



HIGHLIGHT

DO EMPLOYERS NEED TO RECORD WORKING TIME? THE COURT OF JUSTICE GIVES GUIDANCE IN *CONFEDERACIÓN SINDICAL DE COMISIONES OBRERAS (CCOO) v. DEUTSCHE BANK SAE*

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Do employers need to keep a record of workers' actual hours worked? The Court of Justice had the opportunity to provide an answer in *Confederación Sindical de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*.¹ The case concerned a dispute between a number of Spanish trade unions and Deutsche Bank over whether the bank was under an obligation to set up a system to record the actual daily working time of its employees.

The trade unions relied principally on Arts 3, 5 and 6 of Directive 2003/88² which regulate working time, daily and weekly rest periods; and Art. 31, para. 2, of the Charter of Fundamental Rights of the European Union (Charter) which gives workers a right to limited maximum working hours, and to daily and weekly rest periods. They argued that these provisions mandate a system to record working time in order to ensure that the rights contained therein are effective.

Under Spanish law,³ working time is restricted to 40 hours per week (Art. 34) which should be recorded on a daily basis in order to be able to calculate overtime (Art. 35). Information on accrued overtime should be given to workers and their representatives on a monthly basis. This had been interpreted by the Spanish Supreme Court to mean that employers were required to keep a record of *overtime* but not generally of *working*

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¹ Court of Justice, judgment of 14 May 2019, case C-55/18, *CCOO*.

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.

³ Arts 34 and 35 of the *Estatuto de los Trabajadores* (Workers' Statute) of 23 October 2015 (BOE No 255, of 24 October 2015, p. 100224).

time.⁴ Employers were only under an obligation to record working time for specific cases of workers such as part-time workers or mobile workers working in the merchant navy or rail transport.

Directive 2003/88 provides workers with rights to restricted weekly working time (Art. 6), daily rest (Art. 3), weekly rest (Art. 5), annual leave (Art. 7) and rest breaks during working hours (Art. 4). There are additional protections for young workers and those engaged in night work. The Directive's provisions apply to "workers" defined as having an autonomous meaning specific to EU law.⁵ There has been a plethora of case law interpreting the Directive's provisions, focussing particularly on the meaning of "working time" and the right to and calculation of annual leave.⁶ The Court has generally adopted a progressive approach to the Directive, widening its scope and bestowing its rights with a fundamental character although recent decisions have been criticised for being regressive and potentially deregulatory.⁷

To date, the Court has not been required to consider whether the Directive specifically mandates record-keeping of working time.⁸ This is a functional shortcoming as the Di-

⁴ Judgments No 246/2017 of 23 March 2017 (REC 81/2016) and No 338/2017 of 20 April 2017 (REC 116/2016).

⁵ See Court of Justice, judgment of 14 October 2010, case C-428/09, *Union Syndicale Solidaires Isère*.

⁶ 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*, in *Industrial Relations Journal*, 2004, p. 588 *et seq.*; T. NOWAK, *The Working Time Directive and the European Court of Justice* in *Maastricht Journal of European and Comparative Law*, 2008, p. 447 *et seq.*; B. BARRETT, *When is a Work Break Not a Statutory Break?*, in *Industrial Law Journal*, 2012, p. 363 *et seq.*; M. BELL, *Sickness Absence and the Court of Justice: Examining the Role of Fundamental Rights in EU Employment Law* in *European Law Journal*, 2015, p. 641 *et seq.*; A. BOGG, *Of Holidays, Work and Humanisation: A Missed Opportunity?* in *European Law Review*, 2009, p. 738 *et seq.*

⁷ See Court of Justice, judgment of 20 November 2018, case C-147/17 *Sindicatul Familia Constanța and Others*. For a critique of the Advocate General's Opinion see A. BOGG, *Foster parents and fundamental labour rights* in *UK Labour Law Blog*, 25 July 2018, uklabourlawblog.com. Another case that has been criticised is Court of Justice, judgment of 4 October 2018, case C-12/17 *Dicu*. For a commentary see R. ZAHN, *Do parents need a holiday? The Court of Justice rules on parental leave and holiday rights*, in *UK Labour Law Blog*, 7 November 2018, uklabourlawblog.com.

⁸ The exception is where Member States make use of the opt-out contained in Art. 22. Art. 22 permits Member States to "opt-out" of the restrictions on weekly working time provided certain safeguards are in place. See further C. BARNARD, S. DEAKIN, R. HOBBS, *Opting out of the 48-Hour Week: Employer Necessity or Individual Choice – An Empirical Study of the Operation of Article 22(1) of the Working Time Directive in the UK*, in *Industrial Law Journal*, 2003, p. 223 *et seq.* According to the European Commission's latest review of the operation of Directive 2003/88, 18 Member States provide for use of the opt-out with six (Bulgaria, Croatia, Cyprus, Estonia, Malta and the United Kingdom) allowing the use of the opt-out irrespective of sector, whereas the other 12 (Belgium, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Austria, Poland, Slovakia, Slovenia and Spain) limit its use to jobs which make extensive use of on-call time, such as health services or emergency services. See Communication from the Commission COM(2017) 254 final of 26 April 2017, *Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time*, p. 11.

restrictive requires employers to ensure that workers are given adequate daily and weekly rest breaks. By implication, these depend for their effectiveness on a knowledge of actual working time (and overtime). For example, Art. 3 provides that workers are entitled to a minimum daily rest period of 11 consecutive hours in every 24-hour period. Such a period can realistically only be guaranteed if employers are aware of their workers' working and overtime patterns. In the present case, Deutsche Bank relied on a computer system to record whole day absences from work but measured neither daily working time nor overtime despite having been asked by the relevant Employment and Social Security Inspectorate to set up an appropriate system to record working time. The Spanish National High Court therefore referred three questions to the Court of Justice. First, it questioned whether Spanish law, as interpreted by the Supreme Court, was capable of ensuring effective compliance with the obligations laid down by Directive 2003/88 as regards minimum rest periods (Arts 3 and 5) and maximum weekly working time (Art. 6). Second, it queried whether Art. 31, para. 2, of the Charter read in conjunction with the relevant provisions of Directive 2003/88 and Directive 89/391⁹ on the health and safety of workers at work precluded Spanish legislation which could not be interpreted as permitting the set-up of a system for recording actual daily working time for full-time workers. Finally, it sought guidance on whether a record-keeping system was required.

The Court of Justice examined the three questions together and began by reiterating its settled case law which confirms that the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods is a fundamental right enshrined in Art. 31, para. 2, of the Charter which must not be interpreted restrictively.¹⁰ The purpose of Directive 2003/88 is to guarantee better protection of the health and safety of workers and, by extension, their living and working conditions. The Court recognised the inherent weaker position of the worker *vis-à-vis* the employer and therefore placed the burden on Member States to ensure that the rights contained in the Directive were effective.¹¹ As such, Member States are required to take the necessary measures to ensure that workers receive the rights due to them under the Directive. Although Member States have some discretion in this regard, their actions (or lack thereof) must not be such as to render the rights enshrined in the Directive and Art. 31, para. 2, of the Charter meaningless. The Court then went on to agree with Advocate General Pitruzzella's Opinion that the absence of a system to record working time made it impossible to determine reliably either the number of hours worked by the worker,

⁹ 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.

¹⁰ See Court of Justice: judgment of 5 October 2004, case C-403/01 *Döbele*; judgment of 6 November 2018, case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*; judgment of 6 November 2018, case C-569/16 *Bauer*.

¹¹ See also *Döbele*, cit., *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, cit. and Court of Justice, judgment of 25 November 2010, case C-429/09, *Fuß*.

when that work was done, or the number of hours worked beyond normal working time.¹² It also deprives both employers and workers of the possibility of verifying whether their rights have been complied with and makes it excessively difficult, in practice, for a worker to enforce his rights. The Court therefore concluded that in order to ensure the effectiveness of the rights provided for in Directive 2003/88 and in Art. 31, para. 2, of the Charter, Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.¹³

The Court dismissed the Spanish and British Governments' objections that setting up such a system would be costly for employers on the grounds that recital 4 of Directive 2003/88 did not allow the subordination of workers' safety and health to purely economic considerations.¹⁴ Finally, the Court recalled national courts' obligation to interpret national law in light of the wording and purpose of the directive which includes the obligation for national courts to change their established case law where necessary.¹⁵ The Advocate General in this regard went one step further by giving guidance to the referring court in case it found that it could not interpret national law consistent with EU law. He extended the horizontal direct effect of Art. 31, para. 2, of the Charter to the limitation of maximum working hours and to daily and weekly rest periods.¹⁶ Workers could therefore assert their rights directly vis-à-vis their employers in situations, such as the present one, which fall within the scope of EU law. The Court did not, however, comment on this interpretation.

The Court's judgment in this case gives a straightforward answer to a straightforward question. The general tenor of the judgment which focuses on the health and safety origins underpinning Directive 2003/88, the need for effective enforcement of the rights contained therein, and the recognition of the inequality of power between worker and employer are to be welcomed. Yet, the case also leaves a number of questions unanswered. Most obviously, the case did not deal with Art. 4 of Directive 2003/88 which guarantees rest breaks if a working day is longer than six hours. One can only assume that the Court would extend the same reasoning obliging employers to keep a record of rest breaks yet this is not clear.

The judgment also only provides a partial answer to effective enforcement of the Directive's provisions on weekly working time and rest periods. Effective enforcement depends not only on reliable record-keeping. Countries which have made use of the

¹² *CCOO*, cit., para. 47.

¹³ *Ibid.*, para. 60.

¹⁴ *Ibid.*, para. 66.

¹⁵ *Ibid.*, paras 68-70.

¹⁶ Opinion of AG Pitruzzella, *CCOO*, cit., para. 94 and with reference to the Court of Justice's decision in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, cit. at paras 49-51 and 69-79 where it had established the horizontal direct effect of Art. 31, para. 2, with respect to paid annual leave.

opt-out under Art. 22 of the Directive must already require employers to keep records of working time yet there is limited evidence that employers actually do this (or even, as is the case in the UK, that national legislation requires anything more than employers to keep “adequate” records).¹⁷ In the absence of strong labour inspectorates or trade union representation in the workplace, enforcement therefore disproportionately depends on individuals. As the Court has pointed out, individuals are usually in a weaker position *vis-à-vis* their employer which presents an obstacle to enforcement. Thus, if the Court had really wanted to strengthen enforcement then it could have engaged with the Advocate General’s line of reasoning with respect to the horizontal direct effect of Art. 31, para. 2, of the Charter.

Although the Court dismissed the economic impediment arguments to the setting up of a record-keeping scheme, it seemed to do so primarily on the grounds that neither Deutsche Bank nor the Spanish Government identified clearly or specifically the practical obstacles that might prevent employers from setting up, at a reasonable cost, such a system. The Court did not define what it understood by “reasonable” cost. One could envisage a situation where an employer refuses to establish a system for record keeping on economic grounds which would need to be challenged.

Finally, any system of record-keeping that is set up will lead to the collection and processing of large amounts of personal data by the employer and to be shared with relevant national authorities where required. The Court did not engage with the data protection implications of the case. Depending on how the requirement is interpreted in individual Member States, it may open the doors to employers being allowed (and even mandated) to exercise greater control and surveillance over their workers’ working time and rest breaks facilitated by smart technologies. It may not, therefore, necessarily contribute to improving workers’ living and working conditions.

¹⁷ Working Time Regulations 1998, reg. 5.