

WHAT COUNTS TOWARDS 'WORKING TIME'?

Further guidance, transposable to Luxembourg, can be found in a 19 December 2019 sentence rendered by the French Conseil d'Etat (req. n° 426031)¹ and a 20 January 2020 appeal sentence rendered by the Brussels Labor Court (docket n° 2012/AB/592)², which both build on European law.

The Conseil d'Etat recalled that according to the European Court of Justice (21 February 2018, case C-518/15, *Ville de Nivelles v. Rudy Matzak*)³, guard time spent by an employee at home while being required to answer calls by his or her employer within an 8-minute timeframe, constitutes working time, as the employee has only limited possibilities to pursue other activities during said time. This notably applies to periods of time during which firefighters are on duty and are required, even though they are at home, to be constantly prepared to intervene.

Consequently, in the case submitted to the Conseil d'Etat, the guard periods provided by a French departmental fire service's internal regulation, which required firefighters to be reachable at all times during their guard and available to intervene, fully equipped, within 3 minutes, qualified as working time.

The Brussels Labor Court, in turn, drew the consequences from the European Court of Justice's response (of 21 February 2018, pre-cited) to the preliminary questions it had submitted as regards another voluntary firefighter. The Brussels Labor Court thus recalled that guard time spent at home, but under the obligation to answer to the employer within 8 minutes (so that the pursuit of other activities is significantly impeded) is to be considered working time. The Brussels Labor Court further pointed out that in the case at hand, the voluntary firefighters' availability was subject to checks by the fire service of the town of Nivelles and had led, occasionally, to disciplinary sanctions. The employee's availability to answer requests by the employer, as well as the limitation of the employee's freedom to pursue other activities, are also the criteria applied by the Luxembourg courts to determine what counts towards

¹ https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=0A239069188A50F40220D72576FF3555.tplqfr22s_3?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000039648646&fastReqId=383888193&fastPos=26.

² https://www.rechtbanken-tribunaux.be/sites/default/files/ah_brussel/files/2012%20ab%2000592%20%20arret%20final%20ANONYMISE.pdf

³ <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A62015CJ0518>

effective working time (see notably Court of Appeal, 28 February 2019, docket n° CAL-2018-00155)⁴.

Working time' certainly includes the time during which an employee is present at his or her place of work, as defined by the employment contract, and performs the role and tasks as are also defined by the employment contract, while being available to answer the employer's instructions and requests. However, what about periods of time during which the employee is not physically present in the employer's premises, but is nevertheless required to answer requests by the employer and/or attend to certain tasks within a reasonably short timeframe?

These questions are increasingly relevant for notably service firms, including tech companies, which need to attend to customer requests and/or technical issues after-hours and on non-working days.

What counts towards 'working time' will also be relevant in instances where an employee spends time in transit while attending a location directed by his or her employer, such as time spent travelling in order to attend an overseas event selected by the employer.

Under Luxembourg law, whether like periods of time count towards 'working time' potentially entails consequences in terms of overtime, prohibition of Sunday work and salary increases for work on a public holiday. An employer may be required to notify or inform the Luxembourg labor authorities, and observe specific documentation requirements in a register dedicated to working time.

Employers also need to observe a maximum daily and weekly work duration of 10 hours a day and 48 hours a week (to which there are limited exceptions only), and most of the Luxembourg Labor Code's provisions on working time are criminally sanctioned.

European law has its own definition of 'working time' and 'rest periods' (via article 2 of 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) and the European Court of Justice considers these to be autonomous concepts of European law, not to be interpreted by the Member States in accordance with their own regulations.

In its case law, the European Court of Justice has addressed the guard periods of medical staff and of emergency services such as firefighters, as well as transit time between an employee's domicile and client sites. Further guidance (on journeys in between appointments during the working day, irregular journeys to a different workplace or journeys from or to the workplace) has been provided by the European Commission⁵.

⁴ https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/03_Chambre/2019/20190228_CAL-2018-00155_22_ARRET_a-accessible.pdf

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017XC0524%2801%29>

When trying individual claims to have guard periods, stand-by time or time 'in-between' work tasks recognized as working time, the national courts, including the Luxembourg courts (see notably Court of Appeal, 28 February 2019, pre-cited), therefore rely on the European case law and guidance.

CONTACTS



Albert Moro
Partner

T +352 485 050 204

E albert.moro@
cliffordchance.com



Isabelle Comhaire
Counsel

T +352 485 050 402

E isabelle.comhaire@
cliffordchance.com



Ada Schmitt
Senior Associate

T +352 485 050 435

E ada.schmitt@
cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 boulevard G.D. Charlotte,
B.P. 1147, L-1011 Luxembourg, Grand-Duché
de Luxembourg

© Clifford Chance 2020

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Dubai •
Düsseldorf • Frankfurt • Hong Kong • Istanbul •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • Newcastle • New York •
Paris • Perth • Prague • Rome • São Paulo •
Seoul • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement
with Abuhimed Alsheikh Alhagbani Law Firm
in Riyadh.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.