

The EU directive on working time and the military

THE JUDGMENT MINISTRSTVO ZA OBRAMBO
(2021)

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Ministrstvo za obrambo

- ▶ B. K. /Slovenija (Ministry of Defence), C-742/19
- ▶ Grand Chamber judgment (15 July 2021)
- ▶ Interventions: SL, DE, ES, FR + European Commission
- ▶ Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time



The facts of the case

- ▶ B. K. (former non-commissioned officer Slovenian army) did 24h/7days 'guard duty' per month (at the barracks where he was posted)
- ▶ 'Guard duty': periods of actual surveillance / periods of mere availability
- ▶ In case of inspection (military police or intervention team): carry out certain tasks assigned to him by his superiors
- ▶ For each of those days of 'guard duty':
 - ▶ 8 hours: working time (normal salary);
 - ▶ other hours: stand-by duty allowance (20% of basic salary)
- ▶ BK claims overtime remuneration (130%) for hours of his 'guard duty' without performing activity



Are the armed forces excluded?

- ▶ **First issue: scope of EU law**



- ▶ EU law (article 4(2) TEU) excludes the organisational arrangements of the armed forces of the Member States
- ▶ National security is to remain the sole responsibility of each Member State



The Court says: not entirely

- ▶ Member States' essential choices of military organisation are not governed, as such, by EU law
- ▶ E.g. compulsory military service is not a question for EU law (ECJ, Dory, C-186/01)
- ▶ Situation is however different with regard to working time (which is harmonised in the EU)
- ▶ Yet, important caveat: *rules on working time may not prevent the armed forces from fulfilling their tasks, nor adversely affect the essential functions of the State (national security)*



Working time: fundamental right

- ▶ Minimum requirements for workers in the EU are a fundamental right (art 31 (2) Charter of fundamental rights of the EU)
- ▶ No restrictive interpretation to the rights of workers
- ▶ Military staff in question are “workers”: applicability a priori of the directive



What about certain activities?

- ▶ Must certain activities of the armed forces be excluded ?
- ▶ ECJ: reference to other case law: continuity requirements
- ▶ Services in the areas of public health, public safety and public order may be covered, **when performed in normal circumstances**
- ▶ Different in circumstances “*whose gravity and scale are exceptional, such as natural or technological disasters, attacks or serious accidents, which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large*”



Working time may be planned

- ▶ Members of the armed forces are not explicitly excluded from the scope of the directive
- ▶ *Not all activities carried out by military personnel have such particularities which make it impossible to plan working time in a manner compliant with the requirements laid down in Directive 2003/88*
- ▶ Administrative, maintenance, repair and health services, as well as services relating to public order and prosecution: in principle within scope of Directive



Yet, not in all circumstances

- ▶ Where members of the armed forces are faced with “*circumstances whose gravity and scale are exceptional*” their activities are excluded from the scope of Directive 2003/88



Other activities outside the scope

- ▶ Certain categories of military activity fall entirely outside the scope of Directive 2003/88 where those activities are so particular that they are always absolutely incompatible with the requirements imposed by that directive
- ▶ Activities carried out by members of the armed forces who, either because they are highly qualified or due to the extremely sensitive nature of the tasks assigned to them, are extremely difficult to replace with other members of the armed forces by means of a rotation system (AG: also high level security clearance)



Military (or connected) operations

- ▶ Excluded: all military personnel called upon to assist in operations involving a military commitment by the armed forces of a Member State, whether they are deployed, permanently or on a temporary basis
- ▶ In addition: possible interdependence not only between those operations, but also between them and other activities carried out by members of the armed forces
- ▶ Therefore, if it proves to be necessary for the proper performance of actual military operations, it cannot be ruled out that certain activities of the armed forces which do not relate directly to those actual military operations also fall outside the scope of Directive 2003/88 for the duration of those operations
- ▶ Different position of e.g. France (greater derogation, see AG, pt. 100)?



Training

- ▶ French Government: in order to ensure the operational efficiency of the armed forces, it must be possible to expose military personnel, during their initial and operational training, to situations which reproduce as accurately as possible the conditions, including the most extreme of conditions, in which actual military operations take place
- ▶ Court: legitimate objective, which could not be achieved if the rules on the organisation of working time laid down in Directive 2003/88 had to be complied with during that initial and operational training



Scope of the working time Directive

- ▶ Rules on working time do NOT apply :
 - ▶ in the course of initial or operational training or an actual military operation
 - ▶ where it is an activity which is so particular that it is not suitable for a staff rotation system
 - ▶ 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 and safety of the community at large
 - ▶ where a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations



What about the remuneration?

- ▶ Second issue: the stand-by periods
- ▶ Refers to all periods in which the member of military personnel, in the course of his or her security activity, is available exclusively to his or her superiors, without actually performing a security activity
- ▶ Reformulation: such stand-by, is that overtime?



Stand-by time is working time

- ▶ Standing case law: the concept of 'working time' covers all stand-by periods 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*
- ▶ If you cannot manage your own time and interests, it is working time



Guard duty in casu is working time

- ▶ 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



Yet, remuneration is national issue

- ▶ 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
- ▶ National law (or collective labour agreement, or employer's decision) may make a distinction between periods when 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')
- ▶ 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, may be remunerated differently than a stand-by period during which he or she performs actual work



Questions?

