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Laga Newsflash

Time measurement system is mandatory says CJEU - What is the impact for Belgium?

In its 14 May 2019 judgment (C-55/18), the Court of Justice of the European Union (***CJEU***) ruled that "*in order to ensure the effectiveness of the rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, a Member State 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*."

What does this judgment mean for Belgian labour law?

CJEU Judgment

Background

On 26 July 2017, a worker's union brought a group action before the Spanish National High Court against Deutsche Bank. The union was seeking a judgment declaring the bank to be under an obligation to set up a system to record time performed by its members of staff each day, making it possible to verify compliance with working time restrictions and with the obligation to provide union representatives with information on performed overtime.

The National High Court observes that Article 35 of the Spanish Workers' Statute (entitled "overtime") provides that, for the purpose of calculating overtime, every worker's working time must be recorded on a daily basis and the total must be calculated upon the time fixed for payment of remuneration.

The National High Court also observes that according to the Spanish Supreme Court, the above legislation merely requires that a record of *overtime* hours is kept, except where there is an agreement to the contrary.

The National High Court has doubts as to whether the interpretation of Article 35 of the Workers' Statute is consistent with EU law. It considers that, according to a survey, 53.7% of overtime performed had not been recorded. In addition, to determine whether overtime was performed, it was necessary to know the precise number of normal hours completed. According to the National High Court, Spanish law was not capable of ensuring effective compliance with obligations laid down in EU directive 2003/88 regarding minimum rest periods and maximum weekly working time, nor regarding the rights of workers' representatives.

Consequently, the Spanish court filed three prejudicial questions with the CJEU, essentially to ask whether EU law precludes Member State legislation that, according to the interpretation given to it by national case-law, does not require employers to set up a system to measure time performed each day by each worker.

The judgment

According to the CJEU, Member States are required under European Directive 2003/88 to take necessary measures to ensure that every worker is entitled to a minimum daily and weekly rest period and prevent the maximum weekly working time from being exceeded. While Member States enjoy a discretion for that purpose, it remains the case that they are required to ensure that the effectiveness of those rights is guaranteed in full.

The worker must be regarded as the weaker party in the employment relationship, and the worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker. It must be observed that in the absence of a system enabling the duration of time worked each day by each worker to be measured, it is not possible to determine objectively and reliably 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, it appears to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them by the Charter and by Directive 2003/88.

Given that Member States must take all measures necessary to ensure that minimum rest periods are observed and maximum weekly working time is not exceeded, so as to guarantee the full effectiveness of the Directive, **a national law which does not provide for an obligation to have recourse to an instrument that enables the objective and reliable determination of the number of hours worked each day and each week is not capable of guaranteeing the effectiveness of the rights conferred by the Charter and by the Directive**.

What is the impact for Belgium?

Belgian employment legislation does not provide for a general obligation to use a working time registration system. A time recording system is only compulsory for companies operating with flexible working schedules (whereby an employee can choose when to start and stop working, and when to take breaks) or, when a part-time employee performs work outside the planned part-time working schedule (and the employer does not use a written register in which the deviations from the planned working time schedule are noted).

Aside from these exceptions, an employer must only follow specific overtime procedures to lawfully allow its personnel to exceed the normally applicable working schedule. These procedures however, do not include a system that registers deviations from working schedules. This means that even when the employer observes applicable overtime procedures, the number of hours performed outside the working schedules, when the employee effectively started and stopped or took a rest period, remains to be determined.

In these circumstances, it is questionable whether Belgian employment legislation would meet the CJEU's requirements, which seem far more demanding in protecting employee rights established by EU laws.

Immediate impact?

It is difficult to predict the impact this CJEU judgment will have on Belgium.

Firstly, it is each Member State's responsibility to guarantee that minimum rest periods are observed and to prevent maximum weekly working time from being exceeded.

To the extent that Belgian employment legislation would not foresee the minimum required protection, which seems likely considering the Spanish case, Belgium may be required to extend the obligation to use a time recording system.

Choosing the ways and means of implementing that obligation, and defining the practical arrangements that will enable the monitoring of compliance with rules on limits on working time, remains, however, at Belgium's discretion. Due to currently available technology, a wide range of systems for recording working time is available (paper records, computer systems, electronic access cards, etc.) and different systems may be used depending on the characteristics and requirements of individual undertakings.

Although EU-directives are not directly applicable, the CJEU has ruled that certain provisions of a directive may exceptionally have direct effects in a Member State, even if it has not yet adopted a transposing act in cases where: (a) the directive has not been transposed into national law or has been transposed incorrectly; (b) the directive provisions are imperative, sufficiently clear and precise; and (c) the directive provisions establish rights for individuals.

If these conditions have been met, employees could invoke the provisions in question in their dealings with public authorities. On the other hand, an employee could not rely on the direct effect of an un-transposed directive in dealings with other individuals (the 'horizontal effect'). At this moment therefore, employees cannot invoke the Directive 2003/88 to request that the (private) employer installs a time recording system.

Advocate-General Pitruzella considered, however, that employees might be able to invoke Article 31(2) of the Charter, according to which every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. The CJEU has already held, with reference to the right to annual leave, that Article 31(2) of the Charter can have direct effect in horizontal relations between individuals.

Preliminary conclusions

It is up to the Government to evaluate whether legislative changes are required.

In any case, while there is a general call for increased flexibility – from both employers and employees – which is already (partially) addressed by the Peeters Act of 5 March 2017, the CJEU clearly mandates that such flexibility should go along with closely monitoring working time to prevent employees' fundamental rights from being adversely affected.

The Employment, pensions and benefits-team remains readily available to assist with working time rules in Belgium, and will closely monitor developments on the CJEU judgment's consequences.

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