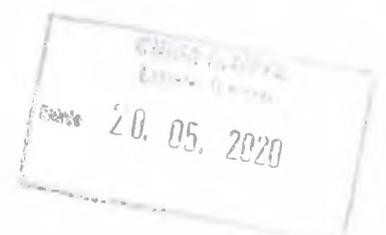
**RESPONDENT**

**DIVISION OF THE COURT**

**Mr Kevin Foley: (Chairman)**

**Ms Sylvia Doyle: (Employer Member)**

**Mr Andrew McCarthy: (Worker Member)**



## **ORDER FOR REFERENCE**

1. This reference arises from an appeal by the Complainant against the decision of an Adjudication Officer of the Workplace Relations Commission in his claim against the Respondent listed in the title of these proceedings. The Complainant contends that the time spent by him on-call constituted working time within the meaning of the section 2 of the Organisation of Working Time Act 1997 and Article 2(1) of Council Directive 2003/ 88/EC. The claim was dismissed by an Adjudication Officer of the Workplace Relations Commission.
2. The Workplace Relations Commission is a body established by law with first instance jurisdiction to hear and determine complaints where breaches of the Organisation of Working Time Act are alleged.
3. The Complainant appealed the decision of the Adjudication Officer to the Labour Court which is the national Court having jurisdiction to hear and determine appeals from the Workplace Relations Commission in employment related appeals, including in matters relating to the Organisation of Working Time Act 1997.

## **Facts Giving Rise to the Main Proceedings**

4. The Complainant is a retained Firefighter employed by the Respondent. He has been in the Respondent's employment since September 2005. A retained Firefighter is a part-time Firefighter that is trained and retained by the Fire Station to which he is attached to respond to an emergency call when alerted. When a call is received for the fire brigade, the alerters for a particular brigade are activated and the firefighters, who each carry an alerter, respond to the fire station immediately. The firefighters are then required to make their way to the station without delay within 10 minutes of being alerted. A retained Firefighter, such as the Complainant, is paid a basic retainer in the region of €10,000 per annum which is paid monthly. The retainer is to compensate the retained Firefighter from being on stand-by. In addition to the retainer, a retained Firefighter such as the Complainant is paid an agreed amount when required to attend the fire station. The Complainant is retained on a 24 hours basis (excluding periods of annual leave and periods when he notifies his employer in advance of his unavailability and the employer agrees to this) to respond to emergencies when alerted by means of a bleeper by the employer. The Complainant is required to respond to the employer bleeper within 5 minutes. The maximum turnout time is 10 minutes. The Complainant is required to attend 85% of normal training practices and 75% of fires.

5. The Complainant is allowed to engage in other work provided he does not work in excess of 48 hours per week averaged over a four, six- or twelve-month period depending on his category of employment. The Complainant works as a taxi driver. It is a requirement of his contract of employment with the fire station that the Complainant provide verification from his second employer that he will be released to attend incidents as required. It is a further requirement of his contract of employment that the Complainant is precluded from taking any other work during his (active)\* hours of work as a retained fire fighter. The Complainant is required to live and work within a reasonable distance of the employer fire station. A reasonable distance is as per turn-out time of the fire station in which they are employed. A change of residence or place of employment which would take them an unreasonable distance from the station will mean automatic termination of their service. On-call firefighters who respond within the turnout time limit will receive full pay for the incident in all circumstances. Any firefighter who fails to respond within the desirable turnout time limit but responds within the maximum attendance time set by the Chief Fire Officer, is paid one-hour flat time and will be at the station unless required at an incident.
6. The employment is expressed to be part-time. It is a condition of employment that retained firefighters are available as required.

## **Submissions of the Parties in the Main Proceedings**

### ***The Complainant***

7. The Complainant's core submission is that that the time spend on standby/on-call amounts to working time. The Complainant is effectively on-call 24 hours of the day, 7 days of the week (absent annual and other leave periods such as sick leave and where he notifies his employer in advance of his unavailability and the employer agrees to this), because of the requirement that he must presented himself at the fire station within the desirable 5- minute or maximum 10 minute turnout time of being alerted. Because of this, the Complainant argues that the Respondent is in breach of sections 11-17 and sections 20 and 23 of the Organisation of Working Time Act 1997 concerning inter alia daily and weekly rest periods and working in excess of a 48-hour week. The Complainant says that due to the restriction of being on-call/stand-by he is unable to commit to family, taxi work or social arrangements that could impact on his ability to be available if alerted. Failure to respond to the alerter can lead to disciplinary action and potential dismissal. The Organisation of Working Time Act 1997 transposed Directive 93/104/EC of the Council of the European Communities concerning certain aspects of the organisation of working time which has since been amended and then consolidated into Directive 2003/88/EC.

8. It is further submitted on behalf of the Complainant that by applying the judgement of the Court of Justice of the European Union in *Ville de Nivelles and Matzak (C-518/15)* and in particular its response to Ruling 4 that time spend by him on-call amounts to working time.

***\*Active hours of work are defined as hours spent actually attending fires or at the station engaged in training / drills etc. The Complainant accrued 221 hours and 17 minutes of active hours in 2019***

### **The Respondent**

9. The Respondent submits that the requirement for the Complainant to be available within a specified distance of the fire station so he can respond to an alerter and mobilise within a specified period of time does not constitute working time. During this time the Complainant can and is employed and free to engage in other activities. The Complainant is not required to remain in any particular place when on stand-by. The only requirement is that when alerted, the Complainant comply with the turn-out period. There is a desirable turn-out period of 5 minutes and a maximum turn-out period of 10 minutes. This reflects the fact that retained firefighters will make every effort to respond to their alerter but may be delayed for reasons outside their control. Any firefighter who arrives after ten minutes is not paid. A firefighter, if alerted, is required to attend the fire station. The station officer will then decide how many crew members are required for the incident. Normally this is limited to five. The Complainant will then be assigned or not. If the Complainant is not assigned, he is free to go and resume his own activities. In 2019 the Complainant attended the station for 64% of alerts and was assigned for 33% of alerts. There was a total of 648 alerts in 2019. The Complainant's maximum weekly working period in 2019 for which he was paid an allowance was 26 hours with a weekly average of 4.61 hours.

### **National Law**

10. The Organisation of Working Time Act 1997 ("the 1997 Act") gives effect in national law to Council Directive 93/104/EC, since repealed and replaced by 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.
11. As is settled law, the 1997 Act must be interpreted and applied, as far as possible, to achieve the purpose pursued by the Directive.

12. Section 2(1) of the 1997 Act provides that “working time” means any time that the employee is

- (a) at his or her place of work or at his or her employer’s disposal, and
- (b) carrying out or performing the activities or duties of his or her work
- (c) and
- (d) “work” shall be construed accordingly.

The text of the Organisation of Working Time Act, in its amended form may be obtained at: <http://revisedacts.lawreform.ie/eli/1997/act/20/front/revised/en/html>

### **Relevant Provisions of Union Law**

13. The relevant provisions of Union law are contained in Article 2(1) of Directive 2003/88/EC. Article 2(1) provides as follows: “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his activities and duties, in accordance with national laws and/or practice.

14. There is no claim of a breach of the 1997 Act in respect of the hours the Complainant spends actually called out. The case is based on the proposition that ‘on call’ time is ‘working time’ within the meaning of the Act and the Directive having regard to the interpretation of Article 2 of Directive 2003 /88/EC set out in Ruling 4 of the CJEU in **Case C-518/15 – Ville de Nivelles (Belgium) and Mr Rudy Matzak**.

15. On that basis the Complainant contends that he works 24 hours a day for 365 days per year absent periods of annual and other leave and periods when he notifies his employer in advance of his unavailability in breach of the Act at Section 11, 12, 13, 14, 15, 16, 17, 20, 21.

16. The key matter of contention is the meaning of ‘working time’. The Directive carries at Article 2 a definition of ‘working time’ and a definition of ‘rest periods’ and it is the interpretation of those definitions which underpin this dispute.

17. Ruling 4 of the CJEU is as follows: *Article 2 of the 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’.*

### **Views of the Referring Court**

18. The decision of the CJEU, at Ruling 4 answers the question as regards a worker on standby at a place nominated by the employer, in the case of Matzak, his home. The CJEU makes specific reference to the difference in terms of restriction placed upon a worker by a requirement to be on standby at a place directed by the employer. The

CJEU also refers to the restriction imposed by the requirement to be within 8 minutes of the workplace when called.

19. Features of the complainant's obligations which distinguish the claimant's 'on call' arrangement from that of Matzak are that he was not required to be at any particular location by the employer and was required only to be able to respond within the required turn-out time when alerted.
20. The Complainant in Matzak was unable to engage in work or economic activity while 'on call' while no such restriction applies to the Complainant. The Complainant is free to and does engage in economic activity on his own account while 'on call' as a taxi driver. He is free to be employed by a third party or to be in business on his own account while 'on call'. It is common case that during the 'on call' periods which he claims are 'working time' the Complainant could and did engage in employment such that another employer would or could carry obligation under the 1997 Act in respect of the organisation of his working time.

### **Outcome**

21. For the reasons set out herein the Court has concluded that it requires the assistance of the Court of Justice of the European Union on the interpretation of Union Law before it can give its determination in this case. Accordingly, the Court has decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:

### **Questions**

1. Must Article 2 of the Directive be interpreted to mean that a worker, when 'on call' at a location or locations of his choosing without requirement at any time while on-call to notify the employer of his or her location, but subject only to the requirement that the worker be able to respond to a 'call in' within a desirable turn-out period of 5 minutes and a maximum turn-out period of 10 minutes, is engaged in working time while on-call?
2. If the answer to question 1 is in the affirmative, can a worker who is not restricted other than by a requirement to respond to a call- in within a desirable turn-out period of 5 minutes and a maximum turn-out period of 10 minutes, and who is able, without restriction, to be employed contemporaneously by another employer or to engage in business on his own account while 'on-call', be regarded as engaged in 'working time' on behalf of the employer in respect of which employment he or she is 'on call'?
3. If the answer to the second question is in the affirmative, if the worker actually is employed by a second employer while 'on call', subject only to a requirement that the second employer must release the worker when called in by the first employer, mean that the time spent by the worker 'on call' and working for the second employer be regarded as working time in terms of his relationship with the first employer?

4. If the answer to the third question is in the affirmative, does a worker who works for a second employer while on call to his first employer accrue working time in relation to the first and second employer contemporaneously?

**By Order of the Labour Court**



Kevin Foley

Chairman

Dated this <sup>4</sup>7 day of May 2020

**CORRESPONDENCE IN RELATION TO THIS MATTER SHOULD BE ADDRESSED TO: Jacqui Kelly, Court Registrar at [Jacqueline.kelly@labourcourt.ie](mailto:Jacqueline.kelly@labourcourt.ie)**