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WORKING TIME

PERIODS OF INACTIVITY QUALIFY AS WORKING TIME IF THE EMPLOYEE REMAINS PHYSICALLY PRESENT AT THE PLACE DETERMINED BY THE EMPLOYER

(European Union Court of Justice ("ECJ") ruling of 26 July 2017[1])

In this recent ruling, the facts under analysis may be summarised as follows:

- A Finnish child protection association, provided accommodation for children in care.
- The personnel at the children's villages consisted of a director, 'foster parents', 'relief parents' and other professionals. The children's houses were home to the children in care, each housing three to six children and one or two 'foster parents' (or 'relief parents' when the 'foster parents' were absent).
- The appellants in the main proceedings were employed as 'relief parents', thus relieving the 'foster parents' while the latter were absent. They lived with the children and attended singlehandedly to that house. They also did the shopping and accompanied the children on trips outside.

Under this ruling, the appellants brought an action before Finnish courts seeking: an order for a **compensation payment in respect of overtime and work at night and on weekends**. Specifically, the ECJ had to assess whether Article 17(1) of Directive 2003/88/EC of the European Parliament and of the

[1] Case C-175/16, Hannele Hälvä, Sari Naukkarinen, Pirjo Paajanen, Satu Piik v. SOS-Lapsikylä ry, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=193217&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=986136 (English version).

Council of 4 November 2003 concerning certain aspects of the organisation of working time was applicable to the case. This provision states that:

> '*With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:*
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> *(a) Managing executives or other persons with autonomous decision-taking powers;*
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> *(b) Family workers; or*
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> *(c) Workers officiating at religious ceremonies in churches and religious communities'*[2].

It was, therefore, under scrutiny whether this provision should be interpreted as meaning that it could also apply to paid employment, which consisted in looking after children in a family environment, relieving the person principally responsible for such care.

The ECJ stated firstly that any period during which the employee **was at work, at the employer's disposal and carrying out his/her activity or duties had to be 'working time'** within the meaning of Article 2(1) of Directive 2003/88.

Secondly, the ECJ concluded that the **periods of inactivity** within the 24-hour periods during which the 'relief parent' oversaw the children's home **were considered part of the performance of that employee's duties and were working hours since the 'relief parent' was required to be physically present at the place determined by the employer and to be available to the employer to provide the appropriate services immediately in case of need**.

Since these periods of inactivity were considered part of the working time of 'relief parents', the option they had to determine **when these periods began and ended** should not be equivalent to the opportunity for the employees to freely determine when their working time began and ended.

Moreover, the ECJ concluded that the derogation laid down in Article 17(1) of Directive 2003/88 had to be interpreted **restrictively** to what was strictly necessary to safeguard the interests whose protection the derogation permitted. Therefore, considering the specific characteristics of the activity

[2] Our emphasis.

under assessment, the Court ruled that the working time of the 'relief parents' was not measured or predetermined by the 'relief parent' himself/herself. In fact, the ECJ stated that this finding was not even called into question by the fact that, in the periods during which the 'relief parents' were responsible for running a children's home, **they had a certain degree of autonomy in the organisation of their time and, more specifically, in the organisation of their daily duties, their movements and their periods of inactivity**, without there appearing to be any supervision by their employer.

Attention should be paid to the fact that the Court **stated that the difficulties that an employer may face, regarding the supervision of the daily exercise of the activities of its employees are not, in general, sufficient for a finding that their working time as a whole is not measured or predetermined, since the employer stipulates in advance both the beginning and the end of the working time**.

Given that working time raises increasingly topical questions, this decision is also an important instrument to construe Portuguese Labour Law accordingly.

Rita Canas da Silva
rcs@servulo.com

Rua Garrett, n.º 64 1200-204 Lisboa - Portugal Tel: (+351) 21 093 30 00 Fax: (+351) 21 093 30 01/02
geral@servulo.com www.servulo.com