HIGHLIGHT

# DOES STAND-BY TIME COUNT AS WORKING TIME? THE COURT OF JUSTICE GIVES GUIDANCE IN *DJ V RADIOTELEVIZIJA SLOVENIJA* AND *RJ V STADT OFFENBACH AM MAIN*

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On 9 March 2021, the Grand Chamber of the Court of Justice of the European Union (CJEU) added two judgments to a long line of case law interpreting the meaning of "working time" under art. 2 of Directive 2003/88/EC (the "Working Time Directive"). Art. 2 defines "working time" as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties. The opposite to working time is a "rest period", defined in art. 2 as any period which is not working time. The two are mutually exclusive. There is a plethora of case law examining the scope of "working time", particularly in the context of on-call work.[1] The CJEU has generally adopted a progressive approach to the Directive, widening its scope through a broad interpretation of what counts as "working time", and bestowing the rights contained within the Directive with a fundamental character.[2] In *DJ v Radiotelevizija Slovenija*[3] and *RJ v Stadt*

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[1] See further cases C-303/98 *Simap* EU:C:2000:528; C-151/02 *Jaeger* EU:C:2003:437; C-14/04 *Dellas and Others* EU:C:2005:728; and C-518/15 *Matzak* EU:C:2018:82.

[2] For an overview of some of the case law and literature on working time see J Kenner, 'Re-evaluating the Concept of Working Time: An Analysis of Recent Case Law' (2004) Industrial Relations Journal 588; T Nowak, 'The Working Time Directive and the European Court of Justice' (2008) Maastricht Journal of European and Comparative Law 447; B Barrett, 'When is a Work Break Not a Statutory Break?' (2012) Industrial Law Journal 363; M Bell, 'Sickness Absence and the Court of Justice: Examining the Role of Fundamental Rights in EU Employment Law' (2015) European Law Journal 641; A. Bogg, 'Of Holidays, Work and Humanisation: A Missed Opportunity?' (2009) European Law Review 738.

[3] Case C-344/19 *DJ v Radiotelevizija Slovenija* ECLI:EU:C:2021:182.


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*Offenbach am Main*[4] the CJEU was asked to consider whether and how stand-by time spent at home falls within the scope of art. 2.

The facts of the cases are relatively straightforward. *DJ v Radiotelevizija Slovenija* concerned a service technician (DJ) who worked at two remote transmission centres. Due to the location of the centres and the distance between them and DJ's home, the employer provided accommodation at the centres for DJ and a colleague. Both technicians worked 12-hour shifts, considered "actual working time" under Slovenian law and paid at a normal salary rate. In addition, there was a stand-by system, not counted as "working time", when the technicians were paid 20% of their normal salary. If a technician was on stand-by then he was required to be contactable by telephone and available to attend work within one hour. DJ lodged an action claiming that stand-by time should be counted as normal working time and be paid as such due to the fact that he lived at his workplace 24-hours a day and that the remote location of the transmission centres meant that he could not easily engage in leisure activities when not working. DJ lost his case at first and second instance. The Slovenian Supreme Court sought guidance from the CJEU on whether the stand-by system at issue constituted "working time" under art. 2 of the Working Time Directive; and whether the placing of service accommodation at that worker's disposal because of the difficulty in accessing his or her workplace and the limited nature of the opportunities to pursue leisure activities within the immediate vicinity of that workplace are to be taken into consideration in that classification.

*RJ v Stadt Offenbach am Main* raised similar questions. The case concerned a firefighter (RJ) who worked regular service hours and was also required to carry out incident command service (so-called "Beamter vom Einsatzleitdienst" or "BvE service") as part of a stand-by system outwith normal working hours. RJ usually carried out BvE service at 10-15 weekends per year. During BvE service, RJ could choose his whereabouts but had to be contactable at any time and have his service uniform and his service vehicle with him. If required to attend an incident then he had to be close enough so that he could reach the Offenbach am Main town boundary within 20 minutes of being called. RJ requested that BvE service be recognised as working time and that he be remunerated accordingly. The Administrative Court Darmstadt sought clarity from the CJEU on whether RJ's period of stand-by time/the BvE service constitutes "working time" within the meaning of art. 2 of the Working Time Directive; and whether the frequency of call-outs during stand-by time are relevant in deciding whether stand-by time constitutes working time.

The CJEU's starting point in both judgments was to recall the importance of the Working Time Directive in protecting the health and safety of workers. By establishing the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods, the Working Time Directive gives specific form to the fundamental right to fair and just working conditions, expressly enshrined in art. 31(2) of the Charter

[4] Case C-580/19 *RJ v Stadt Offenbach am Main* ECLI:EU:C:2021:183.

of Fundamental Rights. It follows that the provisions of the Directive may not be interpreted restrictively to the detriment of the rights that workers derive from it and that compliance with the Directive should not be subordinated to purely economic considerations. Against that background, the CJEU reiterated its well-settled case law starting with *Simap* and *Jaeger* which held that stand-by time in its entirety is to be considered working time when the worker is required to be physically present at the place determined by the employer, and to remain available to the employer in order to be able, if necessary, to provide his or her services immediately. The key characteristics of such time are that the worker must remain apart from their family and social environment, and has little freedom to manage the time during which their professional services are not required. In *Matzak*, the CJEU further clarified that standby-time carried out at home can also, in its entirety, be considered working time where a worker (in this case a firefighter) is under an obligation to respond to calls from their employer within eight minutes. The short call-out time in *Matzak* had the effect of objectively limiting the opportunities which a worker has to devote themself to any personal and social interests.[5]

The CJEU in *DJ* and *RJ* reversed the presumption set out in *Matzak* to find that the entirety of periods of stand-by time spent at home would *not* be considered working time within the meaning of art. 2 of the Working Time Directive *unless* the worker is constrained *objectively and very significantly* in their ability to manage their free time when their professional services are not required (emphasis added).[6] The frequency of call-outs and the length of stand-by time could be taken into account where appropriate to safeguard the health and safety of the worker.[7] The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place where the worker must spend their stand-by time was irrelevant[8], as was the free choice of the worker where to have their home (whether closer or further away from their place of work).[9] The CJEU left it up to the national courts to undertake a concrete assessment of the facts to determine whether DJ and RJ's stand-by time fell within or outwith this definition of working time. The CJEU made it clear that the Working Time Directive defined only working time and not corresponding remuneration. The latter was a matter for national authorities.[10]

The CJEU's approach in *RJ* and *DJ* marks a subtle shift in its jurisprudence. Hitherto, there was a presumption that stand-by time spent at home, where a worker, in effect (due to the nature of the stand-by obligations), remains constantly at the employer's disposal,

[5] *Matzak* cit. paras 64-66.

[6] *DJ v Radiotelevizija Slovenija* cit. paras 64-66.

[7] *Ibid*. paras 64-65 and *RJ v Stadt Offenbach am Main* cit. paras 60-61.

[8] *DJ v Radiotelevizija Slovenija* cit. para. 66.

[9] *RJ v Stadt Offenbach am Main* cit. para 42.

[10] This is consistent with previous case law although once it has been determined that stand-by time is working time then it may be difficult to come to the conclusion that it could be remunerated differently to other work. See further L Rodgers, 'The Notion of Working Time' (2009) Industrial Law Journal 80.

*must* constitute "working time" (*Matzak*). Such an approach followed from the Directive's purpose to protect the health and safety of workers by recognising the inherent disruption that stand-by time can have on a worker's private life even if it can take place at home. It could have serious economic consequences for employers because a finding that stand-by time is working time triggers the associated rights to a maximum working week, rest periods and annual leave contained in the Directive.[11] The decision that stand-by time spent at home is *not* working time *unless* it *objectively and very significantly* impacts a worker's ability to manage their free time, seems to provide some flexibility and to potentially limit the Directive's scope, but actually creates uncertainty and potential divergence across the Member States. It is regrettable that the CJEU did not expand on what constitutes an objective and very significant constraint other than to advocate a holistic consideration of the facts in every case, taking into account the intensity of the stand-by time. National courts will have to devise a sliding scale: the greater the geographical and temporal restrictions on rest time, the more likely a period is to be considered as working time. The question arises, following *DJ* and *RJ,* where should the cut-off be? It is difficult to imagine a situation in a sector falling with the scope of the Working Time Directive which is more constraining on leisure time then that faced by DJ, living with one other technician in employer-provided, remote accommodation on a mountain doing shift work without being able to return to his family. Similarly, in *RJ*, although the external circumstances were less restrictive, the requirement to always have access to his uniform and service vehicle and to be at the town boundary, dressed in uniform, within 20 minutes, effectively rendered RJ at his employer's constant disposal during the stand-by time. Yet the CJEU did not give a clear answer as to whether either case met the threshold of *objectively* and *very significantly* constraining the workers' ability to rest.

The outcome in these cases will be a welcome development for those who favour a more flexible approach to the interpretation of the Directive.[12] Yet, at a time when the boundaries between work and leisure time are increasingly blurred – a trend that has been accelerated by the Covid-19 pandemic – it is unfortunate that the CJEU did not use this opportunity to be more forthright in its assessment of what it means to be at an employer's disposal. It is likely that this will lead to further cases testing the limits of what constitutes working time.

[11] Arts 3-7 Directive 2003/88/EC.

[12] For an overview of the debates on the Directive and the Commission's recent attempts at providing clarity see T Nowak, 'The turbulent life of the Working Time Directive' (2018) Maastricht Journal of European and Comparative Law 118-129.