Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 6 October 2020[1]

Case C-344/19

D. J.
v
Radiotelevizija Slovenija

(Request for a preliminary ruling
from the Vrhovno sodišče Republike Slovenije (Supreme Court, Slovenia))

(Request for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Concepts of working time and rest – Stand-by duty – Work relating specifically to the maintenance of television transmitters located in high mountain regions)

1. Under what circumstances may the time a worker spends on stand-by be regarded as working time?

2. Is it permissible to take the concept of working time contained in Directive 2003/88/EC[2] so far as to include situations in which a worker, despite not 'working', is in a situation in which he or she cannot rest effectively? And what are the characteristics of 'effective rest' that satisfy the objective of protecting the health and safety of workers which that directive pursues?

3. Might there be a grey area, in the sense that it would be possible for a worker to be neither on working time nor on a rest period?

4. Those are the questions underlying the present case, which, examined in parallel with Case C-580/19, offers the Court an opportunity to consider the legal characterisation of on-call time and stand-by time in the light of Directive 2003/88.

5. The Court has given rulings on this subject on a number of occasions. However, the specific features of the present case (the particularities of the geographical location of the place of work) render it necessary to revisit the principles thus far asserted and consider whether those principles might be developed.

6. More specifically, it is necessary to ascertain whether time spent on stand-by duty, during which a worker must remain contactable and may be required to return to his place of work within one hour, is to be regarded as working time or as a rest period, within the meaning of Article 2 of Directive 2003/88.

1 Original language: Italian.

2 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).

7. Here, particular attention will have to be paid to the fact that the applicant, a technician at a television transmission station, remained in close proximity to his place of work during periods of stand-by duty because of the difficulty of getting to the transmission station and its distance from the worker's home.

I. Legal context

A. EU law

8. Recital 5 of Directive 2003/88 states:

'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. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.'

9. Article 2 of Directive 2003/88 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;

…

9. "adequate rest" means that workers have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.'

B. Slovenian law

10. Article 142 of the Zakon o delovnih razmerjih (Slovenian law on employment relationships) (ZDR-1; *Uradni List RS* No 21/2013 et seq.) provides:

'1. Working time shall mean actual working time and break time in accordance with Article 154 of this law, and the time of justified absences from work in accordance with the law and collective agreement or a general regulatory act.

2. All time during which a worker carries out his work, meaning that he is at the employer's disposal and is fulfilling his employment obligations under his employment contract, shall constitute actual working time.

3. Actual working time shall form the basis for calculating labour productivity.'

11. Article 46 of the Kolektivna pogodba za javni sektor (Collective Agreement for the Public Sector) (KPJS; *Uradni List RS* No 57/2008 et seq.) provides:

'Public sector employees shall be entitled to a salary supplement in respect of periods of stand-by duty in the sum of 20% of the hourly rate of basic pay. Periods of stand-by duty shall not be counted as working time for public sector workers.'

12. Article 6 of Radiotelevizija Slovenia's internal regulations of 22 December 2010 ('the internal regulations') on working time provides:

'Within administrative units or departments it shall be permissible to establish on-call duties or other forms of stand-by duty when it is necessary for specific work to be carried out without interruption or on a particular day or by a certain time for reasons of protection in the event of a natural disaster or other type of incident, or on account of exceptional circumstances beyond the employer's control or which he is unable to avert.'

13. Article 8 of the internal regulations provides:

'On-call time shall mean periods during which the worker is not free to dispose of his time and must remain at the employer's disposal at his place of work or other location specified by management in such a way as to be able to take up his usual work and/or other activities or duties related to his work. Time spent by the worker travelling to his place of work as a passenger shall also be regarded as on-call time.'

14. Article 9 of the internal regulations provides:

'All time spent on call shall be regarded as working time.'

15. Finally, Article 16 of the internal regulations provides:

'For workers, periods of stand-by duty may be set on the basis of a production process or the annual division of work at OU (organisational unit) or PPU (programme production unit) level. Stand-by duty means that the worker must remain contactable outside his working hours, by telephone or other means, such that, when necessary, he is able to return to his place of work. The maximum permissible period for reaching the place of work shall be one hour. Stand-by duty shall be agreed in writing with the worker and at least two days' prior notice shall be given. Written requests (on form 5) for periods of stand-by duty may be drawn up on a monthly, weekly or daily basis.

For workers, periods of stand-by duty shall not be regarded as working time.'

II. The facts, the main proceedings and the questions referred

16. The applicant was employed as a technician and worked at transmission stations at Pohorje (Slovenia) and, subsequently, Krvavec (Slovenia), from 1 August 2008 to 31 January 2015.

17. The nature of the work, the distance of the transmission stations from the applicant's home – which was such that it was not possible for the applicant to return home daily, even in clement weather – and the occasional difficulty in reaching the transmission stations, meant that the applicant had to stay in close proximity to them.

18. For those reasons, the employer arranged accommodation at the transmission station (including a kitchen, living area, sleeping area and bathroom) for the applicant and another technician, who were present contemporaneously at each of the transmission stations.

19. After work, the two technicians could rest in the living area or pursue free-time activities elsewhere in the vicinity, to the extent of the opportunities afforded at the relevant location.

20. The two technicians worked in shifts, one from 06.00 to 18.00 hours and the other from 12.00 to 24.00 hours, the applicant generally working the second shift.

21. The work performed in those periods was regarded as 'normal work'. It required the employee's presence at the workplace and entailed, on average, between two and three hours of 'actual' work, while the remaining time was spent sitting in front of a screen, monitoring broadcast transmissions and being alert to any alarms and taking action when necessary.

22. The employer paid the applicant a salary based on the 12 hours of normal work, organised in the manner I have described (and thus for the applicant's physical presence at his place of work). The period between 24:00 and 06:00 hours was treated as a rest period, in respect of which no salary was paid. The remaining six hours of the day (from 06:00 to 12:00 hours) were treated by the employer as a period of stand-by duty.

23. While on stand-by the employee could leave the transmission station and go wherever he chose without any restriction. However, he had to be reachable if called and, if necessary, had to return to work within an hour, albeit that only urgent tasks had to be carried out immediately, while other tasks could be left even until the following day.

24. In respect of such periods of stand-by duty, the employer paid the applicant a salary supplement (allowance) in the amount of 20% of basic pay. If the employee was called while on stand-by and had to take actual action (and return to the workplace), the time thus spent was counted and remunerated as normal work, in accordance with Article 16 of the internal rules.

25. The applicant brought legal proceedings claiming payment, at the hourly rate for overtime, in respect of the hours he was required to be on stand-by (six hours per day). In support of his claim, the applicant first of all relied on the fact that he lived at the place where he carried out his work, and argued that, for that reason, he should have been regarded as present at his place of work, as a matter of fact, 24 hours per day. In this connection, the applicant submitted that he could not dispose of his time freely even during the periods when he was free because when he was on stand-by he had to answer calls and, if necessary, return to his workplace within an hour. In addition, there were few leisure opportunities within the vicinity of the transmission stations and so, on most occasions, he spent the whole time on the premises of the station.

26. The courts of first and second instance dismissed the applicant's claim for the payment of overtime.

27. The applicant then brought an appeal on a point of law before the referring court, in which he emphasised that the concept of actual working time should include not only the time during which a worker actually carries out work, but also all of the time during which he is present at the place designated by his employer. The applicant claimed that his employer had in fact imposed shifts of several days' duration on him and had abused the practice of stand-by duty in order to penalise him in terms of remuneration for the time during which he had to remain available.

28. The referring court observes that the present dispute concerns remuneration for the time spent by the applicant on stand-by duty. Although that issue does not fall within the scope of Directive 2003/88, the referring court considers that it cannot rule on the substance of the applicant's case until the questions which it has referred for a preliminary ruling are resolved.

29. The referring court considers that there are aspects of the present case which differ from the cases in which the Court of Justice has previously given rulings.

30. First of all, in contrast to the case which gave rise to the judgment of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528), it was not necessary for DJ to be physically present and available at his place of work during periods of stand-by duty, nor was it required, except when it was necessary for him to take action. In contrast to the case which gave rise to the judgment of 9 September 2003, *Jaeger* (C-151/02, EU:C:2003:437), DJ's ability to manage his free time and pursue his own interests was restricted as a result of the geographical location (and not by the need to remain contactable).

31. In addition, with regard to the case which gave rise to the judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578), the present case differs in so far as time spent travelling to clients, which is to be treated as working time, cannot be equated with time spent on stand-by duty.

32. Lastly, the case which gave rise to the judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82), differs from the present dispute in so far as not only was DJ not required to remain on stand-by in a designated place, but also the period of time within which he was required to intervene when necessary was significantly longer (an hour, rather than eight minutes).

33. It was in those circumstances that the Vrhovno sodišče (Supreme Court, Slovenia) 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 as meaning that, in circumstances such as those of the present case, stand-by duty, during which a worker who performs his work at a television transmission station must, while not at work (when his physical presence at the workplace is not necessary) remain reachable by telephone and, where necessary, be at his place of work within one hour, is to be considered working time?

(2) Is the definition of the nature of stand-by duty in circumstances such as those of the present case affected by the fact that the worker resides in accommodation provided at the site where he performs his work (a television transmission station), since the geographical characteristics of the site make it impossible (or more difficult) to return home ('down the valley') each day?

(3) Are the answers to the two preceding questions different where the site involved is one where the opportunities for pursuing leisure activities during free time are limited on account of the geographical characteristics of the place or where the worker encounters greater restrictions on the management of his free time and in the pursuit of his own interests (than if he lived at home)?'

III. Legal analysis

A. Preliminary remarks

1. Admissibility

34. Directive 2003/88, which is based on Article 153(2) TFEU, is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers and, in accordance with Article 153(5) TFEU, does not apply to the question of the remuneration of workers falling within its field of application, save in the special case envisaged by Article 7(1) of the

directive [3] concerning annual paid holidays. In principle, therefore, it does not apply to the remuneration of workers.

35. The fact that the subject of the main proceedings is a claim for the payment of overtime remuneration in respect of hours spent on stand-by duty does not mean that the questions referred to the Court in this case should not be resolved.

36. Indeed, it is apparent from the order for reference that the national court is seeking guidance on the interpretation of Article 2 of Directive 2003/88, which it considers necessary in order to be able to resolve the dispute in the main proceedings. The fact that that dispute ultimately concerns a question of remuneration is irrelevant, since it is for the national court, and not the Court of Justice, to resolve that question in the context of the main proceedings. [4]

37. I therefore consider the questions referred by the national court for a preliminary ruling to be admissible.

B. The aim of the directive and the concepts of working time and on-call time

38. The aim of Directive 2003/88 is to lay down minimum requirements intended to improve the protection of health and safety in the workplace, an aim which is to be attained, inter alia, by the approximation of national legislation on working time. [5]

39. That goal is a key element in the formation of social law in the European Union. After laying down, on the basis of Article 153 TFEU, the general principles for protecting the health and safety of workers in Council Directive 89/391/EEC of 12 June 1989, the legislature gave more formal expression to those guidelines in a series of specific directives. Among these is Directive 2003/88, which codified the preceding Council Directive 93/104/EC of 23 November 1993. [6]

40. In order to achieve the abovementioned aims, the provisions of Directive 2003/88 establish minimum periods of daily and weekly rest as well as an upper limit of 48 hours for the average working week, including overtime.

41. Those provisions implement Article 31 of the Charter of Fundamental Rights, which, after recognising, in paragraph 1, that 'every worker has the right to working conditions which respect his or her health, safety and dignity', provides, in paragraph 2, that 'every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. Those rights are directly related to respect for human dignity, which is protected more broadly in Title I of the Charter. [7]

3 See, most recently, the judgments of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraphs 23 and 24), and of 26 July 2017, *Hälvä and Others* (C-175/16, EU:C:2017:617, paragraph 25 and the case-law cited).

4 See the judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 26).

5 See, to that effect, the judgments of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 45), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 23).

6 The Court has consistently confirmed in its case-law that, as Articles 1 to 8 of Directive 2003/88 are drafted in terms which are in substance identical to those of Articles 1 to 8 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41), the Court's interpretation of the latter is transposable to the abovementioned articles of Directive 2003/88; *ex multis*, see the judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 32), and the order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 39 and the case-law cited).

7 See also, to that effect, the Opinion of Advocate General Tanchev in *King* (C-214/16, EU:C:2017:439, point 36).

42. Within that systematic framework, the Court has held that the rules laid down in Directive 2003/88 are rules of EU social law of particular importance from which every worker must benefit as minimum requirements necessary to ensure the protection of his safety and health,[8] and that such protection is not just in the worker's individual interests; it is also in the interest of the employer and in the general interest.[9]

43. An initial consequence that can, I think, be drawn from the functional link between Directive 2003/88 and the fundamental social rights recognised in the Charter, is that Directive 2003/88 must be interpreted, and its scope determined, in such a way as to ensure that individuals may fully and effectively enjoy the rights which the directive confers on workers, and that any impediment that might in fact restrict or undermine the enjoyment of those rights is eliminated.[10]

44. To that end, in interpreting and implementing Directive 2003/88 its must be borne in mind that, as the Court has emphasised on a number of occasions, the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose on him a restriction of his rights.[11]

45. Thus, the objective of worker protection has served as the Court's guiding light in its interpretation of Directive 2003/88.

46. A clear and significant illustration of the teleological interpretation adopted by the Court is to be found in its reading of the definitions of 'working time' and 'rest period', a reading which has had a disruptive effect on the regulatory equilibrium in a number of Member States.[12]

47. In its definition of the concept of *working time*, which it employs for the purposes of the application of the safeguards it establishes, the directive refers to 'any period during which the worker is *working, at the employer's disposal and carrying out his activity or duties*[13] *…*'. Correlatively, *rest period* means 'any period which is not working time' (Article 2(1) and (2)).

48. As the Court has made clear on a number of occasions, the concepts of 'working time' and 'rest period', within the meaning of Directive 2003/88, constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that directive, which is intended to improve workers' living and working conditions.[14] They therefore 'may not be interpreted in accordance with the requirements of the various legislations of the Member States … Only such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States … the fact that the definition of the concept of working time refers to "national law and/or practice" does not mean that the Member States may unilaterally determine the scope of that concept. Thus, those States may not make subject

8 See judgments of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 24), and of 1 December 2005, *Dellas and Others* (C-14/04, EU:C:2005:728, paragraph 49 and the case-law cited), and order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 41).

9 See the Opinion of Advocate General Bot in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:338, point 52).

10 See my Opinion in *Federación de Servicios de Comisiones obreras (CCOO)* (C-55/18, EU:C:2019:87, point 39).

11 See the judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 80 and the case-law cited). See also the judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 41).

12 See to that effect, in the legal literature, Leccese, V., 'Directive 2003/88/EC concerning certain aspects of the organisation of working time', in Ales, E., Bell, M., Deinert, O., and Robin-Olivier, S. (editors), *International and European Labour Law. Article-by-Article Commentary*, Nomos Verlagsgesellschaft, 2018, pp. 1285 to 1332, in particular p. 1291.

13 My italics.

14 See the judgments of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 62), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 27).

to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of that directive. Any other interpretation would frustrate the objective of Directive 93/104[15] of harmonising the protection of the safety and health of workers by means of minimum requirements.'[16]

49. Thus, the Court takes a decidedly binary approach: a worker's time is either work or rest.

50. The concepts of 'working time' and of 'rest period', in fact, 'are mutually exclusive'.[17] As EU law currently stands, 'the stand-by time spent by a worker in the course of his activities carried out for his employer must be classified either as "working time" or "rest period"'.[18]

51. In the legal literature, it has been said that 'this binary system has the advantage of simplicity, but is not without its drawbacks'.[19] Indeed, it has been noted, amongst other things, that during a period of stand-by duty, even if the worker is not carrying out any work, his freedom of movement, the quality of his rest and his ability to attend to his own interests are diminished, even if not entirely excluded. If periods of stand-by duty are classified as rest periods, it could be that the worker is systematically on stand-by between two periods of work.

52. There has been broad debate of the matter in the legal literature discussing the possibility of identifying a *tertium genus* that is neither work nor rest.[20]

53. As things currently stand, while the needs which prompted the proposals to overcome the existing rigid dichotomy are understandable,[21] I think that dichotomy can only be overcome by means of EU legislation.

54. I would observe that, as regards the possible introduction of a grey area between work and rest,[22] I foresee certain risks in how that would be applied in practice in all countries, and therefore a risk to legal certainty.

15 The objective of Directive 93/104 was, as I have mentioned, the same as that of Directive 2003/88, to which the Court's interpretation of the provisions of the earlier directive applies.

16 See the judgment of 9 September 2003, *Jaeger* (C-151/02, EU:C:2003:437, paragraphs 58 and 59).

17 See the judgments of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraphs 55), of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528, paragraph 47), and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578, paragraph 26).

18 See the judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 55).

19 Kéfer, F. and Clesse, J., 'Le temps de garde inactif, entre le temps de travail et le temps de repos', in *Revue de la Faculté de droit de l'Université Liège*, 2006, p. 161.

20 See, for all, Supiot, A., 'Alla ricerca della concordanza dei tempi (le disavventure europee del "tempo di lavoro")', in *Lav. dir.*, 1997, p. 15 et seq. In Italian legal literature, see Ichino, P., 'L'orario di lavoro e i riposi. Artt. 2107-2109', in Schlesinger P. (series edited by), *Il Codice Civile. Commentario*, Giuffrè Editore, Milan, 1987, p. 27. More recently, see Ray, J.-E., 'Les astreintes, un temps du troisième type', in *Dr. soc.* (F), 1999, p. 250; and Barthelemy, J., 'Temps de travail et de repos: l'apport du droit communautaire', in *Dr. soc.* (F), 2001, p. 78.

21 See Mitrus, L., 'Potential implications of the Matzak judgement (quality of rest time, right to disconnect)', in *European Labour Law Journal*, 2019, p. 393, according to which 'the binary relationship between "working time" and "rest period" … does not always meet the requirements of the current labour market'.

22 All the parties attending the hearing expressed their opposition to the introduction of a *tertium genus* that is neither work nor rest.

55. In any event, I think it very difficult to overcome the existing dichotomy by means of interpretation, given that the legislation is clear and unequivocal: any period of time that is not working time is a rest period. [23]

56. Turning now to the criteria which characterise the concept of working time, as contemplated by Article 2 of Directive 2003/88, these have been effectively summarised as follows: (i) a spatial criterion (being at the workplace), (ii) an authority criterion (being at the disposal of the employer) and (iii) a professional criterion (carrying out one's activity or duties). [24]

57. As we shall see, the Court has found itself constrained to depart from a literal interpretation of this provision of the directive and take a teleological approach to its interpretation. [25]

58. In its judgments concerning on-call duty, the Court has in fact followed a consistent line in order to provide a solid framework for interpreting the concepts of working time and rest period, so that time spent by workers on call may be ascribed to either one or the other concept.

59. Since its first ruling on the matter, [26] the Court has drawn a distinction between two situations: (i) on-call duty where physical presence at the workplace is required (on-call duty at the place of work) and (ii) on-call duty where the worker must be contactable at all times without, however, having to be present at the workplace (stand-by duty).

60. The first situation does not pose any particular problems of interpretation, since it is now settled that workers who are obliged to be present and available at the workplace with a view to providing their professional services are to be regarded as carrying out their duties and, thus, on working time, [27] even during periods in which they are not actually working.

61. The second situation, exemplified by the facts of the present case, is far more complicated from an interpretative viewpoint.

62. As regards stand-by duty, the Court has asserted different principles tailored to the specific questions that have been referred for a preliminary ruling, all of which, however, fit coherently with the teleological standpoint referred to above.

63. The starting point was the judgment in *Simap*, which concerned doctors in primary care teams on call at a health centre who had to be present at their place of work some of the time, while for the rest of the time they merely had to be contactable.

64. As regards the second of those situations, although the doctors were at the disposal of their employer, inasmuch as they had to remain contactable, they could manage their time with fewer constraints and pursue their own interests. This time therefore fell into the category of 'rest period', except for any time actually spent providing services upon being called.

23 The only lever, unrelated to the aims of Directive 2003/88, which national legislatures may use to introduce flexibility into the concept of working time, in the sense of compensating the restrictions imposed on a worker during a period of stand-by duty, is that of remuneration. The Court has, in fact, reaffirmed the principle that national legislation is free to provide for differentiated remuneration to compensate situations in which a worker is on stand-by duty: see the judgment of 21 February 2018, *Matzak* (C-518/15, EU:C:2018:82, paragraph 52), which states that 'Article 2 of Directive 2003/88 must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the classification of those periods as "working time" or "rest period"'; see also the order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 84), which states that 'Directive 2003/88 must be interpreted as meaning that the employer's obligation to pay salaries and benefits which may be treated as salary in respect of the period during which the forest ranger is required to carry out wardenship duties in the section of the forest under his control does not fall within the scope of that directive, but under that of the relevant provisions of the national law.'

24 See the Opinion of Advocate General Bot in *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:391, point 31) and the commentary referred to in footnote 12 thereto.

25 See, to that effect, paragraph 40 of the Commission's written observations.

26 See the judgment of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528, paragraphs 48 to 50).

27 See the judgment of 3 October 2000, *Simap* (C-303/98, EU:C:2000:528, paragraph 48).

65. The case of *Matzak*[28] may be distinguished from *Simap* by reference to the fact that the worker there was not *at the workplace* in order to answer calls *immediately*, but was *at a place determined by the employer*[29] (in this case, the worker's own home) and under an obligation to respond to calls *within eight minutes*.

66. In substance, the Court found that stand-by duties such as those of Mr Matzak had to be regarded as falling entirely within working time, since, although he did not have to be at his place of work, he was subject to geographical constraints (remaining contactable at a place determined by his employer) and temporal constraints (the obligation to return to his place of work within a very short period of time, once called) which very significantly restricted his freedom to pursue his own personal and social interests during rest periods.

67. Remaining in a 'place determined by the employer' was regarded by the Court as equivalent to remaining 'at the place of work' when combined with the fact that calls had to be answered in such a short period of time as to be almost immediate.

68. As it had already done in relation to on-call duties performed at the workplace,[30] from the presence of two components of the concept of working time, the Court inferred the third: being present in a place determined by the employer and being available to carry out work imply the actual performance of work, but only where the time allowed to respond to calls is particularly short.

69. It may therefore be inferred from the case-law of the Court that three conditions must be met in order for time spent on stand-by to be regarded as working time: (i) the worker must be present in a place determined by the employer, (ii) the worker must be at the employer's disposal in order to respond to calls, and (iii) the time allowed to react to calls must be particularly short.

70. What is now being asked of the Court is to consider whether, guided by a teleological interpretation of Directive 2003/88, such as I have mentioned, these requirements must always be present in order for periods of stand-by duty to be classified as working time, and whether these requirements must be assessed with specific reference to the constraints upon the worker, with a view to determining whether they are such as to stand in the way of his actually pursuing his own interests during rest periods.

C. The questions referred: the constraints imposed by the employer and effective rest

71. By the three questions it has referred for a preliminary ruling, the national court is essentially asking whether Article 2(1) and (2) of Directive 2003/88 must be interpreted as meaning that the stand-by duties imposed on a worker in the circumstances of the present case must be classified as 'working time' or, on the contrary, as a 'rest period', in accordance with the definitions given in that directive.

72. The particular circumstances described by the referring court which caused it to doubt whether a case such as that before it fell within one of the situations thus far analysed by the Court are (a) the fact that the worker had to remain reachable by telephone and if necessary return to his place of work within one hour, (b) the fact that the worker resided in accommodation provided at the site where he

28 The case concerned the stand-by duties of a volunteer firefighter who, while on stand-by, was obliged to remain at his own home and respond to calls and reach the fire station within eight minutes, already dressed for duty, failing which he was exposed to disciplinary measures.

29 My italics.

30 Where, from the presence of two of the components of the concept of working time contained in Article 2 of Directive 2003/88 (the spatial component, that is to say, presence at the place of work, and the authority component, that is, being at the disposal of the employer), the Court inferred the third (the professional component, which is to say, carrying out one's activity or duties).

performed his work because the geographical characteristics of the site made it impossible (or more difficult) to return home each day, and (c) the fact that the site in question was one where the opportunities for pursuing leisure activities during free time were limited on account of the geographical characteristics of the location.

73. In light of what I have said thus far, the matters which must be assessed are (i) the place where the worker had to remain while on stand-by duty, (ii) the time allowed to respond to calls, and (iii) the geographical characteristics of the place of work.

74. As regards the first matter – the spatial component – it is clear from the case file and was confirmed at the hearing that the worker was under no legal obligation to remain at his place of work or in any other place determined by his employer while on stand-by. He was, in fact, free to spend his time where he wished, the only constraint imposed on him being that he had to respond to calls within a response time of one hour.

75. As regards the second matter – the temporal component – it hardly seems that the response time could be regarded as immediate or almost immediate: an hour would appear to be a long enough response time for it to be possible to plan a period of rest while remaining attentive to calls.

76. As emerges from the questions referred for a preliminary ruling, it is the third component – which relates to the geographical features characterising the site where the place of work is located – that causes the national court to doubt whether the time spent by the worker on stand-by may actually be regarded as a rest period. According to the documents before the Court, the television station at which the worker was employed is located in a high mountain region far from inhabited areas and connected to the valley by a cable-car that operates only part of the year; the worker had no independent means of transport because he was brought to and from the television station at the beginning and end of each period he spent there in transport provided by the employer; the worker was unable to go home each day and was therefore constrained to stay on premises adjoining the television station for the entire period, in accommodation provided by the employer.

77. In my opinion, the aspects relating to the geographical features of the place of work – its remoteness and the consequent difficulty for the worker to return home, and the limited opportunities for the worker to pursue leisure interests – are incapable of changing the classification of the periods of stand-by duty from rest periods to working time.

78. The place of employment is one of the organisational decisions taken by the undertaking and the assignment of a worker to one or other site is a managerial prerogative of the employer. An employee is therefore required to fulfil his employment duties at the place designated by the employer in the interests of the undertaking.

79. As regards the first aspect, the fact that work must be done in a place far from the worker's home is a very common occurrence [31] and in very many cases it will be impossible or particularly difficult for the worker to return home at the end of the working day.

80. In such cases, the worker may decide to change his residence to suit his work requirements or to spend part of the week, or longer periods, away from home. The employer cannot be required to establish the place of employment in accordance with the worker's place of residence.

81. In some cases, the location of the place where the work is to be carried out is, by its very nature, far from inhabited areas and such as to keep the worker far from home, even for very long periods of time: maritime work and work on oil rigs are examples.

31 See, to that effect, paragraph 61 of the Commission's written observations.

82. Finally, there is no direct relationship between this particular circumstance and the stand-by duty requirements: the characteristics described in the documents before the Court appear to be such as to have made it impossible for the worker to return home each day, even if he had had no stand-by duties.

83. It follows that the remoteness – especially if it is temporary – of the place of employment from the worker's home can have no influence on the classification of periods of stand-by duty.

84. I would add that modern technology makes it far easier than it was in the past to remain in contact with family members and loved ones, even from a distance.

85. As regards the second aspect, the limited opportunities for the worker to pursue leisure interests does not appear to be a criterion capable of influencing the classification of periods of stand-by duty.

86. EU law guarantees workers the right to periods of rest, alternating with periods of work, such as will permit them to recuperate their mental and physical energy. The concept of 'adequate rest' [32] is also limited to ensuring that workers have regular rest periods which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.

87. The fact that a worker is merely restricted in the pursuit of leisure activities, while not being completely prevented from pursuing them, seems to me entirely compatible with the concept of adequate rest period which I have described.

88. In the present case, it is apparent from the case file and also from certain statements made by the parties at the hearing that the worker was able to engage in numerous activities while on stand-by, despite the peculiar geographical setting. [33]

89. Lastly, as regards the provision of accommodation for the worker in the vicinity of the place of work, that circumstance can have no bearing on the classification of periods of stand-by duty: in *Grigore*, the Court already resolved that question, holding that the classification of a period of stand-by duty as 'working time' within the meaning of Article 2(1) of Directive 2003/88 did not depend on the provision of staff accommodation. [34]

90. In the instant case, therefore, it seems possible to conclude, subject to the findings of fact which it is for the national court to make, that the partial restrictions of the worker's freedom of movement and of his freedom to pursue his personal and social interests were not the direct result of the constraints imposed by the employer, but were caused by particular, objective circumstances for which the employer is not contractually liable and which were not such as to prevent the worker from resting effectively during periods of stand-by duty.

32 Article 2(9) of Directive 2003/88.

33 The employer in fact confirmed that it was clear from the main proceedings that workers pursued various interests and activities while on stand-by: some skied or walked, others took the cable-car down the valley, shopped or watched films and television serials (minutes of the hearing, p. 6).

34 See the order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 70).

91. The principles expressed by the Court to date thus apply for the purpose of resolving the present case: the determining factors for classifying periods of stand-by duty as working time are constraints imposed by the employer that prevent the worker enjoying adequate periods of rest. [35]

92. The additional component that the Court might now wish to offer, again as part of a teleological interpretation of the concepts contained in Directive 2003/88, is that the worker need not be in a place designated by the employer in order for periods of stand-by duty to be classified as working time – the fact that the worker is at the employer's disposal and must take action and actually do his work within a very short period of time may be sufficient.

93. As we have seen with the recent judgment in *Matzak*, the Court has given a flexible interpretation to the wording used in the directive, according to which the worker's 'working' is a necessary element of working time, taking that to mean not only at the place of work but also at any other place designated by the employer.

94. Where the worker is not at the workplace, even in some of the earlier cases examined by the Court, it is the fact of being subject to constraints imposed by the employer, and in particular the time allowed to react to a call, that plays a decisive role, rather than the fact of being in a place designated by the employer or close to the place of work.

95. In both *Grigore* and *Tyco*, the question of whether or not the worker was in a specific place designated by the employer or close to the place of work was held to be neutral in relation to the classification of periods of stand-by duty.

96. In *Grigore*, taking the view that the provision of staff accommodation close to the place of work was not a decisive factor in the classification of periods of stand-by duty as work or rest, the Court nevertheless left it to the national court to make the relevant assessment on the basis that a period of stand-by duty could be regarded as working time if it is established that there are 'obligations which make it impossible for the worker concerned to choose where he stays during periods of work inactivity'. Such obligations, if found, 'must be regarded as falling within the scope of the employee's performance of his duties'. [36]

97. In *Tyco*, [37] on the other hand, the Court confirmed that, in a case such as that which was the subject of the main proceedings, the time that workers who had no fixed place of work spent travelling from home to the customers designated by their employer had to be regarded as working time, since the workers in question, while having a certain degree of freedom during those journeys, were nevertheless required to act in accordance with the employer's specific instructions.

98. My reading of the Court's precedents, from the teleological interpretative standpoint to which I have referred a number of times, thus leads me to think that the decisive factor in the classification of periods of stand-by duty is the intensity of the constraints which result from the worker's being subject to his or her employer's instructions and, in particular, the time allowed to react to calls.

99. The time allowed to react to calls is a decisive factor because it impinges directly, objectively and unequivocally on the worker's freedom to pursue his or her own interests and, in essence, to rest: a response time of just a few minutes does not allow the worker to plan, even provisionally, his or her rest periods.

35 See also, to that effect, Leccese, V., Il diritto del lavoro europeo: l'orario di lavoro. Un focus sulla giurisprudenza della Corte di giustizia, 2016, p. 7, apparently not published, but available at: http://giustizia.lazio.it/appello.it/form_conv_didattico/Leccese%20-%20Diritto%20lavoro%20europeo%20e%20orario%20lavoroLECCESE.pdf: 'certainly, the cornerstone of the reasoning is a teleological assessment of whether the rest which the worker is allowed is *adequate* in terms of the directive's objectives.'

36 See the order of 4 March 2011, *Grigore* (C-258/10, not published, EU:C:2011:122, paragraph 68).

37 Judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* (C-266/14, EU:C:2015:578).

100. On the other hand, a reasonable response time does allow the worker to pursue other activities during periods of stand-by duty, even while remaining aware that he or she may be called back to work.

101. The response time will also, in my opinion, have an influence on where the worker will be while on stand-by. [38] Obviously, if the response time is very short, the worker will have to remain on stand-by within a given geographical radius which is, in essence, determined by the employer. [39] In other words, even if the employer does not require the worker to be in a designated place, he will as a matter of fact be imposing a considerable constraint on the worker's freedom of movement if he allows him or her only a very short period of time in which to respond to calls.

102. I therefore consider that it is not the place where the worker is during periods of stand-by duty that plays a decisive role in the classification of that time as rest or work so much as the constraint on the worker's freedom of movement which results from the period of time within which he or she must respond to calls.

103. Indeed, I see no great difference, in terms of the constraints on the worker, between the situation where he or she is required to remain at home during periods of stand-by duty and the situation where he or she is under no such obligation but is required to respond to calls within a particularly short period of time.

104. As I have said, it is therefore, in my opinion, the extent of the constraints resulting from the worker's being subject to his employer's instructions that plays a decisive role in the classification of periods of stand-by duty as work or rest. The constraints resulting from that subordination may vary significantly, but first and foremost the time allowed to respond to calls should be regarded as decisive.

105. The designation of a place where periods of stand-by duty must be spent may play a role, as an indication of the extent to which a worker is subject to his employer's instructions, but only as part of an overall assessment.

106. Analysing the situation from the employer's point of view, the possibility of reaching the worker by portable electronic means (mobile telephone, tablet, laptop) which make it possible to contact the worker at any time makes it less justifiable, less understandable for the employer to require the worker to be physically present while on stand-by duty at a place which he designates. What is of primary importance to the employer is the *period of time* within which the worker must be able to reach the place assigned to him or her by the employer from wherever it is the worker may be.

107. Having identified the decisive factor in the classification of periods of stand-by duty as work or rest, it is necessary to suggest to national courts some additional criteria that may be applied when the principal constraint – the time allowed to react to calls – is not so inordinately short as to prevent the worker from resting effectively.

108. When the time allowed to react to calls is inordinately short, being no more than a few minutes, I think that that is sufficient for periods of stand-by duty to be classified as working time even in the absence of other findings in relation to the considerations I have set out: the worker's freedom of movement is, in such a case, so diminished that his physical location must also be regarded as restricted by his or her employer's instructions.

38 A requirement to respond to calls within a particularly short period of time 'restricts the worker's freedom to manage his own time. It implies both geographical and temporal constraints on the worker's activities': see Mitrus, L., 'Potential implications of the Matzak judgment (quality of rest time, right to disconnect)' in *European Labour Law Journal*, 2019, p. 391.

39 Frankart, A. and Glorieux, M., 'Temps de garde: regards rétrospectifs et prospectifs à la lumière des développements européens' in *La loi sur le travail – 40 ans d'application de la loi du 16 mars 1971* (sous la coordination scientifique de S. Gilson et L. Dear), Anthémis, Limal, 2011, p. 374.

109. If, on the other hand, the time allowed to react to calls is short, but not so short as to preclude almost entirely the worker's freedom to choose where he or she spends periods of stand-by duty, then it may be helpful to consider additional criteria, which should be examined together, with attention being paid to the overall effect that all of the conditions for implementing the stand-by scheme may have on the worker's rest: do the constraints imposed, taken together, restrict the worker's ability to attend to personal and family interests and his or her freedom to leave his or her place of work, or do they very nearly prevent him or her from doing those things? Of course, it is natural that periods of stand-by duty should result in certain constraints and restrictions of the worker's freedom; the objective pursued by EU law is to prevent such restrictions from being so invasive as to prevent workers from resting effectively.

110. That is the manner in which I believe attention should be had to the effectiveness of the worker's rest. I would, by contrast, be more cautious about using as a criterion the 'quality of the time' that the worker may enjoy when on stand-by duty, although it has been authoritatively proposed.[40] Indeed, I think that criterion could prove to be excessively subjective and thus lend itself to varying interpretations on the part of national courts, partly on account of the differing sensibilities in the individual countries, and that would not benefit legal certainty.

111. In their written observations and at the hearing the parties[41] suggested a number of criteria, consisting in constraints which could determine whether periods of stand-by duty are classified as work or rest: whether or not there is an obligation to respond to calls; any discretion the worker has in dealing with calls (whether he or she can take action remotely, whether he or she can be replaced by another worker); whether sanctions are stipulated for failing to take action or for responding to a call late; the urgency of the action that is required, the level of the worker's responsibility, specific characteristics of the profession, the distance that must be covered between the place the worker is and the place where he or she must take up his or her duties, geographical constraints that might slow down the journey to the place of work, the need to wear work clothes and the availability of a service vehicle.

112. In addition to these is the criterion of the extent to which a call to work is reasonably to be expected, which is the subject of the second question referred for a preliminary ruling in Case C-580/19, and which seems to refer to the effect, on the nature of the period of stand-by duty as an effective period of rest, of the frequency with which action must be taken.

113. In my opinion, the Court should confine itself to laying down general, objective criteria and not go too far into the details of particular situations, leaving it to the national courts to assess all of the factual circumstances.

114. I therefore think it appropriate for the Court to confine itself to illustrating certain additional criteria that may be applied in borderline cases, as set out above, all of which should nevertheless relate to the exercise of the employer's managerial authority – and to the corresponding subordinate status of the worker, who is the weaker party in the relationship – rather than pertain to objective situations beyond the employer's control.

115. I would therefore exclude from assessment circumstances such as the distance to be covered in order to reach the place where the work is to be carried out (unless it is different from the usual place and thus not the place specifically intended by the employer) as well as geographical constraints, which, as I have said, are also independent of the employer's control.

40 See the Opinion of Advocate General Sharpston in *Matzak* (C-518/15, EU:C:2017:619, point 57).

41 In particular in Case C-580/19, at the joint hearing.

116. Nor would I would attach particular importance to the level of responsibility or to the specific tasks performed: stand-by duty is a work pattern within the managerial discretion of the employer. As far as the worker is concerned, responding to calls is an employment obligation which the worker must perform with normal diligence. I therefore think that the work has to be carried out by the worker, for the undertaking, with the same commitment regardless of the position held or the level of responsibility. It would, in fact, be difficult to make an objective assessment of the undertaking's interests: what might appear to be of little importance to some might be highly important to others. The same reasoning applies to the criterion of the urgency with which action must be taken and to the nature and importance of the interests served by the action taken.

117. Admittedly, the degree of psychological pressure on the worker may vary according to the level of responsibility. However, in my opinion, this is too subjective a matter to be called into play for the purposes of classification.

118. A different approach should, in my opinion, be taken in respect of certain criteria that relate to matters within the employer's control: any discretion the worker has in dealing with calls, for example, could be used as an additional criterion where it consists in flexibility in the response time, where it consists in the possibility of taking action remotely without going to the workplace, or where the worker can be assured that he or she can be replaced by another worker who is already at the workplace or is able to get there more easily.

119. The same applies with regard to the prescribed consequences of taking action late or of failing to take action when called during a period of stand-by duty.

120. As I have said, the response to a call while on stand-by consists in the worker carrying out his or her work. The employer may, however, prescribe consequences of varying degrees of severity for incomplete performance. If no sanctions are expressly stipulated for non-performance or late performance, that could come into play in the classification of periods of stand-by duty, as could the gravity of any sanctions that are stipulated.

121. Even circumstances of apparently minor importance, such as a need to wear technical work clothing or the availability of a service vehicle for travel to the place where work is to be carried out, could come into play in the classification of periods of stand-by duty, in particular in the assessment of whether or not the time allowed to respond to calls is adequate.

122. Indeed, if the worker has only a relatively short period of time in which to respond to calls to work when on stand-by and the employer requires him or her in that time to put on specific and particularly complex clothing that takes a long time to put on, that could influence the assessment of whether the response time is adequate.

123. By contrast, where the employer makes a service vehicle available for travel to the place where work is to be carried out following a call – for example, a vehicle that, owing to the importance of the interests served by the response, does not have to follow all the rules of the highway code – that could influence the assessment of whether the response time is adequate, inasmuch as it facilitates response, and thus cause a response time which might otherwise appear insufficient to allow for effective rest to be considered appropriate.

124. Another circumstance, again within the discretion of the employer, that I think could, in borderline cases, influence the classification of periods of stand-by duty is the scheduling and duration of stand-by duties. If stand-by duties are frequently scheduled at night or on public holidays, or are particularly long in duration, they will be more onerous for the worker than if they were scheduled during the day or during the working week.

125. Lastly, as regards the likely frequency with which action must be taken, which, as I have said, is the specific subject of the second question referred for a preliminary ruling in the related Case C-580/19, that is, in my opinion, one of the circumstances that may be assessed in borderline cases, albeit with no automatic conclusion being drawn therefrom: infrequent intervention does not mean that a period of stand-by duty can be classified as rest, just as frequent intervention does not mean that it can be regarded as working time.

126. The factor that may come into play in an overall assessment is whether – and if so to what extent – the worker must usually expect to be called while on stand-by. [42]

127. That circumstance is at least partly within the discretionary managerial authority of the employer who, in the organisation of the undertaking, can forecast the need for intervention.

128. If action is frequently required during periods of stand-by duty, the demands on the worker will become so significant that he or she will lose the ability to programme his or her free time during those periods almost entirely, and if those demands are combined with a very short response time, the effectiveness of the worker's rest may be seriously jeopardised.

129. On the basis of the criteria outlined above it will be the task of the national courts to classify the time spent on stand-by duty as working time or a rest period, after ascertaining the circumstances of the specific case before them, taking an approach that aims to consider the overall effect that all of the conditions for implementing the stand-by scheme may have on the effectiveness of the worker's rest. They must specifically evaluate whether the time spent on stand-by duty is, generally, a rest period or whether, on account of particularly stringent constraints imposed by the employer, it is so altered in nature as to have become working time.

IV. Conclusion

130. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the national court for a preliminary ruling as follows:

(1) Article 2 of Directive 2003/88 must be interpreted as meaning that the decisive factor in the classification of periods of stand-by duty as working time or a rest period is the extent of the constraints which result from the worker's being subject to his or her employer's instructions and, in particular, the time allowed to react to calls.

If the time allowed to react to calls is short, but not so short as to preclude entirely the worker's freedom to choose where he or she spends periods of stand-by duty, then it may be helpful to apply additional criteria, evaluate them as a whole, and consider the overall effect that all of the conditions for implementing the stand-by scheme may have on the worker's rest.

Those additional criteria should relate to the exercise of the employer's managerial authority – and to the corresponding subordinate status of the worker, who is the weaker party in the relationship – rather than pertain to objective situations beyond the employer's control.

Those criteria might, by way of example, consist in the discretion the worker has in dealing with calls, the prescribed consequences of taking action late or of failing to take action when called, the need to wear technical work clothing, the availability of a service vehicle for travel to the place where work is to be carried out, the scheduling and duration of stand-by duties or the likely frequency with which action must be taken.

42 As the Finnish Government submitted in its written observations in the related Case C-580/19 (at paragraph 22).

In the circumstances of the present case, subject to the findings of fact which it is for the national court to make on the basis of the abovementioned criteria, it does not appear to be permissible to classify as 'working time' the stand-by duties of a worker who works in a place that is difficult to get to, but who is under no spatial constraints imposed by the employer and who is allowed a response time of one hour.

(2) The fact that the worker stays for certain periods in accommodation close to where he performs his work (a television transmission station) because the geographical characteristics of the place make it impossible (or more difficult) to return home each day does not influence the legal characterisation of the periods of stand-by duty.

(3) Subject to the findings of fact which it is for the national court to make on the basis of the abovementioned criteria, the answers to the preceding questions are no different if the place in question is one where the opportunities for engaging in recreational activities are limited on account of the geographical characteristics of the place or if the worker is more restricted in the management of his free time and in the pursuit of his own interests (than would be the case if he lived at home).