ECLI:EU:C:2021:722

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

9 September 2021(*)

(Reference for a preliminary ruling – Social policy – Directive 2003/88/EC – Organisation of working time – Concepts of ‘working time’ and ‘rest period’ – Break during which the employee must remain ready to respond to a call-out within a two-minute time limit – Primacy of EU law)

In Case C-107/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Obvodní soud pro Prahu 9 (District Court, Prague 9, Czech Republic), made by decision of 3 January 2019, received at the Court on 12 February 2019, in the proceedings

XR

v

Dopravní podnik hl. m. Prahy, akciová společnost,

THE COURT (Tenth Chamber),

composed of E. Juhász, acting as President of the Chamber, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Dopravní podnik hl. m. Prahy, akciová společnost, by L. Novotná,

– the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,

– the European Commission, by M. van Beek and K. Walkerová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 of 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 (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between XR and Dopravní podnik hl. m. Prahy, akciová společnost ('DPP'), concerning DPP's refusal to pay XR a sum of 95 335 Czech koruny (CZK) (approximately EUR 3 600) plus default interest as remuneration for breaks taken during his professional activity between November 2005 and December 2008.

Legal context

EU law

3 Recitals 4 and 5 of Directive 2003/88 state:

'(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. …'

4 Article 1 of that directive provides:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

…'

5 Article 2 of that directive, entitled 'Definitions', provides:

'For the purposes of this Directive, the following definitions shall apply:

1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. “rest period” means any period which is not working time;

…

5. “shift work” means any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

…’

6 Under Article 4 of Directive 2003/88, entitled ‘Breaks’:

‘Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.’

Czech law

7 Paragraph 83 of Zákon č. 65/1965 Sb., zákoník práce (Law No 65/1965 establishing the Labour Code), which applied until 31 December 2006, provided that:

‘(1) “Working time” is the time in which the employee is required to carry out work for the employer.

(2) “Rest period” means a period which is not working time.

…

(5) “Stand-by service” is the period during which, under his or her employment contract, an employee has to remain ready for a possible assignment which, in the event of overriding need, must be performed outside the schedule for his or her shift.

…’

8 Paragraph 89 of that law, concerning ‘Breaks’, stated that:

‘(1) An employer shall offer his or her employees, after no longer than six hours of continuous work, a food and rest break of at least 30 minutes; a person aged under 18 shall be offered such a break after no longer than four and a half hours of continuous work. If the work concerned cannot be interrupted, employees shall be ensured an adequate period to rest and eat, albeit without interruption of the service or work; a person aged under 18 shall always be offered a food and rest break in accordance with the first sentence.

(2) The employer may determine the appropriate duration of the food break, after consultation with the competent professional body.

(3) The employer shall determine the start and end of those breaks, after consultation with the competent professional body.

(4) The meal and rest breaks offered may not be at the start or the end of working time.

(5) The meal and rest breaks offered shall not be included in the calculation of working time.'

9 Those provisions were repealed and replaced by Zákon č. 262/2006 Sb., zákoník práce (Law No 262/2006 establishing the Labour Code), which came into force on 1 January 2007. Under Paragraph 78 of that law:

'(1) For the purposes of the provisions governing working time and rest periods:

(a) "working time" shall mean the time in which the employee is required to carry out work for the employer and the time in which the employee remains ready, at the workplace, to perform a task according to the employer's instructions;

…

(h) "stand-by service" shall mean the period during which, under his or her employment contract, an employee has to remain ready for a possible task which, in the event of overriding necessity, must be performed outside the schedule for his or her shift. The stand-by service may be provided only at another location agreed with the employee other than the employer's workplace;

…'

10 In respect of the duration of rest breaks and safety breaks, Paragraph 88 of that law states that:

(1) An employer shall offer his or her employees, after no longer than six hours of continuous work, a food and rest break of at least 30 minutes; a person aged under 18 shall be offered such a break after no longer than four and a half hours of continuous work. If the work concerned cannot be interrupted, employees shall be ensured an adequate period to rest and eat, albeit without interruption of the service or work. That period shall be included in the calculation of working time. Employees aged under 18 shall always be offered a food and rest break in accordance with the first sentence.

(2) If the food and rest break must be split, part of that break must be of at least 15 minutes. …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 From November 2005 to December 2008, XR was employed as a company firefighter at DPP.

12 XR was subject to a shift working regime, consisting of a day shift covering the period from 6.45 to 19.00 and a night shift covering the period from 18.45 to 7.00. His daily working times included two food and rest breaks of 30 minutes each.

13 Between 6.30 and 13.30, XR could go to the factory canteen, situated 200 metres from his workstation, provided that he was equipped with a transmitter alerting him, if necessary, that the service vehicle was coming to pick him up, within two minutes, in front of the factory canteen. The depot where XR worked also had an area where meals could be prepared when the staff canteen was closed.

14 Breaks were included in the calculation of XR's working time only inasmuch as they were interrupted by a call-out. Consequently, uninterrupted breaks were not remunerated.

15 XR challenged that method of calculating his remuneration. Taking the view that breaks – even uninterrupted ones – constituted working time, he claimed a sum of CZK 95 335 together with default interest by way of the remuneration which, in his view, was due to him in respect of the two daily breaks which had not been taken into account in the calculation of his remuneration for the period at issue in the main proceedings.

16 Hearing the action at first instance, the Obvodní soud pro Prahu 9 (District Court, Prague 9, Czech Republic), which is the referring court, granted XR's claim by judgment of 14 September 2016, which was upheld on appeal by judgment of 22 March 2017.

17 DPP brought an appeal against those judicial decisions before the Nejvyšší soud (Supreme Court, Czech Republic), which set them aside by its judgment of 12 June 2018. That court held, on the basis of the relevant national provisions, that, while it was certainly not inconceivable that breaks had been interrupted due to a call-out, those interruptions occurred only fortuitously and unpredictably, such that they could not be regarded as forming part of the ordinary performance of professional duties. Accordingly, breaks could not, in principle, be regarded as working time.

18 The Nejvyšší soud (Supreme Court) therefore referred the case back to the referring court for it to rule on the substance. The referring court states that, in accordance with national procedural rules, it is bound by the legal assessments of the Nejvyšší soud (Supreme Court).

19 However, the referring court considers that the circumstances in which XR was required to take his breaks could lead to those breaks being considered 'working time' within the meaning of Article 2 of Directive 2003/88.

20 In those circumstances, the Obvodní soud pro Prahu 9 (District Court, Prague 9) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a break period in which an employee must be available to his or her employer within two minutes, in case there is an emergency call-out, to be considered "working time" within the meaning of Article 2 of Directive [2003/88]?

(2) Is the assessment to be made in relation to the question above influenced by the fact that such interruption [of the break] in the event of an emergency call-out occurs only at random and unpredictably or, as the case may be, by how often such interruption occurs?

(3) Can a court of first instance, ruling after its decision has been set aside by a higher court and the case referred back to it [to rule on the substantive issue], fail to comply with [a ruling] pronounced by the higher court and which is binding on the court of first instance, if [that ruling] conflicts with EU law?'

Consideration of the questions referred

The first and second questions

21 By the first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2 of Directive 2003/88 must be interpreted as meaning that

the break granted to a worker during his or her daily working time, during which the worker must be ready to respond to a call-out within a time limit of two minutes if necessary, must be classified as 'working time' or as a 'rest period', within the meaning of that provision, and whether the occasional and unpredictable nature and the frequency of call-outs during those breaks have a bearing on that classification.

22 As a preliminary point, it should be borne in mind that the dispute in the main proceedings concerns the remuneration to which a worker claims to be entitled in respect of the breaks he receives during his working day.

23 It follows from the Court's case-law, however, that, save in the special case covered by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers, with the result that, in principle, it does not apply to the remuneration of workers (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 57 and the case-law cited).

24 That being so, since, as the referring court observes, in the dispute in the main proceedings, the question of remuneration for breaks depends on the classification of those periods as 'working time' or as 'rest periods' within the meaning of Directive 2003/88, it is necessary to answer the questions referred, which concern that classification.

25 In that regard, it should be recalled that Article 2(1) of Directive 2003/88 defines 'working time' as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties'. In Article 2(2) of that directive, the concept of 'rest period' is defined negatively as any period which is not working time.

26 The second chapter of Directive 2003/88 is devoted, inter alia, to 'minimum rest periods'. In addition to daily and weekly rest periods, that chapter concerns, in Article 4 of that directive, the 'breaks' to which every worker must be entitled where the daily working time is more than six hours and the details of which, in particular the duration and the terms on which they are granted, are laid down in collective agreements, agreements between the two sides of industry or, failing that, by national legislation.

27 In this case, it is apparent from the order for reference that, during his breaks, XR was not replaced at his workstation and was equipped with a receiver enabling him to be alerted if his breaks had to be interrupted for an emergency call-out. It follows that the applicant in the main proceedings was subject, during his breaks, to a stand-by system, a term which covers, generically, all of the periods during which the worker remains available to his or her employer in order to ensure that work is provided, at the employer's request (see, to that effect, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 2).

28 It must be recalled, in that regard, that the concepts of 'working time' and 'rest period' are mutually exclusive. A worker's stand-by periods must therefore be classified as either 'working time' or a 'rest period' for the purpose of applying Directive 2003/88, the latter not providing for any intermediate category (see, to that effect, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 29 and the case-law cited).

29 Furthermore, the concepts of ‘working time’ and ‘rest period’ are concepts of EU law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of Directive 2003/88. Only an autonomous interpretation of that nature is capable of ensuring the full effectiveness of that directive and the uniform application of those concepts in all the Member States (see, to that effect, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 30 and the case-law cited).

30 As regards, more specifically, periods of stand-by time, it is apparent from the case-law of the Court that a period during which no actual activity is carried out by the worker for the benefit of his or her employer does not necessarily constitute a ‘rest period’ for the purposes of the application of Directive 2003/88 (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location),* C-344/19, EU:C:2021:182, paragraph 32*).*

31 Thus, first, the Court has held, regarding periods of stand-by time undertaken at places of work which were separate from the worker’s residence, that the decisive factor for finding that the elements that characterise the concept of ‘working time’ for the purposes of Directive 2003/88 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 to the employer in order to be able, if necessary, to provide his or her services immediately (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 33 and the case-law cited).

32 The Court has considered that, during such a period of stand-by time, a worker, who is required to remain at his or her workplace and to be available to his or her employer, must remain apart from his or her family and social environment and has little freedom to manage the time during which his or her professional services are not required. Therefore, the whole of that period must be classified as ‘working time’, within the meaning of Directive 2003/88, irrespective of the professional activity actually carried out by the worker during that period (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 35 and the case-law cited).

33 Second, the Court has held that a period of stand-by time according to a stand-by system, namely a period during which the worker remains at his or her employer’s disposal in order to provide work at the employer’s request without being required to remain at his or her workplace, must also be classified, in its entirety, as ‘working time’ within the meaning of Directive 2003/88, where, having regard to the impact, which is objective and very significant, that the constraints imposed on the worker have on the latter’s opportunities to pursue his or her personal and social interests, it differs from a period during which a worker is required simply to be at his or her employer’s disposal inasmuch as it must be possible for the employer to contact him or her (see, to that effect, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 36 and the case-law cited).

34 It follows that the concept of ‘working time’ within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, during which the constraints imposed on the worker are such as to affect objectively and very significantly the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests (see, to that effect, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by-time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 37).

35 More specifically, the Court has found that a period of stand-by time during which the worker may, taking into account the reasonable time period allowed for him or her to resume his or her

professional activities, plan his or her personal and social activities does not, a priori, constitute 'working time', within the meaning of Directive 2003/88. Conversely, a period of stand-by time during which the time limit within which the worker is required to return to work is limited to a few minutes must, in principle, be regarded, in its entirety, as 'working time', within the meaning of that directive, since in that case the worker is, in practice, strongly dissuaded from planning any kind of recreational activity, even of a short duration (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by-time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 48).

36 Nevertheless, as the Court has made clear, the impact of such a time limit in which the worker has to react must be evaluated following a concrete assessment which takes into account, as appropriate, the other constraints imposed on the worker, just as in the case of the facilities granted to him or her during the period of stand-by time (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 49).

37 In the present case, it is for the referring court to assess, in the light of all the relevant circumstances, whether the constraint to which XR was subject during his breaks, resulting from the need to be ready to respond to a call-out within a time limit of two minutes, was such as to limit objectively and very significantly the opportunities that that worker had to manage his time freely in order to devote himself to the activities of his choice.

38 In that regard, taking into account the objections raised by DPP and the European Commission in their written observations, it should further be noted, in the first place, that the discretion enjoyed by the Member States under Article 4 of Directive 2003/88, to determine the detailed rules for breaks, in particular their duration and the terms on which they are granted, is not relevant for the purposes of classifying the periods at issue in the main proceedings as 'working time' or 'rest periods', within the meaning of Article 2 of Directive 2003/88, in so far as those two concepts constitute autonomous concepts of EU law, as has already been noted in paragraph 29 above.

39 That being so, since, as is apparent from the order for reference, XR's breaks were short, namely 30 minutes each, the referring court, in its examination of whether the constraints imposed on XR in connection with those periods were such as to limit objectively and very significantly the possibilities which that worker had to relax and to devote himself to the activities of his choice, will not have to take account of the restrictions on those possibilities which would have existed in any event, since they inevitably resulted from the 30 minute duration of each break, such restrictions being independent of the limitations linked to his obligation to remain ready for a call-out within a time limit of two minutes.

40 In the second place, as regards the fact that interruptions of breaks are occasional and unpredictable, the Court has already held that the fact that, on average, the worker is only rarely called upon for a call-out during the periods of stand-by time cannot lead to those periods being regarded as 'rest periods', within the meaning of Article 2(2) of Directive 2003/88, where the impact of the time limit imposed on the worker to return to his or her professional activities is such that it suffices to constrain, objectively and very significantly, the ability that he or she has freely to manage, during those periods, the time during which his or her professional services are not required (judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 54).

41 It is important, in that regard, to add that the unforeseeable nature of the possible interruptions to a break is likely to have an additional restrictive effect on the worker's ability to manage that time freely. The resulting uncertainty is liable to put that worker on permanent alert.

42 Lastly, it is important to bear in mind, in the light of the case-law cited in paragraph 23 above, that the way in which workers are remunerated for periods of stand-by time is not covered by Directive 2003/88 but by the relevant provisions of national law. Consequently, that directive does not preclude the application of a law of a Member State, a collective labour agreement, or an employer's decision which, for the purposes of the remuneration of stand-by time, makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, even if those periods must be regarded, in their entirety, as 'working time' for the purposes of that directive (see, to that effect, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)*, C-344/19, EU:C:2021:182, paragraph 58).

43 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 2 of Directive 2003/88 must be interpreted as meaning that the break granted to a worker during his or her daily working time, during which the worker must be ready to respond to a call-out within a time limit of two minutes if necessary, constitute 'working time' within the meaning of that provision, where it is apparent from an overall assessment of all the relevant circumstances that the limitations imposed on that 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 or her professional services are not required and to devote that time to his or her own interests.

The third question

44 By its third question, the referring court asks, in essence, whether the principle of primacy of EU law must be interpreted as precluding a national court, ruling following the setting aside of its decision by a higher court, from being bound, in accordance with national procedural law, by the legal rulings of that higher court, where those rulings are not compatible with EU law.

45 It should be recalled that, in the light of the principle of primacy of EU law, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

46 In that regard, the national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and accordingly must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with EU law (judgment of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 30).

47 In those circumstances, the requirement to give full effect to EU law includes the obligation on a national court to alter established case-law, where necessary, if that case-law is based on an interpretation of national law that is incompatible with EU law (judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 35 and the case-law cited).

48 It follows that, in the present case, the referring court is under an obligation to give full effect to Article 267 TFEU, if necessary refusing of its own motion to apply the national procedural

provisions which require it to apply national law as interpreted by the Nejvyšší soud (Supreme Court), where that interpretation is not compatible with EU law.

49 In the light of the foregoing, the answer to the third question is that the principle of primacy of EU law must be interpreted as precluding a national court, ruling following the setting aside of its judgment by a higher court, from being bound, in accordance with national procedural law, by the legal rulings of that higher court, where those assessments are not compatible with EU law.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. **Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working times must be interpreted as meaning that the break granted to a worker during his or her daily working time, during which the worker must be ready to respond to a call-out within a time limit of two minutes if necessary, constitutes 'working time' within the meaning of that provision, where it is apparent from an overall assessment of all the relevant circumstances that the limitations imposed on that worker are such as to affect objectively and very significantly the worker's ability to manage freely the time during which his or her professional services are not required and to devote that time to his or her own interests.**

2. **The principle of primacy of EU law must be interpreted as precluding a national court, ruling following the setting aside of its judgment by a higher court, from being bound, in accordance with national procedural law, by the legal rulings of that higher court, where those assessments are not compatible with EU law.**

[Signatures]

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* Language of the case: Czech.