Court of Justice of the European Union
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Press and Information

Judgment in Case C-742/19
Ministrstvo za obramo

The Court of Justice provides guidance on the instances in which the Directive concerning certain aspects of the organisation of working time does not apply to activities carried out by military personnel

That directive does not preclude a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than a stand-by period during which he or she performs actual work

Between February 2014 and July 2015, B. K., a non-commissioned officer in the Slovenian army, performed uninterrupted 'guard duty' for seven days per month. While performing that service, which included both periods during which B. K. was required to carry out actual surveillance activity and periods during which he was required only to remain available to his superiors, he was contactable and present at all times at the barracks where he was posted.

The Ministry of Defence took the view that, for each of those days of 'guard duty', only eight hours constituted working time; it paid B. K. the corresponding ordinary salary in respect of those hours and, in respect of the other hours, paid him only a stand-by duty allowance amounting to 20% of his basic salary.

The action brought by B. K., in which he claimed that he should be paid, as overtime, for the hours during which, in the course of his 'guard duty', he had not actually performed any activity for his employer, but had been obliged to remain available to his superiors, was dismissed at first instance and on appeal.

In that context, the Vrhovno sodišče (Supreme Court, Slovenia), hearing an appeal on a point of law, decided to refer questions to the Court concerning the applicability of Directive 2003/88, [1] which lays down minimum requirements concerning, inter alia, the duration of working time for security activity carried out by a member of military personnel in peacetime and, as the case may be, on the issue of whether 'stand-by periods' during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, must be regarded as working time, within the meaning of Article 2 of that directive, for the purposes of determining the remuneration payable to him or her in respect of that period.

Findings of the Court

In its Grand Chamber judgment, the Court provides guidance, in the first place, on the instances in which security activity carried out by a member of military personnel is excluded from the scope of Directive 2003/88.

[1] 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).

In doing so, the Court notes, at the outset, that Article 4(2) TEU, which provides that national security is to remain the sole responsibility of each Member State, [2] does not have the effect of excluding the organisation of the working time of military personnel from the scope of EU law.

In that regard, the Court notes that the principal tasks of the armed forces of the Member States, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State which the European Union must respect. However, it points out that it does not follow from the above that decisions taken by the Member States on the organisation of their armed forces fall entirely outside the scope of EU law, in particular where the harmonised rules at issue relate to the organisation of working time.

Although it does not therefore result from the respect which the European Union must have for the essential functions of the State that the organisation of the working time of military personnel entirely escapes the application of EU law, the fact remains that Article 4(2) TEU requires that the application to military personnel of the rules of EU law relating to the organisation of working time must not hinder the proper performance of those essential functions. EU law must take into consideration the specific features which each Member State imposes on the functioning of its armed forces which result, inter alia, from the particular international responsibilities assumed by that Member State, from the conflicts or threats with which it is confronted, or from the geopolitical context in which that State evolves.

Turning then to the question of who is covered by Directive 2003/88, the Court notes that the concept of 'worker' is defined by reference to the essential feature of an employment relationship, namely the fact that a person performs services for and under the direction of another person in return for which he or she receives remuneration. As this was the case for B. K. during the relevant period, that directive was applicable to his situation.

Lastly, as regards the matters covered by Directive 2003/88, which is defined by reference to Article 2 of Directive 89/391, [3] the Court points out that that directive is to apply to 'all sectors of activity, both public and private', [4] apart from where characteristics peculiar to certain specific public service activities, such as the armed forces, inevitably conflict with it. [5]

In that regard, the Court finds that Article 2 of Directive 89/391 cannot be interpreted as meaning that all members of the armed forces of the Member States are permanently excluded from the scope of Directive 2003/88. Such an exclusion does not cover whole sectors of the public service, but rather only certain categories of activity in those sectors, by reason of their specific nature. With respect, specifically, to activities carried out by military personnel, the Court finds, inter alia, that those activities connected to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, do not, as such, have particularities which make it impossible to plan working time in a manner compliant with the requirements laid down in Directive 2003/88, at least provided that those activities are not carried out in the context of a military operation, including the period of preparation immediately preceding such an operation.

However, the Court finds that that directive does not apply to the activities of military personnel and, in particular, to their security activities where those activities take place in the course of initial or operational training or in the course of operations involving a military commitment by the armed forces, whether they are deployed, permanently or on a temporary basis, within the borders of the relevant Member State or outside of those borders. Furthermore, Directive 2003/88 equally does not apply to military activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive. That is also the case where it appears that the military activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health

[2] According to the wording of that same provision, the Union is to respect the essential functions of the State, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.
[3] 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).
[4] Article 2(1) of Directive 89/391.
[5] First subparagraph of Article 2(2) of Directive 89/391.

and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed, or where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations. It is for the referring court to determine whether the security activity performed by B. K. is covered by one of those situations. If not, then that activity will have to be deemed to fall within the scope of Directive 2003/88.

In the second place, the Court finds that, assuming that Directive 2003/88 applies in the present case, a stand-by period imposed on a member of military personnel which involves him or her being continually present at his or her place of work must be regarded as being working time where that place of work is separate from his or her residence. However, since the way in which workers are remunerated for the period of stand-by time is covered by national law and not by Directive 2003/88, the latter does not preclude a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than a stand-by period during which he or she performs actual work.

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