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COLOPHON

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TOPIC

REMUNERATION ACCORDING TO WORK? STANDBY DUTY AND WORKING TIME

The European Court of Justice recently ruled that a standby duty (possibly at home) can be considered working time. A crucial factor in this regard is the extent to which the standby duty restricts the freedom of the employee to do other things.

But if standby duty is working time, what does this mean in practice? The goal of this article is to make everything somewhat clearer. What is working time? What are the consequences? Above all, consider compensatory time off and overtime payments.

Here, we are placing the emphasis on the general services sector. Specific situations in, for example, the medical, construction, security and concierge sectors are not discussed. Also, it should not be forgotten that the working time regulations (or a part of them anyway) do not apply to some employees. This is namely the case for executives and management employees.

WHAT IS WORKING TIME?

Working time or working duration is the time during which an employee is available to the employer.[1] During working time, the employee is obliged to follow the employer's instructions and perform his or her work activities for the latter. That is a really rather broad definition. On the basis of a few questions, we will try to define the criteria more tightly.

Is the employee's presence at the place of work always working time? No, the fact that the employee is present does not mean that he or she is at the employer's disposal. The time spent by the employee in the company but which he or she can use freely is not working time. A rest break or a meal break is therefore not working time.

Does the employee have to perform work activities for it to be considered working time? No, you may not link working time to the actual performance of work activities. Working time is the time that the employee cannot use freely. Even if the employee performs no actual work activities, all periods during which the employee is under the authority of the employer are nevertheless working time. The journeys between the place of residence and the place of work can also be working time. This is namely the case for the travelling time of employees from home to the first customer. (The employee may not have a fixed or usual place of work in that case, however.[2])

And just to make it that extra bit more complicated: an employee can actually perform work activities without it being considered working time. The employee must namely perform the work activities at the request of the employer. This instruction from the employer can also be implicit. An employee who, after a refusal by the employer to work more than 8 hours a day or 38 hours a week, does so anyway, does not have the right to an overtime payment or compensatory time off.

If the employer grants a compensation for a certain amount of time, does that mean that this is always a question of working time? No, compensation and working time must also be separated to a certain extent. If it is a question of working time, the employer must grant remuneration (possibly in the form of an overtime payment). Conversely, however, this does not apply. As an employer, you can for example, grant a stand-by compensation payment, without the employee's standby duty having to be equated with working hours. Moreover, any remuneration for those stand-by hours do not have to be the same as the remuneration for the hours of actual work.

STANDBY DUTY: TWO CATEGORIES

So does standby duty count as working time or not? Here, the legislation does not provide a clear answer. What is of central importance is whether or not an employee is available to the employer, and that question is not always easy to answer in the case of standby duty.

One way to get closer to the answer is to distinguish between two types of standby duty.

1) A first category is a standby duty during which the employee has to be physically present at a place designated by the employer. From this specific location, the employee must then be available for any calls made upon him or her.

The employer will often allow the employee to rest or sleep during such a (usually) night-time standby duty. This is therefore called a "sleeping" standby duty.

2) A second category is a standby duty during which the employee does not have to be physically present at a place designated by the employer. However, the employer does expect the employee to be able to answer any calls from the employer made upon him or her. These standby duties are also referred to as "availability service" or "standby".

In both categories of standby duty, there are periods during which the employee does not perform any actual work activities, and potential periods during which he or she does do so. Those periods during which the employee performs actual work activities are working time.

The standby duty contains periods during which no actual work activities are performed, alternating with periods during which they are. In the first category of standby duty, the periods of actual work activities may be more frequent than in the second category of standby duty. However, this frequency is not really very important. In both cases, the periods of actual work activities are working time.

AN EXAMPLE

A customer service employee is on standby during the weekend. That means a customer can telephone her via the customer helpline that is then patched through to the employee's mobile phone. Once the employee has a customer on the line, she is simply performing her job. These periods of actual work activities count as working time, even if the telephone call takes only a few minutes.

CATEGORY 1: COMPULSORY PRESENCE

During the standby duty, the employee has to be physically present in a place that the employer determines. That can be the normal place of work, but this does not necessarily have to be the case. The employer is actually limiting the employee's freedom of movement to the maximum possible extent in this situation. At no point can the employee use his or her own time freely, since the employee does not actually have any time of his or her own in this scenario.

As such the entire standby duty is working time. Limitations to this are actually not possible, as is shown by case law. CLAs and contractual clauses that determine a fixed working time for sleeping standby duty are in conflict with the working time regulations.

This interpretation by case law is perhaps a little strict. One could after all argue that such a fixed-time approach is indeed acceptable, but only on condition that the sum of the standby duty and the actual working time never exceeds 48 hours per period of seven days.[3]

So what possibilities do you in fact have as an employer to limit salary costs? There is nothing to prevent you from compensating the hours during which actual work activities are performed differently from those during which they are not.[4] However, stipulating in the employment contract that the standby duty need not be compensated at all is null and void.[5] Specifically, you can pay the employee a lower remuneration during the standby duty than for actual performance of work.

Make good agreements, for example in the employment contract or an appendix to it, so that it is very clear to the employee what compensation he or she is entitled to and when he or she is entitled to it. This freedom to agree a lower remuneration for hours during which no actual work activities are performed is not unlimited. You can draw up a scheme that provides for a different manner of remuneration, but be sure to comply with the hierarchy of legal sources. So in other words always respect the sectoral minimum wages and the guaranteed minimum monthly income.

CATEGORY 2: NO COMPULSORY PRESENCE

Does the employee not have to be present at a place designated by the employer, but merely available to answer any calls from the employer made upon him or her? Belgian case law does not consider this "availability service" or "stand-by" to be working time. The employee is not (or at least not fully or adequately) available to the employer. The employee's limited freedom of movement during the standby duty because he or she has to stay within a certain range of the workplace (so that he or she can reach it within a certain time) makes no difference to the case law.[6] Only the time during which a call is made on the employee and he or she is thus performing actual work activities would then count as working time.

RECENT EUROPEAN CASE LAW: A LOT OF NUANCE, BUT NOT A LOT OF CONCRETE FOOTHOLDS

Recent European case law[7] does not change the basic principles. The judgement of the Court of Justice is, however, more nuanced than Belgian case law. A key factor in this regard is whether the conditions imposed by the employer during the standby duty significantly restrict the freedom of the employee to perform other activities. If this is the case, the entire standby duty counts as working time. The Court of Justice ruling concerns an employee who had to be at the place of work within eight minutes. This limitation meant that the standby duty counted as working time.

So from when does standby duty at home no longer count as working time? The Court of Justice does not set any clear and firm rules in this respect. Being at the place of work within eight minutes is too much of a limitation. Would that also be the case if the employee had to be at the place of work within half an hour? The only guideline is the limitation of the freedom of the employee to perform another (possibly private) activity. The nuanced attitude of the Court of Justice therefore creates many uncertainties.

It is clear, however, that you still have the option of allocating a lower remuneration during standby duty than when the employee is performing actual work activities.

WHAT ARE THE CONSEQUENCES?

Are you an employer who makes use of standby duty now and again? If so, what do you need to do now, and what do you need to think about?

Perhaps you are offering employees a great deal of freedom of movement during the standby duty. Is that the case? If it is, evaluate just how much freedom you are offering them. Enough to give employees the opportunity

to exercise a hobby for example? Or do they have no other option but to stay sitting in their chair waiting for your call to come in? The line is sometimes a thin one. Maybe it all depends on the circumstances - sometimes you can give a great deal of freedom, but at other times you can't.

Instead of changing your entire work organisation, you might be better off using the system of *overtime*. We briefly explain the basic principles below (full-time employment).

- Working time may not exceed 8 hours per day. The maximum limit per week is 40 hours (on condition that a weekly scheme of 38 hours on average is respected (over a reference period of no more than 1 year).
- You may be exceeding these limits with the standby duty. If so, you must observe the rules relating to overtime. Overtime is only possible in a number of specific cases and when you respect certain conditions. For example, working time limits may be exceeded when work is performed in consecutive shifts.
- As a rule, you will have to grant compensatory time off. In this way, the employee compensates the extra working time at a later time. For this reason, overtime is often a short-term solution and the compensatory time off must be compensated later by having another employee work longer.
- Aside from the compensatory time off, you owe a remuneration supplement, the overtime payment. As a rule, the employee is entitled to receive an overtime payment for all work activities that he or she performs beyond 9 hours a day or 40 hours a week. This overtime payment amounts to 50% of the normal salary. This percentage is increased to 100% for overtime on Sundays and public holidays.

Also consider using the *voluntary overtime* (new since 1 February 2017). In that case, the standby duty must however take place at the initiative of the employee.

- With the agreement of the individual employee, you can exceed the working time limits up to a maximum of 100 hours (in some sectors up to 360 hours).
- You do not need to grant compensatory time off. However, the employee is entitled to remuneration and an overtime payment if the normal limits of working time are exceeded (9 hours a day, 38/40 hours a week). Therefore, you pay the remuneration for the voluntary overtime and also a 50% overtime payment surcharge. This surcharge can rise to 100% if the overtime is performed on a Sunday or public holiday.

Are you an employer who has implemented a system of standby duty for a large group of employees on a rota system? If so, what do you need to do now, and what do you need to think about?

The chances of your employees having a lot of freedom of movement may be small and responding quickly is crucial, both for you and your customers. Maybe the pool of 100 voluntary overtime hours offers you sufficient room for manoeuvre. Is that not the case? Then you're better off looking at how you can change your work organisation more thoroughly. In this way, the peak and trough rotas of limited flexibility can offer a solution. So you must elaborate a customized structural solution.

Yves Stox, Senior Legal Counsel

1 Article 19, paragraph 2 of the Labour Law.

2 Court of Justice 10 September 2015, no. C-266/14, www.curia.eu.

3 Art. 22 Working Time Directive 2003/88; F. Kéfer and J. Clesse, "Le temps de garde inactif, entre le temps de travail et le temps de repos", Rev.dr.ULg 2006, 165-166.

4 Court of Cassation 6 June 2011, JTT 2011, 373.

5 Liège Labour Tribunal 19 December 2007, Sociaalrechtelijke kronieken/Chroniques de droit social 2008, 288.

6 Court of Cassation 18 May 2015, AR S.13.0024.F, www.cass.be

7 HCourt of Justice 21 February 2018, no. C-518/15, www.curia.eu.

NEWS

CAREER SAVINGS AS OF 1 FEBRUARY 2018? YES AND NO...

Career savings is a concept established by the law on feasible and manageable work. An employee (private sector) can save up time and then take it later in his or her career as paid leave. It is therefore a measure that reduces working time and/or end-of-career. The employee saves up time, but he or she cannot convert that time into money.

On 1 February 2018, career savings came into effect. Do you as an employer need to get your skates on with this? No, you don't. Employees cannot yet make use of career savings. Below you can read more about why this is the case and what you can expect in the future.

POSTPONEMENT DOES NOT EQUAL RENUNCIATION

The career savings scheme was introduced by the Law of 5 March 2017 on feasible and manageable work. This law gave the social partners time to develop an interprofessional arrangement on career savings themselves, firstly until 1 August 2017, later until 31 January 2018. This interprofessional CLA has not seen the light of day.

THE BALL IS IN THE SECTORS' COURT

It is now up to the joint committees to activate career savings and to conclude a sectoral CLA in which a sectoral system of career savings is drawn up.

The social partners at sectoral level have six months to conclude a sectoral CLA. Employees are not obliged to participate in career savings, but the sectoral CLA can require you as an employer to start it up within the company.

The biggest advantage of such a sectoral CLA seems to be the possibility of transferring the savings to another employer within the same sector. An interprofessional CLA could even have made this transfer possible across the various different sectors, but that opportunity now seems to have gone by the wayside for good.

Each sector must set its own rules on:

- What time an employee can save (e.g. non-statutory holidays or voluntary overtime)
- The period within which the employee can accumulate the savings
- How employees can save up time
- The valuation of the savings (e.g. indexation or not)
- Managing career savings and guarantees for employees (e.g. by the employer, an external institution or the social security fund)
- What happens to the savings when the company goes into liquidation

WE HAVE REACHED THE DATE OF 1 AUGUST 2018 AND NOTHING HAS HAPPENED. WHAT NOW?

You can implement career savings at your own company level, but you must then conclude a company CLA. It is then impossible to transfer the savings to a new employer and the only option is to pay out the value of the savings. This would then be a form of conversion into money, although this was initially not the intention...

Is there no trade union delegation active within your company? Nothing prevents you from introducing your own form of "career savings". You can offer employees the opportunity of saving up non-statutory holidays. A My Choice cafeteria plan can also offer a realistic alternative.

Yves Stox, Senior Legal Counsel

CASE LAW

DISCRIMINATION AGAINST A SICK EMPLOYEE

An employer may not simply refuse an employee's request for adapted working conditions during the latter's recovery following a serious illness. For the first time, a judge has accepted that the chronic consequences of cancer are a disability. The Brussels Labour Tribunal ruled in a recent judgement that an employer should have provided adaptations so that an employee, after a long absence due to illness, would have still been able to keep her job. However, the employer had dismissed the employee. The judge ordered the employer to provide compensation for damages.

THE FACTS

An employee was working as a shop assistant when the full-time employment contract was suspended in November 2012 due to cancer. The employee was declared incapacitated for work until the end of October 2015, but was permitted to resume work progressively as from 1 September 2014 despite that further work incapacity until the end of October 2015. The employee contacted the employer in August 2014 to discuss progressive resumption of work. Shortly afterwards, the employer terminated the employment contract with payment of a compensation for termination. The reason: lack of suitable work, the hiring of a new employee, the expansion of the task package, the launch of the webshop, and the need for additional training as a result of new products and a new cash register program.

WHAT IS A DISABILITY?

In court, the employee claimed compensation for damages due to discrimination on the grounds of disability. The Labour Tribunal ruled that disability was indeed a factor. After 21 months of full work incapacity, the employee was still partially incapacitated for work for one year at least. As a result, the court decided that there was a long-term (physical and psychological) disorder that prevented the employee from participating in professional life fully, effectively and on an equal footing with other employees.

NO REASONABLE ADAPTATIONS = DISCRIMINATION

Not providing reasonable adaptations for a person with a disability is a form of discrimination. So what can these reasonable adaptations comprise? The legal framework in this connection is broad. It involves

appropriate measures that are taken in a specific situation and depending on need so as to enable a person with a disability to access, participate in and advance in the matters to which this law applies, unless these measures constitute a disproportionate burden for the person who must take these measures (Article 4, 12° anti-discrimination law). Very specifically, they can be adaptations to a building or to the equipment, work rhythm or division of tasks, or the provision of specific training.

According to the Labour Tribunal, the employer could certainly have made reasonable adjustments without them constituting a disproportionate burden on the latter. The Labour Tribunal approached matters very specifically:

- The employer has fourteen shops and did not demonstrate that there was no suitable work at any of them.
- Changes in the operation of the company (e.g. the webshop or the cash register system) occur frequently and so are not a good excuse. Additional training could have remedied the problem.
- The company was sufficiently profitable, so adjusting the work rhythm and providing additional training do not constitute a disproportionate burden on the employer.

COMPENSATION FOR DAMAGES

The Labour Tribunal granted a fixed compensation for damages of six months' salary. This compensation was over and above the compensation for termination. The combination with an additional compensation for manifestly unfair dismissal is not possible (Article 9, §3 of CLA no. 109 concerning grounds for dismissal).

Yves Stox, Senior Legal Counsel


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