

Stand by for new rules on shift pay

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The ECJ has once again shaken up rules on working time in a recent employment case on stand by shifts.

Previously, on call or stand by shifts would count as working time only if the employee was required to stay in a location specified by the employer. However, the new ECJ case says that the key factor should be the quality of time that the employee is able to spend while on stand by.

If a worker's freedom to enjoy non-work activities is severely impacted by the constraints involved in being on stand-by, then that will be working time and must be paid.

The facts of the case give a good illustration of the difference in the old and new tests. Mr Matzak was a firefighter working for the Ville de Nivelles in Belgium. He was required to be on stand-by for one week in every four during evenings and weekends. During time spent on stand-by, Mr Matzak was required to remain contactable and, if requested, report to the fire station within no more than 8 minutes. While there was no specific geographical constraint, in practice, the rules meant that Mr Matzak's activities on stand by were significantly restricted. In particular, it meant that he had to live very close to the fire station and his actions at home whilst on stand-by were limited. The ECJ confirmed that in the degree of restriction meant that the time qualified as working time and must be paid,

This case did not set out a general test as to when a worker's time will be "significantly restricted" by requirements placed on them during periods on stand-by. The broad point of principle established will open the door for arguments on other circumstances that qualify, just as it has done for other aspects of working time, like holiday pay. Employers who impose restrictions that are comparable in their impact will need to consider whether to pre-emptively change their payment policy for on call time or to take a wait and see approach until domestic case law develops and gives a clearer picture of the boundaries. They may get lucky as the UK government's long term opposition to aspects of the European working time law framework could mean that this area will be changed after Brexit. In any event, employers with on call time will want to monitor the position closely.

Ville de Nivelles v Matzak (C-518/15)

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