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ECLI:EU:C:2021:909

## JUDGMENT OF THE COURT (Fifth Chamber)

11 November 2021 (\*)

(Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 2 – Concept of ‘working time’ – Retained firefighter – Stand-by time according to a stand-by system – Pursuit, during the period of stand-by time, of a self-employed professional activity – Constraints arising from the stand-by system)

In Case C-214/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Labour Court (Ireland), made by decision of 6 May 2020, received at the Court on 20 May 2020, in the proceedings

**MG**

v

**Dublin City Council,**

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, C. Lycourgos (Rapporteur), President of the Fourth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– MG, by B. O’Brien,

- Dublin City Council, by E. Hunt, acting as Agent,
- the Belgian Government, by L. Van den Broeck and M. Van Regemorter, acting as Agents,
- the French Government, by E. de Moustier and N. Vincent, acting as Agents,
- the Netherlands Government, by M.K. Bulterman, C.S. Schillemans and H.S. Gijzen, acting as Agents,
- the Finnish Government, initially by S. Hartikainen and A. Laine, and subsequently by H. Leppo and A. Laine, acting as Agents,
- the European Commission, initially by D. Recchia, C. Valero and M. Wilderspin, and subsequently by D. Recchia and C. Valero, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, 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 MG and Dublin City Council (Ireland) concerning the calculation of the hours worked for the latter during periods of stand-by time according to a stand-by system.

## **Legal context**

### ***European Union law***

#### *Directive 89/391/EEC*

3 Article 5(1) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) provides:

‘The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.’

4 Article 6(1) of that directive provides:

‘Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means.

...’

#### *Directive 2003/88*

5 Article 1 of Directive 2003/88, entitled 'Purpose and scope', 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.

...'

6 Article 2 of that directive, entitled 'Definitions', states:

'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;

...'

7 According to Article 3 of that directive, entitled 'Daily rest':

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

8 Under the heading 'Weekly rest period', Article 5 of the same directive provides:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

...'

9 Article 6 of Directive 2003/88, entitled 'Maximum weekly working time', provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

***Irish law***

10 The Organisation of Working Time Act 1997 transposed into Irish law Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ 1993 L 307, p. 18), which was repealed and replaced by Directive 2003/88.

11 Section 2(1) of that act provides:

‘ ...

“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

...’

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

12 MG is a retained firefighter employed by Dublin City Council on a part-time basis. He is, by virtue of a system of stand-by time according to a stand-by system, retained by the brigade of the fire station by which he was trained.

13 MG is required to participate in 75% of that brigade’s interventions, with the option of abstaining from the remaining interventions. Without being obliged, during his periods of stand-by time, to be present at a specific place, he must, when he receives an emergency call to participate in an intervention, endeavour to arrive at the fire station within 5 minutes of the call and, in any event, observe a maximum turn-out time of 10 minutes.

14 That period of stand-by time according to a stand-by system is, in principle, 7 days per week and 24 hours per day. It is interrupted only by leave periods, as well as by periods for which MG has notified his unavailability in advance, provided that Dublin City Council agrees to those latter periods.

15 MG receives a basic salary, paid monthly, which is meant to remunerate his stand-by time according to a stand-by system, as well as additional remuneration for each intervention.

16 He is permitted to carry out a professional activity on his own account or for a second employer, provided that that activity does not exceed 48 hours per week on average. MG, however, is prohibited from carrying out such an activity during his ‘working hours’ as a retained firefighter, those hours being not only those spent responding to an incident, but also those devoted to other brigade activities, such as training.

17 MG must live and carry out his professional activities at a ‘reasonable distance’ from the fire station of his brigade, so as to be able to observe the time for turning out at that fire station.

18 Taking the view that the hours for which he is on stand-by for Dublin City Council must be classified as ‘working time’ within the meaning of the Organisation of Working Time Act 1997 and Directive 2003/88, MG filed a claim to that effect before the Workplace Relations Commission (Ireland).

19 That claim having been rejected, he lodged an appeal before the Labour Court (Ireland), the referring court.

20 MG observes before that court that he must at all times be in a position to respond rapidly to an emergency call. That prevents him from freely devoting himself to his family and social activities as well as to his professional activity as a taxi driver. He states that failure to comply with his obligations towards Dublin City Council can lead to disciplinary action or even dismissal. According to him, by imposing stand-by 7 days per week and 24 hours per day, and by refusing to acknowledge that stand-by hours constitute working time, Dublin City Council is in breach of the rules on daily and weekly rest and maximum weekly working time.

21 Dublin City Council counters that retained firefighters are not required to remain in a particular place when they are on stand-by. Moreover, if a retained firefighter does not arrive at the fire station within the maximum turn-out time, the consequence is simply that he or she receives no remuneration. In view of the flexibility of the stand-by system at issue, there is no justification for classifying stand-by hours as ‘working time’.

22 The referring court notes that the interpretation of the concept of ‘working time’ is decisive for the resolution of the main proceedings, Dublin City Council being satisfied that it complies with the rules on daily and weekly rest and maximum weekly working time, whereas MG maintains that Dublin City Council is in breach of those rules.

23 That court recalls that the Court held, in the judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82), that stand-by time which a firefighter spends at home with the duty to respond to calls from his employer within 8 minutes very significantly restricts the opportunities for that worker for other activities and must therefore be regarded as ‘working time’ within the meaning of Article 2 of Directive 2003/88.

24 The situation which led to that judgment should, however, be distinguished from that at issue in the main proceedings, since Dublin City Council does not require MG to be at a particular location when on stand-by and, in addition, permits him to work on his own account – which he does as a taxi driver – or to work for another employer.

25 In those circumstances, the Labour Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 2 of [Directive 2003/88] be interpreted to mean that a worker, when [on stand-by] at a location or locations of his [or her] choosing without [being subject to a] requirement at any time while [on stand-by] 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 stand-by]?’

(2) If the answer to [the first question] 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 [or her] own account while [on stand-by], be regarded as engaged in “working time” on behalf of the employer in respect of which employment he or she is [on stand-by]?’

(3) If the answer to the second question is in the affirmative, if the worker actually is employed by a second employer while [on stand-by], subject only to a requirement that the second employer must release the worker when called in by the first employer, [does that] mean that the time spent by the worker [on stand-by] and working for the second employer [must] be regarded as working time in terms of his [or her] 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 stand-by] to his [or her] first employer accrue working time in relation to the first and second employer contemporaneously?

### **Consideration of the questions referred**

#### ***Admissibility***

26 It should be noted that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 54 and the case-law cited).

27 Nonetheless, the Court cannot rule on a question submitted by a national court where it is quite obvious that the interpretation sought by that court of a rule of EU law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 13 December 2018, *Ritinger and Others*, C-492/17, EU:C:2018:1019, paragraph 37 and the case-law cited).

28 In that regard, it must be recalled that the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure of the Court. Thus it is, inter alia, essential, as is stated in Article 94(a) and (c) of those rules, that the reference for a preliminary ruling itself must contain a statement of the reasons which prompted the national court to inquire about the interpretation or validity of certain provisions of EU law (judgment of 13 December 2018, *Ritinger and Others*, C-492/17, EU:C:2018:1019, paragraphs 38 and 39 and the case-law cited).

29 In the case at hand, it is apparent from the order for reference that MG is a retained firefighter and carries out, during the period of stand-by time served under that post, a professional activity on his own account as a taxi driver.

30 Since it is thus common ground that MG's professional activity while on stand-by for Dublin City Council is carried out in a self-employed capacity, the order for reference does not reveal any connection between the third and fourth questions and the actual facts of the main action or its purpose.

31 By those questions, the referring court asks, in essence, how the concept of 'working time' within the meaning of Article 2(1) of Directive 2003/88 must be interpreted where a worker, during

the period of stand-by time provided for a first employer, carries out a professional activity for a second employer. In the absence of an account of facts enabling an understanding of how such a situation would arise in the case in the main proceedings, however, the Court does not have before it the information necessary to give a useful answer to those questions.

32 It follows that the third and fourth questions are inadmissible.

33 On the other hand, the first and second questions, which it will be appropriate to examine together, are admissible, in so far as they concern the situation, expressly referred to in the second question, in which a retained firefighter, while on stand-by according to a stand-by system, carries out a professional activity in a self-employed capacity.

### ***Substance***

34 By its first and second questions, the handling of which must be confined in the manner indicated in paragraph 33 of the present judgment, the referring court asks, in essence, whether Article 2(1) of Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained firefighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an emergency call, reach his or her assigned fire station within 10 minutes, constitutes ‘working time’ within the meaning of that provision.

35 Article 2(1) of Directive 2003/88 defines the concept of ‘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. Those two concepts being mutually exclusive, a worker’s stand-by periods must 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 September 2021, *Dopravní podnik hl. m. Prahy*, C-107/19, EU:C:2021:722, paragraph 28 and the case-law cited).

36 While it is ultimately for the referring court to examine whether the period of stand-by time according to a stand-by system at issue in the main proceedings must be classified as ‘working time’ or a ‘rest period’, it remains the case that it is for the Court to provide it with guidance as to the criteria to be taken into account in that examination (see, to that effect, judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, C-580/19, EU:C:2021:183, paragraph 25 and the case-law cited).

37 In that regard, it must be recalled that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national rules concerning, in particular, the duration of working time. Those requirements constitute rules of EU social law of particular importance from which every worker must benefit. In particular, by establishing the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods, that directive gives specific form to the fundamental right expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union and must, therefore, be interpreted in the light of that Article 31(2). The provisions of that directive may not be interpreted restrictively to the detriment of the rights that workers derive from it (judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, C-580/19, EU:C:2021:183, paragraphs 26 to 28 and the case-law cited).

38 As regards the classification of periods of on-call duty, the Court has held 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 (judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, C-580/19, EU:C:2021:183, paragraph 38).

39 Conversely, where the constraints imposed on a worker during a specific period of stand-by time do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes ‘working time’ for the purposes of applying Directive 2003/88 (judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, C-580/19, EU:C:2021:183, paragraph 39 and the case-law cited).

40 In order to assess whether stand-by time according to a stand-by system creates, objectively, major constraints having a very significant impact on the management, by the worker concerned, of the time during which his or her professional services are not required, it is necessary, more specifically, to have regard to the time limit for that worker to return to his or her professional activities with the employer for whom he or she is serving that stand-by time starting from the moment at which that employer requests it, coupled, where appropriate, with the average frequency of the activities that the worker is actually called upon to undertake over the course of that period (see, to that effect, judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, C-580/19, EU:C:2021:183, paragraph 45).

41 In that regard, the Court has specified that, where that time limit is, during a period of stand-by time, limited to a few minutes, that period must, in principle, be regarded, in its entirety, as ‘working time’. It is nevertheless necessary, as the Court has also specified, to evaluate the impact of such a time limit within which the worker has to react following a concrete assessment that 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 that same period (judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, C-580/19, EU:C:2021:183, paragraphs 47 and 48 and the case-law cited).

42 It is for the referring court to assess, in the light of all the circumstances of the case and relying on the information set out in paragraphs 38 to 41 of the present judgment, whether, during his periods of stand-by time according to a stand-by system, MG is subject to constraints of such intensity such as to constrain, objectively and very significantly, the ability that he has freely to manage, during those periods, the time during which his professional services as a retained firefighter are not required.

43 In that regard, the possibility offered to MG to carry out another professional activity during his periods of stand-by time is an important indication that the terms of the stand-by system do not place that worker under major constraints having a very significant impact on the management of his time, provided that it is established that his rights and obligations arising from his employment contract, from collective agreements and from the legislation of the Member State concerned are structured in such a way as to permit the effective pursuit of such an activity for a significant portion of those periods.

44 The fact that MG at no time has to be in a specific place during his periods of stand-by time according to a stand-by system, that he is not obliged to participate in the entirety of the



interventions effected from his assigned fire station, since a quarter of them may in this case take place in his absence, and that he is permitted to carry out another professional activity not exceeding 48 hours per week on average, could constitute objective factors from which it may be concluded that he is in a position to develop, according to his own interests, that other professional activity during those periods and to devote a considerable part of the time of those periods to them, unless the average frequency of the emergency calls and the average duration of the interventions prevent the effective pursuit of a professional activity capable of being combined with the post of retained firefighter, which it is for the referring court to assess.

45 It is also important to state that organisational difficulties that a period of stand-by time may generate for the worker concerned, such as the choice of residence or places for the pursuit of another professional activity which are more or less distant from the place that he must be able to reach within the time limit set in the context of his post as a retained firefighter, may not be taken into account (see, by analogy, judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter's period of stand-by time)*, C-580/19, EU:C:2021:183, paragraphs 41 and 42 and the case-law cited).

46 Were it to transpire, in the light of all the relevant circumstances in the case in the main proceedings, that the said periods of stand-by time do not satisfy the conditions to be classified as 'working time' within the meaning of Article 2(1) of Directive 2003/88, it would follow, as is apparent from paragraph 35 of the present judgment, that those same periods should be regarded, with the exception of the time linked to the provision of work actually carried out, as 'rest periods' within the meaning of Article 2(2) of that directive.

47 However, the classification of a period of stand-by time as a 'rest period' for the purposes of applying Directive 2003/88 is without prejudice to the duty of employers to comply with their specific obligations under Articles 5 and 6 of Directive 89/391 to protect the safety and health of their workers. It follows that employers cannot establish stand-by periods that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods' within the meaning of Article 2(2) of Directive 2003/88. It is for the Member States to define, in their national law, the detailed arrangements for the application of that obligation (judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter's period of stand-by time)*, C-580/19, EU:C:2021:183, paragraph 60 and the case-law cited).

48 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 2(1) of Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained firefighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an emergency call, reach his or her assigned fire station within 10 minutes, does not constitute 'working time' within the meaning of that provision if it follows from an overall assessment of all the facts of the case, in particular from the scope and terms of that ability to carry out another professional activity and from the absence of obligation to participate in the entirety of the interventions effected from that fire station, that the constraints imposed on the said worker during that period are not of such a nature as to constrain objectively and very significantly the ability that he or she has freely to manage, during the said period, the time during which his or her services as a retained firefighter are not required.

## Costs

49 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 (Fifth Chamber) hereby rules:

**Article 2(1) 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 must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained firefighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an emergency call, reach his or her assigned fire station within 10 minutes, does not constitute ‘working time’ within the meaning of that provision if it follows from an overall assessment of all the facts of the case, in particular from the scope and terms of that ability to carry out another professional activity and from the absence of obligation to participate in the entirety of the interventions effected from that fire station, that the constraints imposed on the said worker during that period are not of such a nature as to constrain objectively and very significantly the ability that he or she has freely to manage, during the said period, the time during which his or her services as a retained firefighter are not required.**

Regan

Lenaerts

Lycourgos

Jarukaitis

Ilešič

Delivered in open court in Luxembourg on 11 November 2021.

A. Calot Escobar

K. Lenaerts

Registrar

President

\* Language of the case: English.

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