

Supreme Court

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KKO:2018:27

Obligation to use a tachograph

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Issues to be decided and the facts of the case

The main issue in Supreme Court judgment KKO 2018:27 concerned whether, in the circumstances at hand, the driver of a motor vehicle had the obligation to use a tachograph.

The police had ordered the driver to pay a fine after they had deemed that, by neglecting to use a tachograph while driving, he had been guilty of the offence of violating Road Traffic Act social legislation, as provided in section 105(a) of the Road Traffic Act. The driver appealed the order to pay the fine and claimed that there had been no obligation to use a tachograph, since he had been working for an electricity company in the construction of a electrical network, and in addition working without a tachograph had been possible within a 50 kilometre radius of the location at that time of the Lohja works site of said company. After the district court had accepted the appeal, the prosecutor had filed a precedent appeal directly to the Supreme Court.

The Supreme Court found that there was no dispute over the fact that at the time the vehicle had been inspected the driver had been in the employ of said company at its electrical network construction site in Lohja. Said company, which had its headquarters in Oulu, was in the construction and civil engineering business, and it did electrical work as well as repair and construction work on electrical networks at construction sites, such as the installation of electrical wiring. At the time in question the company was working as a subcontractor for a third company that was a contractor for the company that owned the electrical network. The motor vehicle that had been operated by the defendant, a van weighing over 3,5 tonnes and that had been registered as a lorry, had been owned by a fourth company, from which the defendant's employer had rented the van. A tachograph had been installed in the vehicle in question, but it had not been in use. At the time the vehicle was inspected it was being used as a maintenance vehicle in the construction of the electrical network. It had been used to transport petrol, tools, spare parts and other supplies needed in the maintenance of equipment and the construction of the electrical network. It had not been used for any other transport.

The obligation to use a tachograph

Section 105(a) of the Road Traffic Act provides for punishment for among others a violation of the provisions of Regulation (EC) No 561/2006 of the European Parliament and of the Council (the Regulation on driving time and rest periods), as well as of Council Regulation (EEC) No 3821/85 on recording equipment in road transport, which has since been replaced by Regulation (EU) No 165/2014 of the European Parliament and of the Council on tachographs in road transport (the Tachograph Regulation). In accordance with the new Tachograph Regulation, references to the repealed regulation are to be deemed references to the Tachograph Regulation which had replaced it.

According to section 92(e) of the Road Traffic Act, a driver shall use a tachograph for example in vehicles in which it is mandatory on the basis of the Regulation on driving time and rest periods and the Tachograph Regulation.

According to art. 3(1) of the Tachograph Regulation, a tachograph shall be installed and used in vehicles registered in a Member State which are used for the carriage of passengers or goods by road and to which Regulation (EC) No 561/2006 on driving time and rest periods applies.

According to article 2 of the Regulation on driving time and rest periods, the Regulation applies to the carriage by road of goods or passengers within the Community, subject to the weight limits and the limits on the number of persons provided

in said article. Article 3 of the Regulation, as amended by Regulation (EU) No 165/2014 of the European Parliament and of the Council, provides for derogations from the scope of its application which apply to all member states.

According to the exception provided in article (3)(a) of the Regulation, the Regulation does not apply in road traffic if the maximum permissible mass of the vehicle or the combination of vehicles does not exceed 7,5 tonnes and it is used for carrying materials, equipment or machinery for the driver's use in the course of his work, and which are used only within a 100 km radius from the base of the undertaking and on the condition that driving the vehicle does not constitute the driver's main activity.

In addition to the exceptions to the scope of application of the Regulation on driving time and rest periods, member states may grant derogations to the obligation to use a tachograph to the extent allowed by the Tachograph Regulation. According to article 3(2) of the Tachograph Regulation, a derogation may be made for example for the vehicles mentioned in Article 13(1) of the Regulation on driving time and rest periods. According to Article 13(1)(h), an exception may be granted among others for traffic involving vehicles used in connection with electricity maintenance services, provided that such exceptions do not prejudice the objectives set out in Article 1.

Finnish national exceptions to the obligation to use a tachograph are provided, on the basis of section 92(f)(3) of the Road Traffic Act, in the Decree on the Operation of Motor Vehicles on Roads. According to section 7(1)(e) of this Decree, articles 5 through 9 of the Regulation on driving time and rest periods need not apply, and a tachograph need not be used, for example in a vehicle that is being used in the service of an electricity company.

Exception provision involving proximity to the base of the undertaking

The driver had argued that, on the basis of the exception provided in article 3(a) of the Regulation on driving times and rest periods, he was relieved of the obligation to use a tachograph, since the vehicle had been operated within 50 kilometres of the base of the undertaking, which at that time had been in Lohja.

The Supreme Court noted that the concept of a "base of the undertaking" had not been defined in the Regulation on driving time and rest periods. It referred to the judgment of the Court of Justice in the Smit Reizen case (judgment 29 April 2010, case C-124/09, Smit Reizen, EU:C:2010:238), which had interpreted the "operating centre" concept in the light of Council Regulations (EEC) No 3820/85 and 3821/85 on driving times and rest periods, and on tachographs, in force at that time. The Supreme Court found that there was no ambiguity regarding the intent of the EU regulations or, in the light of the judgment referred to above, regarding the interpretation of the "base of the undertaking" concept. The base of the undertaking of the driver's employer company had been in Oulu. A temporary work site, such as in the case at hand the electrical network construction site in Lohja, could not be deemed a base of the undertaking as referred to in the regulation, even in the case that the construction at the same site would last longer than a brief period. The exception provision referring to the proximity of the base of the undertaking thus would not apply.

Exception provision referring to the operation of an electrical company

The driver had argued in addition that he was exempt from punishment on the basis of section 7(1)(e) of the Decree on the Operation of Motor Vehicles on Roads, since he had operated his vehicle in connection with the work on the construction of an electrical network. The prosecutor had argued that this exception did not apply, since the electrical company did not own the vehicle.

The Supreme Court noted that the exception contained in section 7(1)(e) of the Decree on the Operation of Motor Vehicles on Roads was based on the possibility provided member states under article 13(1)(h) of the Regulation on Driving Times and Rest Periods as well as article 3(2) of the Tachograph Regulation, to grant individual derogations from the scope of application of these regulations. An additional condition provided in the Regulation on driving times and rest periods was that these exceptions did not prejudice the objectives of the Regulation. National law could provide for derogations from the Regulation on driving times and rest periods only to the extent that this was allowed by the EU regulation. The exception contained in the Road Traffic Decree was to be interpreted as far as possible so that its scope of application did not extend to other situations, or more widely than had been intended in the EU regulation.

The Court of Justice has not considered the question of what is to be considered within the scope of the operation of an electricity company. However, in several of its judgments on the use of a tachograph, the Court of Justice had found that the provisions on exceptions could not be interpreted so that their effects would extend beyond what is needed to protect the interests that the exceptions are intended to secure. In addition, the scope of the exceptions was to be determined by taking into consideration the objectives of the set of provisions in question, in other words the harmonization of conditions

for competition in road transport and the improvement of working conditions and road safety of persons working in this sector (see, for example, judgment 25 June 1992, *British Gas*, C-116/91, EU:C:1992:277, paragraph 12; judgment 21 March 1996, *Goupil*, C-39/95, EU:C:1996:127, paragraph 8; judgment 21 March 1996, *Mrozek and Jäger*, C-335/94, EU:C:1996:126, paragraph 9; judgment 17 March 2005, *Raemdonck and Raemdonck-Janssens*, C-128/04, EU:C:2005:188, paragraph 19; judgment 28 July 2011, *Seeger*, C-554/09, EU:C:2011:523, paragraph 33, and judgment 3 October 2013, *Lundberg*, C-317/12, EU:C:2013:631, paragraphs 20 and 30-31).

The Supreme Court referred to the jurisprudence of the Court of Justice mentioned above and to the judgment in the *A. Karuse* case (judgment 13 March 2014, *A. Karuse*, C-222/12, EU:C:2014:142). It found that the jurisprudence of the Court of Justice shows that decisive significance is not to be given to who owned the vehicle in question. What is of significance, instead, are the type of operations in which the transport took place. It was apparent from the jurisprudence of the Court of Justice that all of the national derogations allowed by EU regulations involved a question of the common good and were related to the nature of the services in question. The Court of Justice had interpreted the derogations narrowly, restricting the scope of application of the derogations to the actual contents and nature of the task at hand.

The Supreme Court found that, in the light of the jurisprudence of the Court of Justice, the exception provision contained in Finnish national law was to be interpreted so that it applies solely to operations connected with the ordinary, day-to-day operations of the electricity company related to the use and maintenance of the electrical network. There were no grounds, in the circumstances at hand, to equating transport in connection with the construction of a new electrical network to transport in connection with the operations of the electricity company in the sense used in article 13(1)(h) of the Regulation on driving times and rest periods and in section 7(1)(e) of the Decree on the Operation of Vehicles on the Road. An interpretation to the contrary would have been conducive to endangering the objectives of the provision on driving time and rest periods.

The conclusion of the Supreme Court

The Supreme Court found that, in the circumstances at hand, the driver of the vehicle had had the obligation to follow the provisions on the use of a tachograph. By neglecting to use the tachograph he had been in violation of section 105(a) of the Road Traffic Act and in so doing had been guilty of violating Road Traffic Act social legislation. The decision of the district court was overturned, with the exception of the decision on compensation for the expenses of the witnesses, and the order to pay the fine was allowed to stand.

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