ULPLR I ULP LAW REVIEW I REVISTA DE DIREITO DA ULP
VOL. 16 N. 1 E N. 2 (2022)
DOI: 10.46294/ULPLR-RDULP.V16

KEEPING UP WITH THE LATEST WORKING TIME CASE LAW [1]

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ABSTRACT: This text seeks to describe and analyse the legal framework and the criterion, set by the most recent case law of the Court of Justice of the Union, concerning the working time.

Following this purpose, it is composed of an introduction; the main legal instruments and some brief closing remarks, highlighting how de Court of Justice's case law is causing some countries to change their Law. As follows:

I. Introduction - **II.** Main legal Instruments - **2.1** The Treaties - **2.2** The Directives - **2.2.1** The Working Time Directive - **2.2.1.1** Scope - **2.2.1.2** Definition (and specific periods) of time - **2.2.1.2.1** Travel time - **2.2.1.2.2** - On-call and stand-by time – **2.2.1.3** Paid annual leave - **2.2.1.4** Monitoring hours worked beyond limits - **2.2.1.5** - Right to disconnect - **2.2.2** The Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union - **2.2.3** The Work Life Balance Directive. - **III.** Closing remarks.

KEYWORDS: Working time; Work-life Balance; Right to disconnect; Transparent and predictable working conditions; Case law of the Court of Justice of the European Union.

I. INTRODUCTION: There are, according to the EU strategic framework on health and safety at work 2021-2027, almost 170 million workers in the EU.

As set out in Principle 10 – Healthy, safe and well-adapted work environment and data protection – of the European Pillar of Social Rights[2], workers have the right to a high level of protection of their health and safety at work.

The improvement of worker's safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations: healthy and safe working conditions are a prerequisite for a healthy and productive workforce and, also, an important aspect of both the sustainability and competitiveness of the EU economy[3].

It is commonly accepted that long working hours and insufficient rest (particularly over prolonged periods) can have damaging effects (higher rates of accidents and mistakes, increased stress and fatigue, short-term and long-term health risks.)

This paper presents such a rationale, approaching the existing legal EU framework; setting out the key factors that need to be addressed in the transposition process by Member States, and the pivotal role of case law in the development and effectiveness of the implementation of that framework, in light of the latest cases brought before the Court of Justice of European Union.

II. MAIN LEGAL INSTRUMENTS

2.1 THE TREATIES:

The protection of workers' health and safety is enshrined both in primary and secondary EU law. Articles 151 and 153 of the Treaty on the Functioning of the

1 Abbreviations: European Union (EU); European Pillar of Social Rights (EPSR); Court of Justice of the European Union (CJEU, Court of Justice or Court); Charter of Fundamental Rights of the European Union (the Charter or CFREU); Treaty of the European Union (TEU); Treaty on the Functioning of the European Union (TFUE); 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 (Directive or Working Time Directive); Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union (DTPWC).

2 The 20 principles of the European Pillar of Social Rights are the beacon guiding us towards a strong social Europe that is fair, inclusive and full of opportunity.

3 EU strategic framework on health and safety at work 2021-2027 Occupational safety and health in a changing world of work {SWD(2021) 148 final} - {SWD(2021) 149 final}, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0323&from=EN.

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European Union provide that the Community is obliged to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety.

In addition, the Charter of Fundamental Rights recognises the right of every worker to "working conditions which respect his or her health, safety and dignity" and to "limitation of maximum working hours, daily and weekly rest periods, and annual paid leave" as part of "EU primary law" – Article 31.

According to Article 153(2)(b) of the TFEU, the European Parliament and the Council – avoiding the imposition of administrative, financial and legal constraints in a way which would restrain the creation and development of small and medium-sized undertakings – may adopt minimum requirements for gradual implementation by means of directives, having regard to the conditions and technical rules pertaining in each of the Member States.

2.2 THE DIRECTIVES

2.2.1 THE WORKING TIME DIRECTIVES

In 1993, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ L 307/18, marked an important turning point in the debate on working time.

This Directive was subject to an action for annulment[4] and was repealed ten years later by 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, [2003] OJ L 299/9 (WTD 2003)[5].

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[6] regulates labour and working time for employees.

Passed in November 2003, the Directive entered into force on 2 August 2004 – Article 28.

Since the Directive's early days, the CJEU declared several practices of Member States incompatible with EU law[7], causing the Directive to be heavily criticized, not least by Unions[8], and subject to strong pressure from the Member States. The Directive is a living and dynamic instrument; taking into account Articles 22 to 24, every five years the Commission shall submit a report on the application of the Directive to the European Parliament, the Council and the European Economic and Social Committee.

In the 2010 Report, the Commission concluded that "there remain problems with the implementation of core elements of the Directive, as interpreted by the Court of Justice, such as the definition of working time (including 'on-call' time), and the rules on equivalent; the compensatory rest (where minimum rest periods are postponed), particularly in services operating on a 24 hour/ 7 day basis; the situation of workers with multiple contracts; the situation of specific groups of workers (particularly in public defence and security services; and the so-called "autonomous workers"); (and) the lack of proper monitoring or enforcement…"[9]. Recognizing the room for discretion they have been given, Member States followed different paths toward the implementation and transposition of the minimum standards set by the Directive.

The Reports also nominated the Commission – the guardian of the Treaties – to clarify the interpretation of some rules, taking into account the jurisprudence, the experience of Member States in its application, and the opinions of the social partners.

A project for the Directive's reform was initiated by the Commission in response to suggestions from the Member States. Such project, nevertheless, was rejected by the European Parliament.

In May 2017, in an attempt to bring an end to the reform initiatives, the Commission published guidelines in *an Interpretative Communication* aiming to "give as much guidance as possible on the interpretation of the Directive, based, first and foremost, on its case-law"[10].

4 Judgment of the Court of 12 November 1996, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, C-84/94, EU:C:1996:431.
The case law of the Court of Justice can be found in https://eur-lex.europa.eu/collection/eu-law/eu-case-law.html.

5 Article 27.

6 http://data.europa.eu/eli/dir/2003/88/oj.

7 In several aspects, such as the treatment of *on-call duty.*

8 The European Trade Union Confederation (ETUC) is of the opinion that the Directive's practical application does not meet its objectives to protect and improve workers' health and safety. See https://www.etuc.org/en/issue/working-time.

9 A second Report, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time {SWD(2017) 204 final}, published in 2017, does not read much differently from the 2010: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0254&from=EN.

10 Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, (2017/C 165/01), COM/2010/0802 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0524(01)&from=EN. Further reading on the legislative process, see A. Bogg, 'The Regulation of Working Time in Europe', *Research Handbook on EU Labour Law* (Edward Elgar Publishing, 2016): 267–298.

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2.2.1.1 SCOPE

With respect to its personal scope, the Working Time Directive does not provide a definition of "worker".

Given that the founding purpose of the EU was the creation of a common market in which barriers to trade between Member States were progressively removed, any discussion of the concept of worker in EU law usually takes, as its basis, the fundamental freedom of the free movement of workers enshrined in Article 45 of the TFEU.

Considering there is no single definition of worker in EU Law, the CJEU ruled on the meaning – in the sense of Article 45 – as first laid down in the landmark case of Lawrie-Blum[11] , where the Court took the view that the criterion is the existence of an employment relationship, regardless of the legal nature of that relationship and its purpose.

According to the Court's settled case-law:

(i) where Member States are themselves empowered to define the concept of "worker", their definitions must not call into question Member States' obligations to respect the effectiveness of the Directive and the general principles of European Union law. Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

(ii) This jurisprudence declares the exclusion of working persons from transposing legislation inadmissible on the grounds that they cannot be qualified as workers under national law although their working conditions are similar to those of workers under national law. In other words, the term worker cannot be defined by reference to the legislation of the Member States, and it cannot be interpreted restrictively[12].

An employment relationship, within the meaning of the Working Time Directive, requires that a person performs services for and under *the direction of another person* in return for which they receive *remuneration*[13] *"[…] for a certain period of time"*[14], to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.

Neither the level of productivity of the individual concerned, nor the origin of the funds from which the remuneration is paid, nor even the limited amount of that remuneration can in any way whatsoever affect whether or not the person is a worker for the purposes of EU law[15].

This could lead to individuals under any form of contractual relationships being categorised as 'workers' and therefore being covered by the Working Time Directive, such as the zero-hour contract.

A *zero-hour contract* is an employment contract for an *on-call worker* for which there is no specific case-law to date in respect of the Working Time Directive. There are no rules at EU level specifically regulating the issue of zero-hour contracts, and in some countries, zero-hour workers can be "employees" or "workers"[16] .

In a landmark reply to a petition on the working conditions at McDonald's in the UK[17], the Commission pointed to the fact that "«zero-hour workers» have to be considered as workers under EU law as they work under the direction of a manager and receive remuneration for that work. Indeed, in accordance with the settled case-law of the Court of Justice of the European Union, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard.

In view of this definition, it has to be concluded, for instance, that the Working Time Directive applies to zero-hour workers and imposes, on the one hand, that workers are subject to the minimum rest periods and the maximum working times provided therein and, on the other hand, that they are entitled to paid annual leave in proportion to the time worked. More globally, and based on case law, the Commission is of the opinion that the definition of a worker quoted above must

[11] Judgment of 3 July 1986, Lawrie-Blum, C-66/85, EU:C:1986:284.

[12] Judgment of 13 January 2004, Allonby v. Accrington & Rossendale College, C-256/01, EU:C:2004:18.

[13] Further reading: Report Expert Group Transposition of Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=10060.

[14] Judgment of 14 October 2010, Isère, C-428/09, ECLI:EU:C:2010:612, paragraph 28. Emphasis added. Also, Judgment of 7 April 2011, Dieter May, C-519/09, EU:C:2011:221, paragraph 21.

[15] Judgment of 26 March 2015, Fenoll C-316/13, EU:C:2015:200, paragraph 34. Also judgments of: 31 May 1989, Bettray, C-344/87, EU:C:1989:226, paragraphs 15 and 16; 19 November 2002, Kurz, C-188/00, EU:C:2002:694, paragraph 32; and 7 September 2004, Trojani, C-456/02, EU:C:2004:488, paragraph 16.

[16] Such as the UK, https://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers. Further reading:

- In the Netherlands, https://business.gov.nl/running-your-business/staff/recruiting-and-hiring-staff/hiring-on-call-employees-with-a-zero-hours-contract/;
- France, https://www.millerrosenfalck.fr/2017/09/leconomie-collaborative-developpement-des-contrats-zero-heure-limites-et-avenir/;
- Belgium, https://www.rtbf.be/article/le-contrat-zero-heure-en-5-questions-9228654?id=9228654.

[17] CM\1152757EN.docx,https://www.europarl.europa.eu/doceo/document/PETI-CM-595542_EN.pdf?redirect .

be retained for the purpose of the application of EU social provisions in general".

Under this legal framework and settled case law of the Court of Justice, the EU concept of worker has three basic and constant elements:

a) the provision of labour,
b) remuneration, and
c) subordination (subordination requires the services to be performed for and under the direction of another person).

The Directive does not apply to seafarers who are be covered by Council Directive 1999/63/EC and young workers[18].

In respect of its material scope of application, the Directive is applicable to all sectors of activity[19], both public[20] and private, including those which deal with events which, by definition, are unforeseeable, such as firefighting or civil protection services[21].

The Court has held that exclusion from the scope of the Directive was strictly limited to exceptional events such as "natural or technological disasters, attacks, serious accidents or similar events".

Excluded from the situations in which the Working Time Directive applies are civil aviation[22] ; road transport[23] ; cross-border railway[24] and inland waterway[25].

2.2.1.2 DEFINITION (AND SPECIFIC PERIODS) of working time

In terms of its wording, the Directive provides for a definition of working time – Article 2 –as meaning 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.

The Directive does not permit any derogation from Article 2 which establishes, amongst others, the definitions of 'working time' according to three cumulative criteria:

a. A spatial criterion, that corresponds to a condition that "the worker is at work" or that he/she is "present at his/her workplace"[26] or "at a place determined by his employer".

b. An availability criterion, according to which the worker is at the employer's disposal, this being the case where workers are legally obliged to obey the instructions of their employer and carry out their activity for that employer. The decisive factor is that the worker is available to provide the appropriate services immediately in case of need[27].

On the contrary, where workers can manage their time without major constraints and pursue their own interests, this could prove that the period of time in question does not constitute working time.

c. The worker must be carrying out his activity or duties.

This third criterion is fulfilled when [workers] are obliged to be present and available at the workplace with a view to providing their professional services, and means that they are carrying out their duties in that instance: Both the intensity of and any discontinuity in the activities carried out are irrelevant (SIMAP[28]).

2.2.1.2.1 TRAVEL TIME

Regarding *journeys to and from the workplace* – daily travel time to a fixed place of work – there is no indication that such periods should be considered as "working time" for the purposes of the Directive.

18 Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work (OJ L 216, 20.8.1994, p. 12).

19 Fenoll, paragraph 19.

20 Employees in a body governed by public law qualify as 'workers' irrespective of their civil servant status (Dieter May, paragraphs 25-26).

21 Casual and seasonal staff employed under fixed-term contracts who are not subject to certain provisions of the national labour code fall within the scope of the concept of 'workers' (Isère, paragraphs 30-32).

22 Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA).

23 Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities.

24 Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector

25 Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement on certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF).

26 This can be explained by a small difference between the various linguistic versions of the Directive: for example, in French it states 'le travailleur est au travail' and in Spanish 'el trabajador permanezca en el trabajo', not 'le travailleur travaille' or 'el trabajador trabaja'.

27 Order of 4 March 2011, Grigore, C-258/10, EU:C:2011:122, paragraph 50.

28 Judgment of 3 October 2000, Simap, C-303/98, EU:C:2000:528, paragraph 50.

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In the light of the criterion set by the Court, workers with a fixed place of work are able to determine the distance between their home and workplace and can use and organise their time freely on the way to and from that workplace to pursue their own interests.

A *contrario*, workers without a fixed place of work, who spent time travelling to and from the last costumer, don't have the ability to freely determine the distance between their homes and the usual place of the start and finish of their working day. This situation was brought before the Court in the Tyco case[29], where the Court was asked to interpret the concept of 'working time' provided for in Article 2 of Directive as applying to a situation in which technicians (employees) who had to install and maintain security equipment in various locations within a geographical area assigned to them – were travelling at least once per week to the offices of a transport logistics company to pick up the equipment needed for their work and, on other days, were driving directly from their homes to the places where they were to carry out their activities[30].

The Court held that in those circumstances, the time spent travelling to the first and from the last customer fulfilled the three abovementioned criteria:

(i) journeys of workers travelling to customers designated by their employer were a necessary means of providing technical services to customers. As a result, it concluded that these periods must be regarded as periods during which the workers carry out their activities or duties;

(ii) the workers were, also during that time, at the employer's disposal, since they received an itinerary for their journeys, and they were not able to use their time freely and pursue their own interests during that period;

(iii) given that travelling is an integral part of being a worker without a fixed or habitual place of work, the place of work of such workers cannot be reduced to the premises of their employer's customers and workers travelling to or from a customer and therefore carrying out their duties must also be regarded as working during those journeys.

According to the Commission, if the same criteria are met, *journeys between jobs during the working day and irregular journeys of workers to a different workplace* both qualify as working time[31].

In line with the wording of the Directive and the Court's case-law, if a period of time does not fulfil these criteria, it must be regarded as a rest period. Under the logic of the Directive, working time is "placed in opposition to rest periods, the two being mutually exclusive"[32].

The Court held that the Directive does not provide for any intermediate category between working time and rest periods[33], and, also, an autonomous interpretation for both concepts, which "may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, intended to improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States"[34].

Difficulties arose in treating specific periods of time (on-call time).

2.1.2.2 ON-CALL AND STAND-BY TIME

The situation regarding "on-call" and "standby" time has received specific guidance from the Court, in particular in the cases of SIMAP, Jaeger and Dellas[35], which concerned doctors in primary care teams and at the hospital as well as a special needs teacher in residential establishments for handicapped young people and adults.

On-call time refers to periods where a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so.

According to the Court of Justice's rulings, all on-call time at the place determined by the employer (which might not be the workplace) must be fully counted as working time for the purposes of the Directive.

The Court pointed to the fact that excluding on-call time from working time if physical presence is required, would seriously undermine the objective of ensuring the health and safety of workers by granting them minimum periods of rest and adequate breaks.

29 Judgment of 10 September 2015, Tyco, C-266/14, EU:C:2015:578.

30 Tyco decided to abolish the regional offices (workplace).

31 Interpretative Communication on Directive 2003/88/EC the organisation of working time (cit.), p. 18-20.

These issues weren't dealt with in the Tyco ruling given the fact these periods were already counted as part of the daily working hours calculated by the employer

32 E.g., Judgment of 9 September 2003, Jaeger, C-151/02, EU:C:2003:437, paragraph 48.

33 Tyco, paragraph 26.

34 Jaeger, paragraph 58.

35 Judgment of 1 December 2005, Dellas, C- 14/04, EU:C:2005:728.

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In such a situation, workers are also subject to much greater constraints, as they have to remain away from their families and social environments and have less freedom to manage the time during which their professional services are not required. *Inactivity periods* are irrelevant: provided that the worker remains at the workplace, both periods where the worker is working in response to a call ("active" on-call time), and periods where s/he is allowed to rest while waiting for a call ("inactive" on-call time), are considered "working time"; similarly, if a rest room is available to workers and they can rest or sleep during the periods when their services are not required, this does not affect the status of on-call time as working time. In addition, the *intensity* of the work carried out by the employee and his output are not amongst the defining characteristics of "working time"[36].

In contrast, *stand-by time* refers to situations where workers must be reachable at all times, but are not required to remain at a place determined by the employer, and may manage their time with fewer constraints and pursue their own interests. In such situations, only the time linked to the actual provision of services (including the time taken to travel to the place where these services are provided) must be regarded as working time within the meaning of the Directive[37]. A worker's time on stand-by periods must therefore be classified as either "working time" or a "rest period":

- working time where, having regard to the objective and significant impact that the constraints imposed on the worker may have, these have an objective and significant effect on the worker´s opportunities to pursue personal and/or social interests;
- rest periods are those during which workers may manage, with fewer constraints, their time (during which a worker is required simply to be at his or her employer's disposal insofar as it must be possible for the employer to contact him or her) and pursue their own interests[38].

In these periods, the *time linked to the actual provision of services* (including travel time to the place where these services are provided) must be regarded as working time within the meaning of the Directive.

Recently, the Court was asked to assess the extent to which periods of stand-by time, according to a stand-by system, may be classified as 'working time' with regard to Directive 2003/88 – and what to consider as "significant constraints" for that purpose.

In two preliminary rulings, brought to the Court in 2019 – the Radiotelevizija Slovenija[39] and the RJ[40] cases, both claimants considered that, owing to the restrictions involved, their periods of stand-by time – according to a stand-by system – had to be recognised, in their entirety, as "working time" and remunerated accordingly, irrespective of whether or not they had carried out any specific work during those periods.

In the Radiotelevizija Slovenija case, a specialist technician was responsible for ensuring the operation, for several consecutive days, of television transmission centres situated in the mountains of Slovenia. He provided, in addition to his twelve hours of normal work, services of stand-by time for six hours per day, according to a stand-by system. During those periods, he was not obliged to remain at the transmission centre in question, but was required to be contactable by telephone and to be able to return there within a time limit of *one hour,* in case of need. On the facts, due to the geographical location of the transmission centres, where access was difficult, he was obliged to remain there while carrying out his stand-by time services, in service accommodation placed at his disposal by his employer, without many opportunities for leisure pursuits.

In RJ (case C 580/19), a public official carried out activities as a firefighter in the town of Offenbach am Main (Germany). To that end, in addition to his regular service hours, he regularly had to carry out periods of stand-by time according to a stand-by system. During those periods, he was not required to be present at a place determined by his employer, but had to be reachable and able to reach, if alerted, the city boundaries within a *20-minute period,* with his uniform and the service vehicle made available to him.

The Court underlined that only the constraints that are imposed on the worker, whether by the law of the Member State concerned, by a collective agreement or by the employer, may be taken into consideration.

By contrast, organisational difficulties that a period of stand-by time may entail for the worker and which are the result of *natural factors or free choice* – such as choice of residence or places for the pursuit of another professional activity (MG[41]) – or limited opportunities for leisure pursuits within the area that the worker is unable in practice to leave (Radiotelevizija Slovenija) are not relevant.

36 Order of 11 January 2007, Vorel, C-437/05, EU:C:2007:23, paragraph 25.

37 Simap (cit.), paragraph 50.

38 To that effect, see judgment of 21 February 2018, Matzak, C-518/15, EU:C:2018:82, paragraphs 63 to 66.

39 Judgment of 9 March 2021, Radiotelevizija Slovenija, C-344/19, EU:C:2021:182.

40 Judgment of 9 March 2021, RJ, C-580/19, ECLI:EU:C:2021:183.

41 Judgment of 11 November 2021, MG, C-214/20, EU:C:2021:909.

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A classification of a period of stand-by time (according to a stand-by system) as "working time" is not automatic in the absence of a requirement to remain at the workplace, and depends on an overall assessment of all the facts of the case, for the national courts to carry out.

For that purpose, the Court set out two criteria: (i) the response time and (ii) the average frequency of the activities that the worker is actually called upon to undertake over the course of that period, where it is objectively possible to estimate.

As for the former, national Courts have to take into account the reasonableness of the time limit to return to his/her workplace starting from the moment at which his or her employer requires his or her services, assessing other constraints imposed on the worker, such as (i) the obligation to have specific equipment with him or her when returning to the workplace, but also (ii) facilities that are made available to him or her (for example, the provision of a service vehicle that permits use of traffic regulations privileges).

Considering a time limit of *one hour,* in the Radiotelevizija Slovenija case, the Court ruled «a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of Article 2(1) of Directive 2003/88/EC, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests. The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment.».

As for a 20 *minute* response time, in RJ, the Court ruled that Article 2(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which a worker must be able to reach the town boundary of his or her workplace within a 20 minute response time, in uniform with the service vehicle made available to him or her by his or her employer, using traffic regulations privileges and rights of priority attached to that vehicle, constitutes, in its entirety, 'working time', within the meaning of that provision, solely if it follows from an overall assessment of all the circumstances of the case, in particular the consequences of such a response time and, where appropriate, the average frequency of interventions during that period, that the constraints imposed on that worker during that period are of such a nature as to constrain objectively and very significantly the ability that he or she has to freely manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests.

The Court provided more guidance on the circumstances to consider as fulfilling the concept of "major constrains" in MG[42] , a case concerning a retained firefighter who was employed on a part-time basis and permitted to carry out his professional activity (as a taxi driver) on his own account, provided that that activity did not exceed 48 hours per week on average. His period of stand-by time according to the stand-by system in question was, in principle, 7 days per week and 24 hours per day and was interrupted only by leave periods and periods of unavailability notified in advance.

MG was required to participate in 75% of that brigade's activities and had the option of refraining from the remaining activities, without being obliged, during his periods of stand-by time, to be present at a specific place, MG had, when he received an emergency call, to participate, arriving at the fire station within a maximum period of *10 minutes*.

The Court stressed that the facts of the case constituted objective factors from which it may be concluded that the period of time in question did not constitute working time, as MG could have managed his time without major constraints and could have pursued his own interests: (i) MG at no time had to be in a specific place during his periods of stand-by time; (ii) he was not obliged to participate in all activities of his assigned fire station, since a quarter of them took place in his absence; and that (iii) he was permitted to carry out another professional activity.

Such conclusion might be excluded by the national (referring) court in carrying out an overall assessment of all the facts of the case, if the average frequency of the emergency calls and the average duration of the interventions prevent the effective pursuit of a professional activity capable of being combined with the post of retained firefighter.

Thus the court ruled that «Article 2(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained firefighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an

[42] Judgment of 11 November 2021, MG, C-214/20, EU:C:2021:909.

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emergency call, reach his or her assigned fire station within *10 minutes,* does not constitute 'working time' within the meaning of that provision if it follows from an overall assessment of all the facts of the case, in particular from the scope and terms of that ability to carry out another professional activity and from the absence of obligation to participate in the entirety of the interventions effected from that fire station, that the constraints imposed on the said worker during that period are not of such a nature as to constrain objectively and very significantly the ability that he or she has freely to manage, during the said period, the time during which his or her services as a retained firefighter are not required».

The MG case raised the question, yet to be ruled on by the Court, of whether the Directive's provisions set absolute limits in cases of *concurrent contracts* with one or more employer(s), or if they apply to each employment relationship separately.

The Directive does not expressly state how working time limits should be applied in the case of *workers with more than one employment contract:* should the limits be respected 'per-worker' (adding up the hours worked for all concurrent employers): or 'per-contract' (applying the limits to each employment relationship separately).

The relevance given to the ability to carry out another professional activity – on the concept of working time and not solely on its limits –, as well as to the absence of an obligation to participate in the entirety of the interventions from the fire station (MG was employed on a part-time basis), is a step backward in the possibility of obtaining a decision establishing legal clarity on this topic.

The practice in Member States varies considerably on this point.

Austria, Bulgaria, Croatia, Cyprus, France, Germany, Luxembourg, Estonia, Greece, Ireland, Italy, Lithuania, the Netherlands and Slovenia apply the Directive per-worker.

However, eleven Member States apply it per contract. They are: The Czech Republic, Denmark, Hungary, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Spain.

Belgium, Sweden and Finland adopt an intermediate position: The Directive applies per worker where there is more than one contract with the same employer but per contract in situations where the worker has more than one contract with different employers.

As referred to in the (2017) Interpretative Communication, the Commission considers that, in light of the Directive's objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should as far as possible, apply per *worker.*

2.2.1.3 PAID ANNUAL LEAVE

Following Article 153 of the TFUE, the Directive does not address the issue of remuneration.

This results also from both the purpose and the wording of the Directive's provisions and includes salary levels and the methods of remuneration and various pay rates which can be established at national level.

With the exception of pay to be ensured during the workers' annual leave.

According to Article *7*(1) of the Directive, the right to – of at least four weeks – paid annual leave is granted to every worker.

This right has the dual purpose of enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure[43].

Paid annual leave means being paid the same amount of remuneration as that which was paid to him or her during the reference period, without being subject to a condition that the worker has worked full time during that period.

The Court has stated that 'every worker' includes workers who are absent from work on sick leave, whether short or long term, regardless of whether they have in fact worked in the course of the leave year.

In Staatssecretaris van Financien, the Court ruled that Article *7* is to be interpreted as precluding national provisions and practices pursuant to which, when a worker, who is incapable of work due to illness, exercises his right to paid annual leave, the reduction, following the incapacity for work, of the amount of remuneration he received during the period of work prior to the period for which annual leave is claimed is taken into account in determining the amount of remuneration to be paid to him in respect of his paid annual leave[44].

In support of its stance, the Court pointed to the fact that it is necessary to consider, in relation to the right to paid annual leave, that workers who are partially incapacitated from work due to illness during the reference period are treated in the same way as those who have actually worked during that period. Accordingly, entitlement to paid annual leave in such a case must, in principle, be determined by reference to the periods of actual work completed under the employment contract, without account being taken of the fact that the amount of that remuneration was reduced on account of a situation of incapacity of work due to illness (paragraph 39). Both the Court and the Commission held that Article *7* - granting (i) the right to paid annual leave of 4 weeks, (ii) to every worker, (iii) replaced *(allowance in lieu)*

[43] Judgment of 25 June 2020, Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA, C 762/18 and C 37/19, EU:C:2020:504, paragraph 57.

[44] Judgment of 9 December 2021, Staatssecretaris van Financien, C-217/20, EU:C:2021:987.

only when the relationship is terminated – satisfies the criteria for direct effect, being unconditional, unequivocal and precise[45], thus granting (i) the right of paid annual leave of 4 weeks, (ii) to every worker, (iii) replaced (*allowance in lieu*) only when the relationship is terminated.

The Directive is duly aligned with paragraph 2 of Article 31 of the Charter, which draws on Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

2.2.1.4 MONITORING HOURS WORKED BEYOND LIMITS

A limitation on maximum working hours and a right to daily and weekly rest periods are fundamental rights of every worker, expressly enshrined in Article 31(2) of the Charter of Fundamental Rights[46].

Under the Directive, average weekly working time must not exceed 48 hours per week on average, over a seven-day period, calculated over a reference period of up to 4 months.

Workers, are in general[47], entitled to at least 11 consecutive hours of daily rest and at least 24 hours of uninterrupted weekly rest every 7 days, over a reference period of 2 weeks (within a 14-day period). Article 6(2) of the EU Working Time Directive requires Member States to take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers, the period of weekly working time is determined by the two sides of industry or by national legislation, provided that the average working time for each seven-day period, does not exceed forty-eight hours. This average weekly working time includes overtime.

The Directive does not define overtime. Overtime has to be regarded as working time beyond normal working hours.

The Directives don't provide any mechanism for the enforcement of a provision by an individual against other individual parties – "horizontal direct effect" – neither can an individual claim before the court that his/her wrongdoing relies on the estoppel principle: no individual is at fault in consequence of an implementation of a directive by a Member State[48] .

Even though this isn't presently very straightforward, given the way the CJEU's jurisprudence has developed, not only the "indirect effect doctrine" but also liability in damages, as per the *Francovich and Bonifaci v. Italy* decision[49].

However, it is in any event the responsibility of the national courts to provide the legal protection which an individual derives from that rule and therefore to interpret national law, as far as possible, in light of the wording and the purpose of the Directive, in order to achieve the desired result.

In Spain, two cases concerning financial companies went before the National High Court in 2015 and 2016, respectively. Overtime is regulated in Article 35.5 of the Workers' Statute – entitled *Horas Extraordinarias* –, which reads that "for the purposes of calculating overtime, each worker's day shall be recorded daily and shall be totalled in the period fixed for the payment of the remuneration. Furthermore, a copy of the summary shall be delivered to the worker in the corresponding invoice".

When working overtime is necessary, it is voluntary for the worker and must be paid according to what is established in the collective agreement, but it can never be less than the amount for an ordinary working hour or compensated for with time off.

Trade union organisations sued the companies to force them to set up a recording system for actual working hours and to inform worker representatives about overtime worked on a monthly basis in accordance with the provisions of Article 35.5 of the Workers' Statute, the third additional provision of Royal Decree-law 1561/2015 on special working hours and Article 32.5 of the sectoral agreement for the banking sector in force at the time.

The question brought before the Court was whether companies have to make a daily record of *all working hours*, or *only overtime*.

The Supreme Court[50]ruled that Article 35.5 of the Workers' Statute only makes it necessary to have a record of the working day when overtime is performed. It further advised in favour of legislative reform to clarify the obligation to keep a record of hours, thus making it easier for the worker to prove overtime worked.

This was followed – in 2018 – by the case of the Services Federation of the Trade Union Confederation of Workers' Commissions (FS-CCOO) against a German

45 Judgment of 24 de January 2012, C-282/10, EU:C:2012:33, paragraphs. 34-39.

46 Entitled "Fair and just working conditions", Article 31 of the Charter provides every worker has the right to "working conditions which respect his or her health, safety and dignity" (n.º 1) and "limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave" (n.º 2).

47 Employees with an irregular working pattern are allowed to work 56 hours per week, but the average working hours in a6-month period (or 12 months, if defined so in the collective agreement, e. g. for tourism or hospitality) should not exceed 40 hours per week.

48 Judgment of 5 April 1979, Ratti, C-148/78, EU:C:1979:110.

49 Judgment of 19 November 1991, cases C-6/90 and 9/90, ECLI:EU:C:1991:428.

50 Ruling 246/2017 of 23 March 2017, http://www.poderjudicial.es/search/indexAN.jsp.

multinational bank.

The union challenged the bank on the need to record working time to ensure that overtime hours were properly noted; the union sought a declaration that the employer was obliged to set up a system for recording the time worked each day by its members of staff, in order to make it possible to verify compliance with, first, the working times stipulated and, second, the obligation to provide union representatives with information on overtime worked each month.

The case – Federación de Servicios de Comisiones Obreras (CCOO) – went to the European Court of Justice, which, in 2019, issued a key ruling that effectively requires all employers to record their employees' working time[51].

The Court held that Articles 3, 5 and 6 of Directive 2003/88 – read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Articles 4(1), 11(3) and 16(3) of Directive 89/391/EEC – preclude legislation that, according to the interpretation given thereto in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

The Court went on to note, in relation more specifically to the putting in place of appropriate mechanisms for calculating the duration of time worked each day by each worker, that in the absence of such a system, it is not possible to objectively and reliably determine either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours, as overtime.

In those circumstances, the Court observed that it appears to be excessively difficult, if not impossible, in practice, for workers to ensure compliance with the rights conferred on them by EU law, with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that Directive[52].

The objective and reliable determination of the number of hours worked each day and each week is essential in order to establish, first, whether the maximum weekly working time defined in Article 6 of Directive 2003/88, including, in accordance with that provision, overtime, was complied with during the reference period set out in Article 16(b) or Article 19 of that Directive and, second, whether the minimum daily and weekly rest periods, defined in Articles 3 and 5 of that Directive respectively, were complied with in the course of each 24-hour period, as regards the daily rest period, or in the course of the reference period referred to in Article 16(a) of the same Directive, as regards the weekly rest period.

The Court concluded that Member States must implement appropriate mechanisms enabling the objective and reliable determination of the number of hours worked each day and each week.

It went on to note that appropriate mechanisms need to be put in place for measuring the duration of time worked each day by each worker.

The Court added that the fact that a worker may, under national procedural rules, rely on other sources of evidence, such as witness statements, the production of emails or the consultation of mobile telephones or computers, in order to provide indications of a breach of those rights and thus bring about a reversal of the burden of proof, had no impact in this regard. It observed that such sources of evidence do not enable the number of hours the worker worked each day and each week to be objectively and reliably established.

In particular, as regards witness evidence, the Court emphasised the worker's position of weakness in the employment relationship.

It also held that the powers to investigate and impose penalties conferred by national law on supervisory bodies, such as the employment inspectorate, did not constitute an alternative to the abovementioned system, enabling the duration of time worked each day by each worker to be measured, since in the absence of such a system, those authorities are themselves deprived of an effective means of obtaining access to objective and reliable data as to the duration of time worked by workers in each undertaking, which may prove necessary in order to exercise their supervisory function and, where appropriate, impose a penalty.

Thus, the Court (Grand Chamber) ruled «Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured».

Following the Court's ruling, the Spanish government passed *Royal Decree-law 8/2019*[53]*on urgent measures for social protection and the fight against precariousness in the working day,* amending the Workers' Statute to stipulate the compulsory registration of working hours by all public and private employers. Non-compliance with the working time register is considered an offence – Article 10.

51 Judgment of 14 May 2019, Federación de Servicios de Comisiones Obreras (CCOO), C 55/18, ECLI:EU:C:2019:402.

52 Paragraph (48).

53 As set in its preamble, *Il Tribunal Supremo en su Sentencia 246/2017, de 23 de marzo, afirmó que «de lege ferenda convendría una reforma legislativa que clarificara la obligación de llevar un registro horario y facilitara al trabajador la prueba de la realización de horas extraordinária»*: https://www.boe.es/eli/es/rdl/2019/03/08/8.

2.2.1.5 RIGHT TO DISCONNECT

A significant challenge to working hours, which became much more relevant during the pandemic, was ensuring that workers feel empowered to be unavailable for work at specified times reserved for rest and personal life, without negative repercussions for their careers. The right to disconnect has been recognised by the CJEU while interpreting the Working Time Directive (2003/88/EC): the employee has the right to be unavailable for work; "the objective of that directive (…) is to ensure better protection of the safety and health of workers" (paragraph 50)[54] .

France was the first European country to introduce the right to disconnect through a provision in the new Labour Code in 2016; the right to disconnect has to be implemented in all companies with more than 50 employees[55].

In Italy, the right to disconnect applies only to «smart workers»[56]and should be implemented through individual agreements between the employer and the employee.

In the Portuguese Labour Code, a new provision (Article 199-A) was introduced by Law 83/2021, of 6 December, entitled "duty to refrain from contact". This new article does not refer to a right to disconnect, but rather, on the one hand, to the employee's right to a rest period and, on the other, imposes a duty on employers to refrain from contacting employees outside regular working hours[57].

Rest periods correspond to periods in which the worker is not contractually obliged to remain available for the provision of work. In general – with exception to parents with children under 12 months; carers; disabled individuals; chronically ill individuals; minors and pregnant employees – the concept excludes situations of overtime work or on-call work.

Entered into force 1 January 2022, the duty to refrain from contacting is not in effect for situations of *force majeure,* a legal concept that some authors define as equivalent to situations which are usually considered under the overtime work regime, recalling the idea of inevitability and exceptionality (often linked to natural phenomena, which, due to being uncontrollable and not predictable, are not liable for their consequences, such as fires or floods)[58].

Spain established the right to disconnect in Law 3/2018, of 5 December 2018, on the Protection of Personal Data and the Guarantee of Digital Rights (LOPD)[59].

In terms of this approach, legislation – article 88 of LOPD – in Spain leaves the implementation of the right to disconnect to collective bargaining or, in its absence, to an agreement between the employer and the worker's representatives.

In an innovative decision, the *Sala de Audiência Nacional* declared a clause inserted in a telework (employment) agreement, which waived the right to disconnect in "exceptional circumstances" null and void. These being considered "circumstances of justified urgency in situations that may imply a business damage or business whose temporal urgency requires an immediate response or attention on the part of the worker"[60].

As that court observed, «it is obvious that no right presents absolute profiles from the moment in which its exercise coexists with other rights that may occasionally conflict, but the limits to the right to digital disconnection in teleworking cannot be established unilaterally by the employer, but rather, as indicated by article 88 of the LOPD, will be subject to what is established in collective bargaining or, failing that, to what is agreed between the company and the workers' representatives».

2.2.2 THE DIRECTIVE (EU) 2019/1152 ON TRANSPARENT AND PREDICTABLE WORKING CONDITIONS IN THE EUROPEAN UNION

Principle N.º 7 of the EPSR states that workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from

54 C-55/18, Federación de Servicios de Comisiones Obreras (CCOO).

55 Eurofound, "Right to Disconnect", (December 2021), https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect.

56 Flexible work practices aimed at improving the reconciliation of work and family life through the use of ICT (referred to as "smart working"– *lavoro agile*) have been introduced in Italy, first regulated by Law n.º 81, of 22 May 2017. Smart working is put in place by an individual agreement – formally in written form – between employee and employer, in written form between the employer and the employee but employers must give priority to requests made by (i) mothers of small children and (ii) parents of disabled children.

57 Mariana Pinto Ramos, "The-right-to-disconnect-or-as-portugal-calls-it-the-duty-of-absence-of-contact", http://global-workplace-law-and-policy.kluwerlawonline.com/2022/03/09/the-right-to-disconnect-or-as-portugal-calls-it-the-duty-of-absence-of-contact/.

58 João Leal Amado "Teletrabalho: o «novo normal» dos tempos pós-pandémicos e a sua nova lei", *Observatório Almedina,* 29 (December 2021), https://observatorio.almedina.net/index.php/2021/12/29/teletrabalho-o-novo-normal-dos-tempos-pos-pandemicos-e-a-sua-nova-lei/.

59 Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales.

60 Judgment of 22 March 2022, FEDERACION DE SERVICIOS CCOO, Case-44/2022, ECLI:ES:AN:2022:1132.

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the employment relationship[61].

With the platform economy, millions of on-demand workers are nowadays channelled through online platforms for the execution of all kinds of tasks, giving rise to new types of employment, such as zero-hour contracts, employee sharing, ICT-based mobile work, voucher-based work, interim management, portfolio and crowd work[62].

In June 2019, a new Directive on transparent and predictable working conditions in the European Union was adopted, clarifying "core labour standards for all workers" and, with it, the concept of worker.

The Directive applies (personal scope) to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each MS - Article 1(2). An important caveat, however, is introduced: when assessing 'worker' status, national judges and legislators have to take into account the case law of the Court of Justice. Additional information is to be provided to casual workers (who are engaged in on-demand contracts or contracts for work under which the working pattern is entirely or mostly unpredictable) – Article 4(2)(m). In the latter case, the employer must inform the worker of: (i) the number of guaranteed paid hours; (ii) the pay for work performed in addition to those guaranteed hours; (iii) the reference hours and days within which the worker may be required to work; (iv) the minimum notice period the worker is entitled to before the start of a job and (v) the deadline for the employer to cancel a job assignment. If the employer fails to give reasonable advance notice, workers can refuse the job assignment without harming their employment status. Furthermore, the new Directive has introduced additional measures to protect zero-hour workers. When no guaranteed amount of paid work is predetermined, Member States have to adopt one (or more) of the following approaches to prevent abuse: (i) they can introduce limitations to the use and duration of on-demand or similar work contracts; (ii) they can establish a rebuttable presumption of an employment relationship with a minimum amount of paid hours based on the average hours worked during a given period; and/or (iii) they can adopt alternative equivalent measures that would ensure the effective prevention of employers' exploitative practices (Article 11).

2.2.3 THE WORK-LIFE BALANCE DIRECTIVE

One of the deliverables of the European Pillar of Social Rights is the Work-life Balance Initiative, which addresses the work-life balance challenges faced by working parents and carers.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents – all working parents of children up to at least 8 years old –, and carers (hereafter work-life balance Directive)[63], includes the extension of the existing right to request flexible working arrangements (reduced working hours, flexible working hours and flexibility in place of work).

Entered into force in July 2019, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with it by 2 August 2022 (the EU has competence to enact obligations for individuals with immediate effect only where it is empowered to adopt regulations)[64].

In Spain – Case 3191/2020[65] –, the *Tribunal Superior de Justicia de Galicia* was required to decide on whether an employee – a Director of a rest-home for elderly, who worked 5 days a week, from Monday-Friday, from 9 am until 5 pm, a single-parent with a 7 year old child – should be entitled to work remotely for 60% of her weekly period time and the rest 40% at the premises of the employer, corresponding to 3 days working from home.

In the Judgement of 5 February 2021, the Court upheld the applicant's right to reconcile her work and family life, to adapt her working hours and to take up the option of distance working for 60% of her working time, working 3 days at home and the remaining 2 days (40%) at the workplace, until the minor child was 12 years old.

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61 Including on probation period. Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation.

62 Eurofound, "Improving the working conditions in platform work" (February 2021), https://www.eurofound.europa.eu/pt/topic/platform-work.

63 Repealing Council Directive 2010/18/EU.

Further reading:

- M. R. PALMA RAMALHO and TERESA COELHO MOREIRA," Equality, Non-Discrimination and Work-Life Balance in Portugal", *Comparative Labor Law Dossier on Equality, Non-Discrimination and Work-Life Balance,* IUSLabor" (2/2016): 46-58; also in https://www.upf.edu/iuslabor;

- SOPHIA KOUKOULIS-SPILIOTOPOULOS, "Reconciling private and professional responsibilities: a necessary means for promoting substantive gender equality, European Gender", http://www.era-comm.eu/oldoku/SNLLaw/07 Work-life balance/2009-109DV60-Koukoulis-Spiliotoupoulos2-EN.pdf.

64 Judgment of 6 November 2018, Bauer and Willmeroth, C 569/16 and C 570/16, EU:C:2018:871, paragraph 76 and the case-law quoted.

65 STSJ GAL 1056/2021 - ECLI:ES:TSJGAL:2021:1056. The Spanish mentioned decisions are available at https://www.poderjudicial.es/cgpj/search.

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In Portugal, employees have a legal right to adjust working time patterns upon request, for work-life balance purposes.

According to article 55 of the Portuguese Labour Code, an employee with family responsibilities has the right to change to a part-time job, for two years (or three years for a third child and four years for a disabled child or a child with a chronic disease), provided the child is under twelve years old, or is a disabled or chronically-ill child.

Employees are also entitled to perform their work within flexible working hours/ arrangements, as their parental responsibilities must prevail over the fixed-working schedule hours defined by the employer, as recognised in the following decisions:

- Judgement of 19 April 2021 (Porto Court of Appeal), case 14789/20.7T8PRT.P1 [single parent; child of twelve (12) years old; working times until 8 pm while schools were closing at 6 pm];
- Judgement of 13 July 2020 (Lisbon Court of Appeal), case 514/19.9T8BRR.L1-4 (single parent with a child of eight (8) years old who had to take care of his daughter, the court held that the dismissal for absences was unfair);
- Judgement of 11 July 2019 (Évora Court of Appeal), case 3824/18.9T8STB.E1 [single mother with a child of five (5) years old who had no schools open in part of her working hours, as established by the
employer] [66].

III. CLOSING REMARKS.

Improving health and safety working conditions is an important objective of the European Union, not subordinated to purely economic considerations. A limitation of maximum working hours and the right to daily and weekly rest periods are fundamental rights of every worker, expressly enshrined in Article 31(2) of the Charter of Fundamental Rights.

Forming the legal basis on which the Working Time Directives were adopted, Article 153 of the Treaty on the Functioning of the European Union provides that the Union is to support and complement the activities of the Member States with a view to improving the working environment to protect worker's health and safety.

The 2003 Working Time Directive concerning certain aspects of the organisation of working time has been strongly criticised and some of the concepts and provisions embedded in its complex architecture became an active field of litigation. The Directive does not provide for a concept of worker; with the exception of pay to be ensured during the worker's annual leave, does not address remuneration, giving the Member States a broad margin of discretion; «time spent on-call» is addressed on a *case by case basis* in the preliminary rulings brought before the Court of Justice. Leaving the floor to the Commission, while awaiting guidance from the Court of Justice on zero-hour contracts.

The Commission, as the guardian of the Treaties and following the 2017 «Interpretative Communication», pointed to the fact that «zero-hour workers» have to be considered as workers under EU law as they work under the direction of a manager and receive remuneration for that work.

A new Directive – Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union – has introduced additional measures to protect zero-hour workers.

Ensuring compliance with the Working Time Directive also poses some significant challenges, as many countries don't have appropriate mechanisms for setting up the duration of time worked each day by each worker to be measured. Still, the case law of the Court of Justice of the European Union has largely contributed to the progress on the right of every worker to "working conditions which respect his or her health, safety and dignity".

The right to disconnect has been recognised by the CJEU while interpreting the Working Time Directive (2003/88/EC).

Additionally, the recording of working hours was brought before the Court of Justice which, in 2019, issued a key ruling that effectively requires all employers to record their employees' working time[67], causing some countries, such as Spain, to change their national laws.

Even though some aspects relating to the Directive remain unaddressed (such as whether the Working Time Directive applies per worker or per contract) the Court of Justice's rulings play a pivotal role in defining worker's rights in relation to Working Time.

66 All the Portuguese mentioned decisions are available at http://www.dgsi.pt/.

67 Judgment of 14 May 2019, Federación de Servicios de Comisiones Obreras (CCOO), C 55/18, ECLI:EU:C:2019:402.