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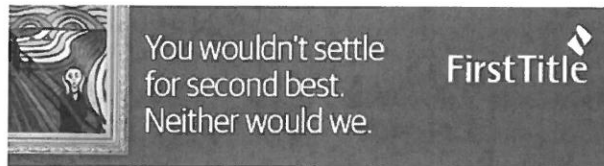


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Richard Grogan on employment law: What is working time and what is rest periods?

Employment law solicitor *Richard Grogan* of *Richard Grogan & Associates* writes on the *Organisation of Working Time Act*.

Case C-518/15 being a case of Ville De Nivelles and Matzak is a judgement of the European Court of Justice which issued on 21st February 2018.



Richard Grogan

The case dealt with the issue of fire personnel. They were required to reside in a place so as not to exceed a maximum of 8 minutes to reach the appropriate fire station. They were required to remain at all times within a distance of the fire station so that the period necessary to reach it when traffic is running normally does not exceed a maximum of 8 minutes.

The issue in this case was what was working time and what was a rest period. The Court helpfully pointed out the issue as to who is a worker. The Court pointed out the case of *Union Syndicale Solidaires Iserre* being case C-428-09 and in particular paragraph 8 that in accordance with settled case law on the matter any person who pursues real genuine activities with the exception of activities on such a small scale as to be regarded as purely marginal or ancillary must be regarded as a worker. The Court pointed out that the defining feature of an employment relationship resides in the fact that for a certain period of time a person performs for and under the direction of another person services in return for which he/she received remuneration. The Court referred to Case C-316/13.

Importantly the Court pointed out that the legal nature of an employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of EU law and referred to cases C-116-06.

The Court pointed out that while the relevant employee did not have the status of a professional fire fighter but was that of a voluntary fire fighter this was irrelevant for his classification as a worker within the meaning of Directive 2003/88.

The Court pointed out that the first issue was whether under Article 17 of Directive 2003/88 it was whether it was possible for a Member State to

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derogate with regard to certain categories of fire fighters recruited by the public fire service.

The Court pointed out that a Member State may derogate from articles 3-6 and 8-16 of the Directive but the wording of Article 17 of the Directive does not allow derogation from Article 2 which defines the main concepts contained in the Directive. The Court pointed out that any derogations under national law must be strictly limited to what is strictly necessary to safe guard the interests which those derogations enable to be protected.

The Court pointed out that in relation to the definition of working time within the meaning of Article 2 of Directive 2003/88 national legislation provisions may provide for more favourable treatment to workers than those laid down in the Directive but cannot amend the definition of working time to be less favourable and cannot apply legislation which is more restrictive.

In relation to the issue of rest periods the Court in their decision set out a considerable amount of case law but effectively held that under Article 2 of the Directive it must be interpreted as meaning that stand by time which a worker spends at home with a duty to respond to calls from his employer within 8 minutes very significantly restricts the opportunity for other activities and must be regarded as working time.

This case dealt with a situation where the employee had to be in a particular place and had to be able to get to the fire station within 8 minutes. The case is interesting in that as part of the decision the Court held that the situation is different where a worker performs a stand by duty according to a standby system which requires that that the worker be permanently accessible without being required to be present at the place of work. The Court pointed out that even if an employee is at the disposal of an employer since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances only time linked to the actual provision of services would be regarded as working time. This case therefore effectively determines that where you have a simple on call provision then that will not be working time. However, if the employee has to be available to get to the place of employment or as directed by the employer within a certain period of time then the issue becomes more difficult. Certainly if it is within 8 minutes it is clearly working time all the time that the employee is on standby. The issue is whether it is 10, 15 or 30 minutes what is the cut off time. That is going to be an issue which will probably have to be addressed in later decisions. It would however in our opinion be hard to limit the application of this case to only situations where the employee had to get there within 8 minutes.

There are some important issues which come out which favour employers in this case and that is that the issue of working time has no relevance to the issue of payment. Therefore the fact that an employee is on standby does not under this particular Directive require that the employee is paid. Under Irish law if however the time is treated as working time then the employee may well be able to claim under the National Minimum Wage Act.

This case is extremely important.

When this case is looked at in association with the TYCO case it indicates how the European Court of Justice is interpreting the relevant Directive. In the TYCO case the Court held that time spent travelling from home to a place designated by the employer was working time.

These decisions have significant impact on some employers.

We can see it particularly as regards those in the security industry that this decision is going to be extremely important. There will be some businesses

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which because of the way they operate various employees will have to be on call and again these are cases which may well have a significant impact for certain businesses.

Employers are going to seriously need to review issues concerning on call time of such workers.

- *Richard Grogan is the principal solicitor at Richard Grogan & Associates Solicitors. You can subscribe to the firm's monthly newsletter at rogansolicitors.ie.*

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