Case C-344/19

Request for a preliminary ruling

Date lodged:

2 May 2019

Referring court:

Vrhovno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

2 April 2019

Applicant and appellant:

D. J.

Defendant and respondent:

Radiotelevizija Slovenija

[…]

REQUEST FOR A PRELIMINARY RULING

An employment-law action brought by **D. J.** […], the [applicant and] appellant, against **RADIOTELEVIZIJA SLOVENIJA**, a public-law body […], the [defendant and] respondent, Ljubljana […], is pending before the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia),

seeking **payment of shortfalls in salary amounting to EUR 53 985.02.**

The Vrhovno sodišče Republike Slovenije […],

by order […] of 2 April 2019, has stayed the proceedings and decided to make a reference for a preliminary ruling to the Court of Justice of the European Union:

[Or. 2]

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I. Factual and legal situation

1. The appellant was employed as a technical transmission specialist. He completed a period of service from 1 August 2008 to 31 January 2015 at certain transmission centres ('the TCs'), and specifically up to and including June 2013 at the Pohorje TC, and from July 2013 at the Krvavec TC. The nature of the work, the distance of the TC from the place of residence […] and the occasional difficulty in accessing the TC […] where the work was to be carried out made it necessary to stay in the vicinity of the installation site. The respondent arranged accommodation at the TC (with kitchen, day area, rest area and bathroom). Two workers — two technicians — who changed over from one another according to shifts or time slots, worked together at the TCs. After work the two technicians were able to rest in the day area or pursue leisure activities in the vicinity. They were able to organise their free time within the limits of the opportunities afforded by the relevant location.

2. Although the findings of the lower courts regarding the division of working time and working arrangements are limited, they show with sufficient clarity that the two workers performed their work in shifts: one from 6.00 to 18.00 and the other from 12.00 to 24.00. These are findings of fact which can no longer be challenged in the appeal proceedings on a point of law. The two workers agreed who would work the first shift and who would work the second. Since the appellant was a fan of films and television series he mostly worked the shift from 12.00 to 24.00. The work performed at that time was 'normal work' and required his presence at the workplace and included, on average, between two and three hours' actual work (inspection tour of the TC, checks, measurements, data readings, minor maintenance, replacement of filters and so on), whist the remaining time was taken up sitting in front of a screen, monitoring the transmissions on air on the screen, waiting for any alarms and taking action wherever necessary. It was also possible to monitor the signal while watching television and therefore the two technicians could, while performing their work, also stay in the day room and watch television.

3. The respondent paid the appellant a salary for the 12 hours of normal work (for his actual presence at the workplace). The respondent counted the period from 00.00 to 06.00 as rest time, for which it paid nothing to the person concerned, whilst it considered the remaining six hours not included in the day shift (for example, from 06.00 to 12.00 or from 18.00 to 24.00) to be a stand-by period. During that period one of the workers performed his work (as normal work as part of his daily shift), whilst the other worker was free. He could leave the TC, walk the dog, go to one of the surrounding chalets **[Or. 3]** or elsewhere, without limitation. However, the worker had to be contactable if called and, where necessary, had to respond and return to work within one hour. Specific individual tasks could be carried out when most convenient: only emergency activities had to be carried out immediately, whilst the other activities could even be postponed until the following day. As regards that stand-by period, the respondent included and paid the appellant a supplement (remuneration) amounting to 20% of basic

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salary; however, if actual action (involving a return to the workplace) was necessary during that stand-by period, following a call, the time spent was included and remunerated as normal work. All the hours actually worked were adjusted by the respondent over the six-month reference period so that at the end of the reference period there were no excess hours of normal work.

4. The respondent paid the appellant the salary and supplements pursuant to the [respondent's] internal Working Time Regulation which, in Article 16, provides that stand-by duty for work means that it must be possible to contact the worker outside his working hours by telephone or other means so that, where necessary, his ability to return to his workplace is guaranteed. The respondent objected to this period being regarded as on-call time. Under Article 8 of the above-mentioned internal regulation, on-call time is regarded as the period during which a worker may not freely dispose of his time and must be available at his workplace, as specified by the head of the group, so that he may commence his usual work and/or particular activities and tasks related to his work.

II. Conduct of the proceedings and claims of the parties

5. The appellant brought an action for payment of the shortfalls in salary due under various headings. The decision of the Vrhovno sodišče in the appeal proceedings on a point of law relates to the request for payment for the hours during which the appellant was requested to be on stand-by (six hours), and more specifically the amount prescribed for work exceeding normal working time (overtime in a gross amount EUR 53 985.02). The appellant claimed that the respondent should have included in the working time, or considered as actual work, also the stand-by period during which he was in principle free, regardless of whether or not he carried out any specific work in that period. In support of his application, the appellant cited the fact that he lived at the site where he performed his work and should therefore have been deemed to be present at the workplace all the time, which was in fact 24 hours a day. Not all the efforts by the union of broadcasting workers to lay down rules on the position of transmission centre workers were taken into account in the collective agreement. The respondent adopted the Working Time Regulation (in 2011), in which it defined ongoing standby duty as time not included in working time. However, the nature **[Or. 4]** of the work and residence at the transmission centres meant that the appellant was unable to dispose freely of his time, even during periods outside work, since whilst on stand-by duty he had, whenever necessary, to respond to calls and be at his workplace within one hour. Given that there was little opportunity to pursue leisure activities at the TC locations, the appellant stayed most of the time on the TC premises. The appellant states that it was necessary to classify this time as on-call time and therefore as the actual performance of work and that that time should therefore have been remunerated, in that it exceeded normal working hours, as work in excess of normal working hours (overtime), although the respondent had not ordered or requested on-call duty and thus a physical presence at the workplace during those six hours.

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6. The respondent objected to the appellant's claim. It stated that after performing his work duties for 12 hours the appellant was not on call since he was free or on stand-by, which does not form part of his working time. The respondent calculated and paid the appellant a salary supplement for the stand-by duty (and in addition a supplement for irregular working hours), all in accordance with the internal Working Time Regulation.

7. The first-instance court dismissed the claim for payment of overtime […]. It ruled that the hours on stand-by cannot, in view of the nature of the appellant's obligations during that period, be regarded as on-call time. The appellant was paid for the actual hours worked as normal work, and as part of a redistribution of working time, those hours were equalised over the six-month reference period. On the other hand, the remaining time during which the appellant was merely on stand-by awaiting possible calls is not considered actual work (the actual performance of tasks) which ought to have been regarded and paid for as on-call time or, in so far as it is in excess of the normal working hours, as overtime. During that period the appellant was not requested to be physically present at his workplace. Therefore, that period is considered stand-by duty for which the appellant received appropriate remuneration (20% of the basic salary), not working time. The respondent did not order on-call working or ask the worker, during the stand-by period, to remain at his workplace. In the view of the first-instance court, if the appellant remained at his workplace or on the premises of the TC of his own free will, that cannot constitute grounds for allowing his claim.

8. The second-instance court dismissed the appeal lodged in that regard by the appellant […]. That court held that the appellant, in the period in which he claims remuneration for work in excess of normal working hours, inasmuch as it was on-call time, had not received an order to be on call, nor had the respondent requested his physical presence at his workplace; on the contrary, he had merely been requested to return when necessary to this workplace within one hour. The fact that the appellant lives **[Or. 5]** at the TC after the twelve hours of normal work does not constitute on-call time even though after that period he did not return home 'down the valley'. The working obligation which the appellant had in that period meets the definition of stand-by duty for work within the meaning of Article 16 of the respondent's Working Time Regulation. Actual (normal) work lasted 12 hours, a period which the respondent recognised as normal work and for which it likewise remunerated the appellant accordingly. The respondent recognised and remunerated as normal work also the actual hours of work which the appellant performed when, in response to a call, he had to appear at work whilst on stand-by. The appellant used those hours as part of the equalisation over the six-month reference period. The second-instance court also made clear that the judgments given by the Court of Justice of the European Union ('the Court of Justice') in Cases C-303/98, *Simap*, and C-151/02, *Jaeger*, did not relate to entirely comparable situations.

9. The appellant brought an appeal on a point of law before this referring court by which he claims that the respondent has failed to specify clearly the working time

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and duration of the shifts, and on the contrary left it to the two workers at the TCs to come to an agreement in that regard. He claims that the court had misunderstood the concept of actual working time since it was not only the time during which the worker actually performs work, but also any time he is present at the site designated by the employer. Through the working time schedule the respondent had actually imposed shifts of several days on him. It had abused the mechanism of stand-by duty in order to penalise him in terms of remuneration for the time he had to be available. In the period in which a 'shift of several days' was imposed on him, he was unable to dispose of his own time since he was either on Mount Pohorje or Mount Krvavec, which was why he disputes the argument that he was not working during that period. The appellant claims that the stand-by duty or continuous presence at the site of the TC means that he was in fact working (at least) 18 hours a day, whilst the continuous presence in the TC was required by the fact it was necessary to work shifts of 24 hours in the transmission centres.

III. National legislation

10. The Zakon o delovnih razmerjih [Law on employment relationships] (ZDR-1; Uradni list RS No 21/2013 et seq.) defines working time in Article 142, which is worded as follows:

'Article 142

(1) Working time shall be the actual working time and break time in accordance with Article 154 [1] of this Law, and the time of justified absences from work according to the law and the collective agreement or to a general regulatory act.

[Or. 6]

(2) All time during which workers work, which is to be understood as meaning the period in which the worker is at the disposal of the employer and fulfils his employment obligations under the contract of employment, shall constitute actual working time.

(3) Actual working time shall form the basis for calculating labour productivity'.

11. Article 46 of the Collective Agreement for the Public Sector (CCSP; Ur. 1. RS n. 57/2008 et seq.) [2] provided as follows:

[1] Article 154 of ZDR-l governs matters relating to breaks during working hours which are to be counted as working time.

[2] […] [particulars concerning the version of the collective agreement applicable to the dispute in the main proceedings]

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‘A public sector employee shall be entitled to a salary supplement for the stand-by period in the amount of 20% of the hourly rate of the basic salary. Stand-by periods of a public sector worker shall not be counted as working time’.

12. Internal Working Time Regulation of RTV (the respondent) of 22 December 2010, which provides:

‘Article 6

Within administrative units or departments it shall be permitted to introduce an on-call duty or another form of stand-by duty for work, when necessary to perform specific work without interruption or on a specific day or by a certain time limit for reasons of protection in the event of natural disasters or other types of accident, or on account of exceptional circumstances which are beyond the control of the employer or which he is unable to prevent.

Article 8

On-call periods shall be those during which the worker cannot dispose freely of his time and must remain available at his workplace or another post specified by the management in such a way that that worker may commence his usual work and/or particular activities and tasks related to his work. The time spent by the worker travelling in the area in a vehicle or as a passenger shall also be considered on-call duty.

Article 9

All time spent on call shall be regarded as working time.

[Or. 7]

Article 16

As regards the worker, the stand-by period for work may be set on the basis of the production process and the annual division of work at OU (organisational unit) or PPU (programme production unit) level. Stand-by means that it must be possible to contact the worker outside his working hours, by telephone or other means so that, where necessary, his ability to return to his workplace is guaranteed. The maximum acceptable period for reaching the workplace shall be one hour. Stand-by duty must be ordered in writing and with the agreement of the worker, at least two days in advance. The written order (form 5) for the stand-by period at work may be fixed on a monthly, weekly or daily basis.

Stand-by periods shall not be counted as working time in respect of the worker’.

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IV. Reasons for a reference for a preliminary ruling

13. The present employment case relates to remuneration for the time spent by the appellant on stand-by duty. This court is cognisant of the fact that remuneration does not fall within the scope of Directive 2003/88. However, for the purposes of determining the appeal on a point of law brought by the appellant, it finds that it is possible to rule on the merits of the claim raised by the appellant only when an answer has been provided to the questions raised in the present case. Given the specific nature of the case under examination it is not possible to find a completely clear answer in the judgments which have dealt with similar problems, and more precisely in the following cases:

– *Simap* (C-303/98), in which the Court of Justice considered the physical presence and availability of the worker at the workplace, for the provision of specialist services, to be the performance of work tasks, even if the activity actually performed varies according to the circumstances (on-call duty of medical staff);

– *Jaeger* (C-151/02), in which the Court of Justice held that where a worker has been ordered to be on stand-by for work and permanently contactable, without having to be present at the workplace, and where, although at the disposal of the employer in that it must be possible to contact him, the worker can manage his time with minor restrictions and pursue his own interests, only time linked to the actual provision of services must be regarded as 'working time' within the meaning of the directive;

[Or. 8]

– *Tyco* (C-266/14), in which the Court of Justice held that the time spent by a worker travelling to work by vehicle must also be regarded as working time since the activity is performed in the area of his work and travelling to the homes of customers where the worker carries out his work forms part of his work obligations;

– *Matzak* (C-518/15), in which the Court of Justice found that the stand-by duty of a firefighter who has to be permanently on stand-by duty at home and has a duty to go to his workplace within eight minutes of being called, also constitutes working time, regardless of whether his travelling and the possibility of disposing of his free time are limited by the obligation relating to stand-by duty, since two circumstances must be regarded as relevant in that context: the fact that the worker must be at home during the stand-by period (designated place) and the response time is short (8 minutes).

14. The facts of the present case brought before this referring court differ from those of the cases cited above because the specific nature of the work carried out and the location of the place where the work is performed. The present case concerns transmission centres located in places which are difficult to reach, in particular in the event of adverse weather conditions. The Pohorje TC is at a height of 1 050 m

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above sea level, whilst the Krvavec TC is at a height of 1 740 m above sea level, which is why, when they are assigned to work in those transmission centres, the workers reside there all the time. In those places there are few opportunities for leisure activities. One of the two sites is, however, so far away from the appellant's habitual residence that there is not even the theoretical possibility of returning home when weather conditions are more favourable. This court considers that the appellant's situation differs from those of the workers in cases already dealt with by the Court of Justice. This referring court sees a difference in relation to *Simap* (C-303/98) in the fact that in the present case the physical presence of the appellant and his availability at the workplace during stand-by periods, other than when action was required, was not necessary or requested. As regards *Jaeger* (C-151/02), which displays the greatest similarities, this court sees a difference in the fact that the appellant encountered greater restrictions on the management of his time and pursuit of his own interests due to the very location of those places (and not because he had to be contactable). The precise place where the appellant had to be was not fixed by the respondent. The reason why the appellant lived at the place where he performed his work was not due to the fact that he had to be available during the stand-by periods, but rather to the geographical characteristics of the place where the work was performed. This court sees a difference with regard to the case examined in *Tyco* (C-266/14) in the fact that it is not possible to equate travelling to customers' homes, as part of the work process, with the situation of stand-by duty. Lastly, the difference with regard to *Matzak* (C-518/15) arises, in this court's view, from the fact that the appellant was not required to be at a specific place and that he also had a substantially longer time to respond to calls.

[Or. 9]

15. The questions which this court refers to the Court of Justice are as follows:

– Must Article 2 of Directive 2003/88 be interpreted as meaning that, in circumstances such as those in the present case, stand-by duty, during which a worker performing his work at a radio and television transmission station must during the period he is not at work (when his physical presence at the workplace is not necessary) be contactable when called and, where necessary, be at his workplace within one hour, is to be considered working time?

– Is the definition of the nature of stand-by duty in circumstances such as those of the present case affected by the fact that the worker resides in accommodation provided at the site where he performs his work (radio and television transmission station), since the geographical characteristics of the site make it impossible (or more difficult) to return home ('down the valley') each day?

– Must the answer to the two preceding questions be different where the site involved is one where the opportunities for pursing leisure activities during

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free time are limited on account of the geographical characteristics of the place or where the worker encounters greater restrictions on the management of his free time and pursuit of his own interests (than if he lived at home)?

[…]

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