

The position of volunteers in EU-working time law

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European Labour Law Journal

2019, Vol. 10(4) 362–369

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DOI: 10.1177/2031952519886150

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One aspect also addressed in the *Matzak* case is the personal scope of the Working Time Directive 2003/88 (WTD), as Mr Matzak is a ‘volunteer firefighter’ and it is not clear if such persons are covered by this piece of EU legislation. This article will therefore first explore the notion of ‘volunteer’ and then examine under what circumstances volunteers are to be considered workers for the purpose of the WTD. It will become evident that the element of remuneration/pay has a special relevance in this context although this is not really in line with the health and safety purpose of the WTD. A purposive approach of defining the personal scope of application of the WTD might lead to more suitable results.

Keywords

Working time directive 2003/88, volunteer, worker, remuneration.

1. Who is a volunteer?

The Oxford English Dictionary¹ provides two definitions for volunteers with an emphasis on different aspects: firstly, a volunteer is defined as a ‘*person who freely offers to take part in an enterprise or undertake a task*’, and secondly as ‘*a person who works for an organization without being paid*’. The word originates from the French ‘*volontaire*’ and has a military reference: volunteer soldiers as opposed to those who have been conscripted.

The original meaning, therefore, emphasises the individual’s free will and his/her choice in carrying out a task. The second aspect seems to have been added later but has now become significant to the understanding of this notion.

1. <https://en.oxforddictionaries.com/definition/volunteer> (15.4.2019).

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Both aspects are usually referred to when we speak of volunteers. This is well reflected in a booklet by the International Federation of Red Cross and Red Crescent Societies, the Inter-Parliamentary Union and United Nations Volunteers on *'Volunteerism and Legislation – a Guidance Note'*:²

'First, voluntary activity is not undertaken primarily for financial reward, although reimbursement of expenses and some token payment may be allowed and even recommendable to facilitate access of individuals from all economic backgrounds. Second, it is undertaken voluntarily, according to an individual's own free will. Third, voluntary activity brings benefits to people other than the volunteer, although it is recognised that volunteering brings significant benefit to volunteers as well.'³

The motivation for volunteer work (mutual aid, philanthropy, civic engagement), therefore, usually differs from that of paid employment, which is usually performed to earn a living.

On the other hand, unpaid voluntary work often shares very similar characteristics with paid work or employment: it is productive, valuable and contributes to the economy. The focus is therefore often on the fact that volunteer work is not paid and the law occasionally defines what type of compensation volunteers may receive without being subjected to the general labour law system and viewed as 'employees'. This usually entails reimbursement of out-of-pocket expenses related to voluntary activities or the board and lodging of volunteers provided in the course of their work. The lack of remuneration, as well as the varying motivations to perform volunteer work often justify exemption from general labour and employment regulations. On the other hand, the integration of volunteers into someone else's organisation and the subordination under his/her direction may not explain why the 'employer' does not have to provide a safe and discrimination-free workplace or observe working time legislation. I will get back to this issue later.

2. The relevant passages in the decision

If we look at the CJEU decision in the *Matzak* case,⁴ we immediately note that the terminology—or rather the translation of the French wording of the relevant Belgian legislation — differs in the Opinion of Advocate General Sharpston and in the Court's decision itself.

In the Advocate General's Opinion, the notion *'les volontaires des services publics d'incendie'* in the Belgian Act provides that, *inter alia* this group, does not fall under the definition of workers translated as *'retained firefighters'*, while in the CJEU decision the term *'volunteers in the public fire services'* is used. This reveals that the concept of volunteerism and how it is to be defined is obviously not that clear, especially considering that Advocate General Sharpston uses the wording *'retained firefighters'* as opposed to *'professional firefighters'* and *'volunteer firefighters'*. This in my view is also reflected in the Court's reasoning, answering (or rather gracefully avoiding) the question of if and under which circumstances volunteers are to be considered 'workers'.

Not surprisingly, the CJEU (para. 29) starts by reminding us that for the purposes of the application of Directive 2003/88 (as well as for other Directives), the concept of worker may not

2. Available online Online in English, Spanish and Arab at <https://www.ipu.org/resources/publications/handbooks/2016-07/volunteerism-and-legislation-guidance-note> (15.4.2019).

3. International Federation of Red Cross/ Red Crescent Societies/ Inter-Parliamentary Union/ United Nations Volunteers, *Volunteerism and Legislation – a Guidance Note* (2004) 8.

4. CJEU C-518/15, *Matzak*.

be interpreted differently in the laws of the Member States, as the term has an autonomous meaning that is specific to EU law.⁵ According to well-established case law, any person who pursues real, genuine activities—with the exception of activities on such a small scale as to be regarded as purely marginal and ancillary—must be regarded as a ‘worker’. The CJEU applies the concept of ‘worker’ as developed in the landmark case *Lawrie Blum* although it does not directly refer to this decision but to the *Fenoll* case.⁶ According to that case, the main feature of an employment relationship resides in the fact that a person performs services for and under the direction of another person for a certain period of time in exchange for remuneration.

The Court points out that the legal nature of an employment relationship under national law cannot have any consequence as to whether or not the person is a worker for the purposes of EU law.⁷ Thus, the fact that under national law, Mr Matzak was not considered a professional firefighter but a volunteer firefighter is irrelevant for his classification as a ‘worker’ within the meaning of the WTD.⁸

A very interesting but very brief part of the decision on the classification of volunteers is only then mentioned in paragraph 31:

‘Having regard to the foregoing, it must be held that a person in Mr Matzak’s circumstances must be classified as a “worker”, within the meaning of Directive 2003/88, in so far as it appears from the information available to the Court that he was **integrated into the Nivelles fire service** where he **pursued real, genuine activities under the direction of another person for which he received remuneration**; it is for the referring court to verify whether that is the case.’ (emphasis added)

The main statement of the decision is, therefore—not very surprisingly—that if the criteria of the European concept of ‘worker’ are met,⁹ the person falls within the scope of application of the WTD.

If we take a look at the Opinion of Advocate General Sharpston,¹⁰ we find more indications on what factors might be relevant for answering the question under what circumstances volunteer firefighters (or in fact any volunteers) are to be classified as ‘workers’ for the purposes of the WTD. Advocate General Sharpston—in my view correctly—detects that the criterion of ‘remuneration’ (or ‘pay’) might be problematic in this context, and argues in favour of a broader understanding of the term. She points out that some guidance may be drawn from the terms specified in Article 157 (2) TFEU (in the context of equal pay), which defines ‘pay’ by reference to sums ‘... which the worker receives directly or indirectly in respect of his employment, from his employer’. In a rather lengthy footnote, two decisions concerning the equal treatment of part-time workers are also referred to, which make use of a broad understanding of ‘remuneration’, including (company) retirement pensions and a dependent child allowance.¹¹

5. Here the CJEU refers to the decision of EuGH C-428/09, *Union syndicale Solidaires Isère vs Premier ministre*, where the court for the first time defines the notion of worker concerning the WTD.

6. CJEU C 316/13, *Fenoll*, para. 27 and the jurisprudence cited.

7. CJEU *Matzak*, para. 29 referring to CJEU C-116/06, *Kiiski*, para. 26 and the jurisprudence cited.

8. CJEU *Matzak*, para 30.

9. Cf. on the concept of ‘worker’ in EU-law in general Risak/Dullinger, The concept of ‘worker’ in EU law – Status quo and the potential for change (2018); Kountouris, The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope, *Industrial Law Journal* 2018, pp. 192 et seqq.

10. Opinion of AG Sharpston of 26.7.2017, *Ville de Nivelles/Rudy Matzak*, ECLI: EU: C:2017:619, para. 24.

11. CJEU C-395/08 and C-396/08, *Bruno and Others*, para. 46; C-476/12, *ÖGB*, para. 16.

Advocate General Sharpston observes that there is no suggestion in the order for reference that firefighters in Mr Matzak's category do not pursue a real and genuine activity and that they are not 'under the direction of another person' in the form of the fire service. If the latter is to operate effectively, all members of the firefighting team (be they professional firefighters, retained firefighters or volunteer firefighters) must clearly work under the direction and follow the orders given by the employer, including making themselves available for active service on a rotational basis. As regards the question whether the amounts Mr Matzak received in return for his services constitute 'remuneration' or 'pay', the Advocate General points out that apart from the (relatively unfocused) submissions of the Belgian government, the Court was provided with little information about the specific arrangements that regulated the position in that Member State (Belgium) and it is thus not possible to comment further.

3. Analysis of the decision

If we take into account the reflections of Advocate General Sharpston, the decision definitely makes sense in the light of the CJEU's long-standing jurisprudence, which applies a general concept of 'worker' to all EU labour law regulations.¹² The CJEU has had a tendency for some time now to unify the concept of 'worker', not only in primary law, but also in secondary law. This is the case with those Directives that explicitly refer to a national understanding. This in my opinion is a welcome development, as it prevents Member States from circumventing EU legislation by narrowing the personal scope of application of those national laws that transpose them.¹³

Decades ago, the CJEU held that the nature of the relationship between the person performing work and the person benefitting from the work does not have consequences for the definition of worker in EU law. Therefore, the national qualification of the person performing work as a civil servant¹⁴ or a self-employed person¹⁵ is irrelevant. It is also irrelevant that the relationship is considered *sui generis* in national law.¹⁶ The CJEU similarly stated that it was irrelevant that a person, whilst being linked to an undertaking by an employment relationship, is linked to the other workers of that undertaking by a relationship of association.¹⁷

If we take a closer look at the definition of 'worker', the following elements are of relevance in the context of volunteers (and have been at least touched upon by Advocate General Sharpston):

- *Real and genuine activity.* The criterion that requires the activities to be effective and genuine finds its origin in the fact that the rules on the free movement of workers (the concept of worker was developed in this context) only guarantee the free movement of those persons who pursue, or have the desire to pursue, an economic activity.¹⁸ If we analyse the jurisprudence of the CJEU, the most important group of cases for this criterion concern the extent of an activity. According to case law, the fact that a person only works for a very

12. Cf. Risak/Dullinger, The concept of 'worker' in EU law, p. 40.

13. Cf. recital 8 of the Directive on Transparent and Predictable Working Conditions in the European Union (not published yet).

14. CJEU 66/85, *Lawrie-Blum*.

15. CJEU C-256/01, *Allonby*, para. 71.

16. CJEU C-316/13, *Fenoll*, para. 30; *Danosa*, C-232/09, EU: C:2010:674, para. 40.

17. CJEU C 22/98, *Becu and Others*, para. 28; C-179/90, *Merci*, para. 13.

18. Cf. Risak/Dullinger, The concept of 'worker' in EU law, pp. 27 et seq., 48.

limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary.¹⁹ However, the fact remains that regardless of the limited amount of remuneration and the number of hours of the activity in question, the possibility cannot be ruled out that following an overall assessment of the employment relationship in question, that activity may be considered to be real and genuine by the national authorities, thereby allowing its holder to be granted the status of ‘worker’ within the meaning of Article 39 EC (now Article 45 TFEU).²⁰ The second important group of cases in which this criterion is relevant consists of cases concerning activities that involve social considerations²¹ or traineeships/vocational training.²² It can be said that this criterion is only applied very restrictively and has not yet resulted in the exclusion of any person from the concept of worker. It is therefore not surprising that Mr Matzak’s activity as a volunteer firefighter, which required him to be on call for one week out of every four weeks during the week and at the weekend, was considered to be a real and genuine activity.

- Another argument that this is a ‘real and genuine’ activity is the character of the activity itself – it is an activity that according to the applicable regulations²³ can obviously either be performed by professional or volunteer staff. As far as the content of the activity and the way it is provided is concerned, both groups of firefighters are the same. It therefore stands to reason that the fact that one activity is paid and the other is not does not change its character as a ‘real and genuine’ activity within the scope of the regulation of working time.
- The judgment in the *Betray*²⁴ case concerning a former drug addict who carried out activities merely as a means of rehabilitation or reintegration indicates that the motivation behind an employment relationship may be of relevance. The CJEU on this basis alone rejected the qualification of the individual as a worker for the purposes of EU law (in the case at hand, for being covered by the freedom of movement of workers). Aside from the different purposes pursued by this fundamental freedom and the WTD, the *Betray* case and the *Matzak* case differ in another significant aspect: the nature of the activities themselves, i.e. the fact that Mr Matzak’s activity was provided in the interest of the town of Nivelles while that of Mr Betray was determined by the needs of the person working and ‘adapted to the physical and mental possibilities of each person’.²⁵
- *Working under the direction of another person* (subordination or—in the German terminology—personal dependency). As Advocate General Sharpston pointed out, for a fire service to function effectively, all members of the firefighting team (be they professional firefighters, retained firefighters or volunteer firefighters) must clearly work under the direction and follow the orders given by the employer, including making themselves available for active service on a rotational basis. Therefore, the specific characteristics of the activity concerned (being part of a fire service) presuppose subordination or, in other words, it is immanent in a fire service that firefighters work under the direction of another person.

19. EuGH C-357/89, *Raulin*, para. 14.

20. EuGH C-14/09, *Genc*, para. 26; C-432/14, *O*, para. 24.

21. EuGH 344/87, *Betray*, para. 5, 13 et seq.; C-456/02, *Trojani*, para. 9; C-316/12, *Fenoll*, para. 35.

22. EuGH, C-3/90, *Bernini*, para. 16; C-27/91, *URSSAF*, para. 7 et seqq.; C-188/00, *Kurz*; C-109/04, *Kranemann*, para. 12 et seq.; C-10/05, *Mattepara*, para. 19 ff.

23. CJEU C- 518/15, *Matzak*, para. 11.

24. CJEU C-344/87, *Betray*.

25. CJEU *Betray*, para. 17.

- *Pay*. As pointed out in the beginning of this paper, the concept of volunteering is construed as work without pay and this element therefore proves to be the most problematic one in the case at hand. It gets even more complicated when taking into account that volunteer work is occasionally compensated either by reimbursement of expenses or a form of token payment, and it may be questionable whether this is to be considered ‘pay’ for the purpose of classification. The element of pay was seen as relevant by both the CJEU as well as the Advocate General, but left unresolved as both pointed out that not enough information was available to undertake the necessary evaluation of qualification. I will therefore briefly lay out the jurisprudence of the CJEU concerning the criterion of pay when defining the notion of ‘worker’.

4. The relevance of the element of ‘remuneration’ or ‘pay’

According to long-standing case law of the CJEU in the context of Article 45 TFEU, it is an essential element of every employment relationship that the worker receives remuneration in return for his/her activities. This requirement has its origin in the fact that the rules on the free movement of workers only guarantee the free movement of persons who pursue an economic activity.²⁶

The CJEU has had to assess different constellations and, interestingly, to the best of my knowledge, has never negated the qualification of an employment relationship based on the requirement of remuneration only. For example, the Court has stated that the fact that a person engaged in part-time work earns less than a person employed full-time is irrelevant.²⁷ It is also irrelevant that the remuneration is below the level of the minimum means of subsistence²⁸ and that the person is seeking to supplement it through other lawful means of subsistence.²⁹ Even the fact that the remuneration is substantially lower than the guaranteed minimum wage cannot be taken into account.³⁰

Moreover, the sole fact that a person is paid a ‘share’ and that the remuneration may be calculated on a collective basis does not deprive that person of the status of worker.³¹ It is also irrelevant that the remuneration mostly consists of benefits-in-kind (and only some pocket money), as long as these benefits constitute consideration for the services performed.³²

It has been pointed out that the origin of the funds from which the remuneration is paid is irrelevant, even if the remuneration is largely provided by subsidies from public funds due to the fact that the person’s productivity is low.³³ Furthermore, it is not necessary for the remuneration to be paid directly by the contractual partner.³⁴

It is even possible to assume the existence of an employment relationship if a community (in this case, the Bhagwan Community) provides for the material needs of its members (and pays some pocket money) in any event, irrespective of the nature and the extent of their activities, if this work

26. Cf. Risak/Dullinger, *The concept of ‘worker’ in EU law*, pp. 37 et seqq.

27. CJEU *Lawrie-Blum*, para. 21.

28. CJEU C-317/93, *Nolte*, para. 19.

29. CJEU 139/85, *Kempf*, para. 14; C-22/08, *Vatsouras/Koupatantze*, para. 28.

30. CJEU C-316/13, *Fenoll*, para. 33.

31. CJEU C-3/87, *Agegate*, para. 36.

32. CJEU C-456/02, *Trojani*, para. 22.

33. CJEU *Bettray*, para. 15.

34. CJEU *Balkaya*, paras. 22, 49 and 51.

constitutes an essential part of participation in that community, because the services that the community provides to its members may be regarded as being an indirect *quid pro quo* for their work.³⁵

In the case of volunteers, they are sometimes paid some form of compensation such as reimbursements of out-of-pocket expenses related to their voluntary activities, for example, for a drive to the fire station or for washing a uniform at home. In the light of the jurisprudence, I would not consider this as relevant ‘pay’, as this is not paid as a consideration for the service that is delivered but to compensate the volunteer for expenses he/she would not have if he/she were not volunteering. I would therefore not consider such volunteers as ‘workers’, provided that the issue of pay is to be considered of decisive relevance (for a critique, see Chapter 5).

The situation would definitely be different if volunteers were paid ‘compensation’ for the work they actually deliver, like a flat rate for a shift or hourly amount for actual hours worked (e.g. for firefighting operations). In the light of the mentioned jurisprudence, it is very likely that the CJEU in its broad understating of pay would consider such compensation ‘pay’, as it is directly linked to the work a volunteer performs and therefore a *quid pro quo* for that work. As the notion of ‘worker’ is autonomous, the same applies to the element of ‘pay’ – a Member State cannot for the purpose of applying EU legislation define amounts paid to a worker as something else like an ‘allowance’ and thereby—for the lack of pay—deprive the worker of the protection he/she would otherwise have.

This is very much in line with the judgment of the CJEU in the *Ruhrlandklinik* case,³⁶ in which the Court ruled that the national classification of a person fulfilling all criteria of the European concept of employee according to the *Lawrie-Blum* formula may not jeopardise the attainment of the objectives of EU legislation and, therefore, undermine the effectiveness of a directive by inordinately and unjustifiably restricting the scope of a Directive. The same applies for the WTD and its scope which may not be restricted by a Member State asserting that a certain amount of money paid to a volunteer is not to be considered pay and therefore, the volunteer must not be qualified as a worker.

5. Towards a purposive approach of defining the personal scope of application of the WTD

It must be stressed that the autonomous notion of worker in EU law was developed within the context of the free movement of workers,³⁷ as laid down in Article 45 TFEU, and that the aim of this provision in safeguarding one of the fundamental economic freedoms of EU citizens is of course different from that of a Directive that primarily protects health and safety, like the WTD.³⁸ Some elements developed in the context of Article 45 TFEU may be of less importance for working time if one undertakes a purposive approach.³⁹ Does it actually make a difference from the perspective of health and safety whether a person working under the direction of another person receives remuneration or not? In my view, it is questionable whether volunteers are not in need of working time regulation in the sense of a prohibition to work beyond a certain number of hours. In my view, the concept of working time itself is based on the idea that this is time during which the

35. CJEU 196/87, *Steymann*, paras. 4, 11 and 12.

36. CJEU C-216/15, *Ruhrlandklinik*, para. 36 et seq.

37. Kountouris, ILJ 2018, p. 198.

38. Risak/Dullinger, The concept of ‘worker’ in EU law, p. 45.

39. Cf. Davidov, A purposive approach to labour law (2016).

person has surrendered autonomy and is not free to determine his/her behaviour during this period. For this purpose it is not relevant why a person works or how much pay he/she receives since only the fact of working under the direction of another person and not autonomously is of relevance when it comes to the regulation of working time. As pointed out above, this purposive approach places less emphasis on the criteria of 'real and genuine activity' and on 'pay', but considers the element of restricted autonomy to be of crucial importance. If volunteers, therefore, work in subordination and their autonomy over how they use the time they volunteer is significantly restricted like in the case of Mr Matzak, who had to be at the fire station within eight minutes, they are to be qualified as 'workers' for the purpose of the WTD.

This result is further underlined by the exception for unmeasured working time in Article 17 para. 1 WTD. Member States may derogate from the provisions on in-work rest breaks, daily and weekly rest periods as well as from the limitation of weekly working time if 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. Persons who are definitely workers are therefore excluded because of their working time autonomy on account of the specific characteristics of the activity. *E contrario* it can be argued that persons who have no autonomy as regards working time due to the specific characteristics of their activity must fall under the scope of protection of the WTD, as this is obviously the decisive criterion for being covered by this Directive. These contemplations reflect the underlying rationale of working time regulation that those times worked under the close direction of another person must be restricted and those worked autonomously do not justify statutory interventions and limitations.

Pay or the absence thereof does not change anything in this context. I would therefore argue that taking a purposive approach to define the personal scope of application of the WTD, the criterion of 'pay' that perfectly makes sense when dealing with the (economic) freedom of movement of workers should not play any decisive role when it comes to the regulation of working time.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.