Bird & Bird

EU Employment Law Report

Keeping you up-to-date on the most significant developments of employment law at EU level

15 October 2021

Q3 2021

Legislative developments 💼

There are no significant legislative developments to report in the third quarter of 2021.

Case law 

As in previous quarters, case-law of the European Court of Justice ('ECJ') has been dominated by a few punctual subject matters, for the period under review essentially around working time issues and discrimination. More marginally relevant, the ECJ also issued some judgments on social security benefits and in the road transport sector.

Henceforth, our quarterly report will highlight one of the cases reported and add some critical observations or annotations to the summary of the case, thus bringing a wider perspective from a historical, economic or political point of view, as the case may be.

For this Report we will start by highlighting the recent abundant ECJ case-law on working time (as opposed to rest/stand-by time).

Working time, stand-by time and breaks

Case C-742/19 (B.K. vs Republika Slovenija), 15 July 2021

Abstract

A former military officer of the Slovenian army had claimed remuneration for the periods of guard duty which he had performed whilst in service. The guard duty included both periods during which he was required to carry out actual surveillance activity and periods during which he was required only to remain available to his superiors, whilst being present at all times at the barracks where he was posted. For this guard duty, he only received regular pay for 8 hours per day, whilst for the remaining hours, he received a stand-by allowance (of 20% of basic salary). He claimed full pay for such hours.

Simple facts, simple case?

The questions raised before the ECJ (gathering in Grand Chamber) in the context of a request for preliminary ruling, were (i) is the relevant Directive 2003/88 on working time applicable to military personnel on guard duty in peacetime, and (ii) does the Directive preclude or allow national laws to consider guard duty (as outlined) not to be counted as working time for purposes of determining the remuneration payable to him?

On the first question the ECJ sets forth in clear terms which specific security activities of military personnel are excluded from the scope of the Directive.

On the second question the ECJ basically confirms that Directive 2003/88 does not preclude different remuneration being payable for stand-by periods during which military personnel does not actually perform work as opposed to stand-by periods during which he performs actual work (cons. 96-97, case C-742/19).

That ruling in itself is not surprising since the ECJ has consistently held that the Directive(s) on working time do not encompass the question of remuneration for working time, be it stand-by or guard time or actual working time. Remuneration for time worked (as actual working time or on stand-by) remains an exclusive issue of national laws.

The main relevance and value of the case at hand is the ECJ's clear summary of its position as regards the issue of guard time, stand-by duties as working time or not, as this has developed over the last 20 years.

Indeed, the ECJ's position on the question of whether 'on guard' duties are to be considered working time is quite well known. For stand-by duties to be performed in the workplace, ECJ case-law is abundant in the

meantime (Simap, C-303/98, 3 Oct 2000; Jaeger, C-151/02, 9 Sept 2003; Pfeiffer, C-397/01, 5 Oct 2004; Dellas, C-14/04, 1 Dec 2005).

For stand-by duties (or guard time) without compulsory presence in the workplace, the ECJ has built consistent case-law through various more recent cases (Matzak, C-518/15, 21 Feb 2018; Stadt Offenbach, C-580/19, 9 March 2021; Radiotelevizija Slovenija, C-344/19, 9 March 2021).

In the case at hand, for the Grand Chamber, the ECJ provides a clear synthesis of its position, when read in conjunction with its recent Radio Slovenija case (discussed in our Q1 2021 Report).

In sum, all stand-by periods (irrespective of how they are organised) during which the constraints imposed upon the worker are such as to affect, objectively and significantly, the possibility for the worker freely to manage the time during which his professional services are not required and to pursue his own interests are considered to be working time. Conversely, where such constraints do not reach such a level of intensity and allow him to manage his own time and to pursue his own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes working time (cons. 93, case C-742/19).

The above principle requires further refinement for those duties of 'on guard' or stand-by which are performed in workplaces other than the worker's residence. For these purposes, the notion of workplace refers to any place where the worker is required to perform actual work on the employer's instruction, even if that is not necessarily the place where he usually carries out his professional duties. In those circumstances, the decisive factor to determine that the characteristic elements of 'working time' are present is the fact that the worker is required to be physically present at the place determined by the employer and to remain available there to be able, if necessary, to provide his services immediately. Since, during such stand-by period, the worker must remain apart from family and social environment and has little freedom to manage the time during which his professional services are not required, the whole of that period must be classified as working time for these purposes, irrespective of the professional activity actually carried out during that period (cons. 94, case C-742/19).

With this ruling, the lines of what constitutes actual working time and what not in the context of stand-by or on guard duties have become clearer and more evident.

For the exact impact of these rulings in national domestic legal practice (incl the question of remuneration of such stand-by service), each jurisdiction has its own approach. For an example of impact in Germany, please consult Th Hey 'Bereitschaftsdienst: Wenn Ruhepause zur Arbeitszeit wird' (Lexology, 6 October 2021).

In fact, some of the same considerations as developed in the above two 'Slovenian cases' are literally repeated and emphasised in the following case of more recent date, case C-107/19, discussed hereafter. Finally, the EFTA Court has also had the opportunity to issue a ruling on the subject matter of working time, as we will outline below.

Case C-107/19 (Dopravni podni hl. M. Prahy), 9 September 2021

A Prague firefighter was subject to an 'on call' regime during his breaks, whereby he was required to respond within 2 minutes to any call-out while on his break. He only received remuneration for such breaks in as much as they were interrupted by call-outs. The challenge relates to the characterisation of the breaks as working time and the subsequent claim for salary payments during such break periods.

In its analysis the ECJ refers to and literally copies language it used in the above Slovenian cases, and it holds that the break granted to a worker during daily working time, during which he must be ready to respond to an emergency call-out within 2 minutes, constitutes working time where it is clear from an overall assessment of all relevant circumstances that the limitations imposed on the worker during that break are such as to affect objectively and very significantly that worker's ability to manage freely the time during which his professional services are not required and to devote that time to his own interests.

E-11/20 (EFTA Court, Sverrisson vs Iceland), 15 July 2021

Exceptionally, we refer in this Report to a case brough before and handled by the EFTA Court. (This Court, with its seat in Luxembourg, ensures since 1994 the judicial control of the EEA Agreement (with 30 contracting parties, 3 EFTA states and 27 EU member states) and the correct interpretation of the EEA Agreement.)

The case at hand does not relate to stand-by, on guard or break time, but to the question whether business travel time spent outside of normal working hours can be considered working time, where an employee travels to a location other than his usual workplace to carry out his duties in that other location as required by his employer, also if that location is outside the territory of the EEA States.

With reference to its own case-law on the subject matter and to the famous *Tyco* case of the ECJ (C—266/14, 10 Sept 2015), the EFTA Court proceeds with an analysis of the concept of working time, along the following lines:

- Where a worker is required to perform tasks at a location away from his fixed place of attendance, the journey to his destination is essential for him to dutifully undertake those tasks.
- In that context, it is irrelevant whether the worker has a fixed place of work at all or not (like in the *Tyco* case),
- The concept of working time covers the entirety of periods of stand-by time during which the constraints imposed on the worker are such as to affect objectively and significantly the possibility for the worker to freely manage the time during which his services are not required,
- During business travel, although the worker may have flexibility and choice in terms of means of transport and alternative travel routes, during that time, the worker remains under the instruction of the employer and cannot use his time freely,
- In that context, it is immaterial which activities are pursued during the travel time, since being required to be present at certain distant locations denies the worker the ability to determine the distance of his commute,
- So, when a worker is required to undertake certain assignments away from his fixed place of attendance, travelling to and from that location must be considered an intrinsic part of his work. This means that the necessary travel time must be considered to be working time, and it is irrelevant whether the hours spent travelling fall within or outside the worker's normal working hours.

Discrimination (religion, handicap, gender)

C-804/18 and C-341/19 (IX vs WABE ev and MH Müller Handels GmbH vs MJ), 15 July 2021

In these joint cases, before the Grand Chamber, the key legal questions relate to the effect of an applied neutrality policy within private undertakings (which prohibits the wearing of any religious signs in the workplace), in particular the question whether such policy can nevertheless constitute direct or indirect discrimination on the grounds of religion or belief.

In both cases, female employees wearing head scarfs were suspended from work because their behaviour was allegedly in breach of a neutrality policy adopted by their respective employer.

A series of prejudicial questions was submitted by the Hamburg Labour Court and the Federal Labour Court Germany, including:

Does an internal rule of a company prohibiting workers from wearing any visible sign of philosophical or religious belief in the workplace constitute a form of direct discrimination with regard to workers who observe certain clothing rules based on religious precepts? The answer is negative to the extent that the rule covers any manifestation of such beliefs without distinction and treats all workers in the same way by requiring them in a general and undifferentiated way to dress neutrally (G4S Secure Solutions, C-157/15, 14 March 2017).

Can such internal rule of a company constitute a form on indirect discrimination based on the grounds of religion or belief? The ECJ develops the following reasoning:

- the difference of treatment which is indirectly based on religion or belief (arising from the internal policy of neutrality) may be justified by the employer's desire to pursue a policy of religious neutrality, provided that

- first, this policy meets a genuine need on the part of the employer to be demonstrated (e.g. taking into account the legitimate wishes of customers and the potential adverse effects in the absence of such policy given the nature of its business activities),

- secondly, the difference of treatment must be appropriate for the purpose of ensuring proper application of the policy (which requires consistent and systematic application), and

- thirdly, the prohibition is limited to what is strictly necessary (taking into account the actual scale and severity of the adverse consequences which the employer seeks to avoid by applying the prohibition).

The ECJ adds that the above justification for the indirect discrimination generated by the neutrality policy can only be invoked to the extent that all visible forms of political, philosophical or religious beliefs are covered by the prohibition and not solely the wearing of conspicuous, large-sized signs of such beliefs.

C-795/19 (XX vs Tartu Vangla), 15 July 2021

This case relates to discrimination based on handicap: a national legal provision of Estonia imposes an absolute bar to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception prescribed by that legislation and does not allow the use of corrective aids during the assessment of whether such auditory requirements are met.

The ECJ first notes that the regulation at stake introduces a difference of treatment based directly on disability, within the meaning of Directive 2000/78. The question then arises whether such difference of

treatment can be justified based notably on a genuine and determining occupational requirement (provided that the objective is legitimate and the requirement is proportionate).

It is obvious that the concern to ensure the operational capacity and proper functioning of public services are a legitimate objective, just like the preservation of the safety of persons and public order and therefore the requirement to be able to hear properly and reach a certain level of auditory acuity – or at least meet a minimum standard of sound perception – may be regarded as a genuine and determining occupational requirement.

However, legislation is appropriate for attaining the objective only if it genuinely reflects a concern to attain it in a consistent and systematic manner. Since it appears that for visual acuity, the regulations at stake allow officers to use corrective devices (such as contact lenses or spectacles) that consistency is not met.

Also, the regulation appears to exceed what is required to attain the legitimate objective, by providing minimum standards of sound perception, without allowing it to be ascertained whether that officer is capable of fulfilling his duties, where appropriate after the adoption of reasonable accommodation measures.

C-389/20 (CJ vs TGSS), opinion of the Advocate-General, 30 Sept 2021

This Spanish case concerns indirect discrimination based on gender: under specific Spanish social security rules for household personnel, these workers are not allowed to pay contributions to cover the risk of unemployment, and therefore they cannot secure nor obtain such unemployment benefits.

The rule of EU law at stake in this case is not any of the anti-discrimination Directives of 2000, but the (old) Directive 79/7 on the progressive implementation of equal treatment for men and women in matters of social security. The key question raised before the ECJ is whether this Spanish regulation violates art 4 of this Directive, i.e. that there shall be no discrimination on grounds of sex either directly or indirectly in particular as concerns the scope of the (social security) schemes and the conditions of access thereto.

In his opinion, the Advocate-General develops the following reasoning:

First, the Spanish regulation creates a difference in treatment based on gender. Contrary to the position held by the Spanish government, the regulation at stake is formulated in a neutral sense, and so it can only reveal a form of indirect discrimination and not of direct discrimination.

Second, the application of the (neutrally formulated) regulation creates a disadvantage for a specific group of persons. Indeed, statistics reveal that the group of household workers is predominantly composed of female workers.

Thus the question arises if this unequal treatment indirectly based on gender can be justified, i.e. whether or not it serves a legitimate objective of social policy and constitutes an apt and necessary means to achieve that objective. Quite obviously, the social policy objective as pursued by the regulation should – in itself – not constitute a discrimination on the basis of gender.

According to the Advocate-General, the motive for the regulation (combat against illegal labour) which is based on the characteristics of the household personnel (low qualification and low pay) appears to be based on stereotyping and therefore biased on gender. The second objective invoked by the Spanish government (protection of the employment levels of household personnel) justifying the exclusion on the ground that inclusion would increase the level of social security contributions and hence lead to more illegal work, is also not convincing and amplifies the traditional stereotyped roles of household workers.

The Advocate-General finds the regulation inappropriate and not proportionate to any policy objective on various grounds, since the fact that excluding a category of workers (predominantly composed of female workers) from protection against unemployment can hardly be seen to be beneficial to such workers in the combat against illegal work.

He concludes that the regulation at stake constitutes a prohibited form of indirect discrimination which cannot be justified on objective grounds that are unrelated to any gender-based discrimination.

Social security benefits

During the reference period covered by this Report, a number of cases were brought before the ECJ relating to social security benefits. We usually do not report on such matters extensively, and so we will simply refer to these cases in a single summary sentence:

C-350/20 (XX vs Istituto nazionale della previdenza sociale – INPS), 2 Sept 2021

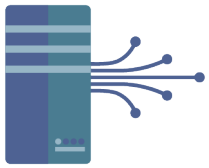
Under Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in any EU Member State, it is unlawful for any national legislation to exclude third-country nationals from entitlement to childbirth and maternity allowances provided for by that legislation.

C-285/20 (K vs Uitvoeringsinstituut werknemersverzekeringen Uwv), 30 Sept 2021

Pursuant to Regulation 883/2004 (on social security), a person who resided in a member state and received sickness benefits is entitled to such benefits in the competent member state (to which he moves and where he wants to collect the benefits) to the extent that entitlement to such benefits (under the laws of the competent member state) is treated the same way as the pursuit of an activity as an employed person, and this irrespective of the reasons for which the person moved residence.

C-535/19 (A vs Latvijas Rep Veselibas ministrija), 15 July 2021

National legislation cannot exclude economically inactive EU citizens (who fall within the scope of the legislation of the host member state and who exercise their right of residency in that state) from the right to be affiliated to the public sickness insurance scheme of the host member state. However, this does not prevent the host member state from charging fees/taxes for such affiliation.



Road transport

We rarely report on matters which relate to road transport mainly because in general the regulatory framework for this industry, from an employment/social security perspective, is quite comprehensive, specific and technical in nature. For this Report, we make an exception because of the wider relevance of the particular matter handled by the ECJ in this area during the reference period.

C-428/19 (OL et al. vs Rapidsped), 8 July 2021 (posting)

Generally, Directive 96/71 on posting of workers in the context of provision of services applies to the road transport sector. Therefore, a breach by an employer established in one member state of another member state's legal provisions on minimum wage may be relied on against that employer by workers posted from the first member state before a court of that first member state (if that court has jurisdiction). A daily allowance varying according to the duration of the workers' posting is part of minimum wage, unless it is paid in reimbursement of expenditure actually incurred on account of the posting (travel, board or lodging).

Particular Regulations on social legislation in the road transport sector do not prohibit the granting of bonuses calculated on the basis of the savings made in the form of reduced fuel consumption; they do prohibit bonuses which reward such saving on the basis of distances travelled and/or the amount of goods carried in such a way as to encourage drives to act in a manner that endangers road safety.

EU policy developments

Update on the digital labour platforms

EU Member States are adopting different approaches to tackle the regulatory challenges arising from digital platform work. Regulatory gaps and fragmentation hamper the establishment of consistent employment relationships, rights, and social protections. Moreover, several national court decisions in different EU Member States have considered digital platform workers "employees" or "workers" rather than "self-employed".

The European Commission concluded that there is a need for further EU action "to ensure basic labour standards and rights to people working through platforms". In June 2021, the Commission launched the second stage of the consultation on how to improve the working conditions for people working through digital labour platforms (the first stage of the consultation started in February). This initiative included the participation of 14 EU social partners, namely trade unions and employer organisations.

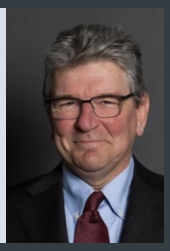
It is expected that the Commission publishes the "Improving the working conditions in platform work" regulatory proposal in December 2021, which will support "the implementation of principles contained in the European Pillar of Social Rights" and could take the form of a directive, a Council recommendation, or a combination of the two. Nonetheless, "if the social partners decide, as provided for under Article 154(4) TFEU, to negotiate between themselves on these matters, the Commission will suspend its work".

Additionally, from January to May 2021, the Commission held an open consultation on "Collective bargaining agreements for self-employed – scope of application of EU competition rules". The aim of this consultation was to provide legal certainty by defining the scope of application of the EU competition laws "to enable an improvement of working conditions through collective bargaining agreements – not only for employees but also, under some circumstances, for the solo self-employed". After assessing the consultation replies and the available policy options, the Commission is expected to come forward with a Council Regulation or a Commission Communication regarding access to collective bargaining for self-employed in the fourth quarter of 2021.

In parallel, in September 2021 the European Parliament adopted a resolution on "Fair working conditions, rights and social protection for platform workers - New forms of employment linked to digital development", with the following priorities: fair and transparent working conditions, a healthy and safe working environment, adequate and transparent social protection, representation and collective bargain rights, training and skills and algorithms and data management. The Parliament also calls on the Member States "to encourage innovative forms of platform work in compliance with Union and national legislation" as well as on the Commission "to reflect quality working conditions in its upcoming legal framework and maintain flexibility while ensuring workers' rights".

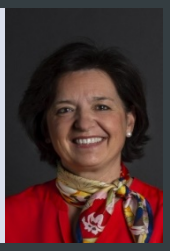
Pieter De Koster
Partner

Tel: +32 2 282 60 81
pieter.dekoster@twobirds.com



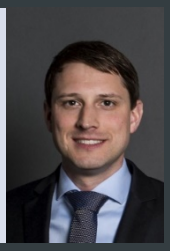
Cecilia Lahaye
Counsel

Tel: +32 2 282 60 84
cecilia.lahaye@twobirds.com



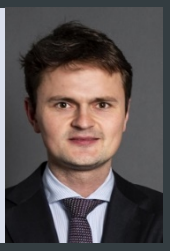
Anton Aerts
Counsel

Tel: +32 2 282 60 83
anton.aerts@twobirds.com



Jehan de Wasseige
Senior Associate

Tel: +32 2 282 60 29
jehan.dewasseige@twobirds.com



Guillaume Nolens
Associate

Tel: +32 2 282 60 31
guillaume.nolens@twobirds.com