

REVIEW ARTICLE / ПРЕГЛЕД ЛИТЕРАТУРЕ

Over-time work of part-time health care professionals – case study of the General Hospital of Valjevo

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Introduction/Objective In practice, for more than 10 years there has been ongoing litigation between healthcare institutions and healthcare workers, who have found that reduced working hours may be payment compensation for overtime work (on-call time, on-call duty, stand-by time).

The objective of this paper was to analyze the problem and propose a solution in order to stop disputes and eliminate uncertainty.

Methods A case study method, comparative method and normative method were used in this article. Court practice has been analyzed in relation to a number of civil proceedings, as well as the opinion of the State Audit Institution of the Republic of Serbia and the Ministry of State Administration and Local Self-Government on a specific case.

Results Healthcare workers and healthcare institutions have different legal views about the right to salary supplement based on overtime work of healthcare workers who work reduced working hours. Although the court has taken a stand on the side of healthcare workers, disputes do not stop because healthcare institutions do not change their calculation method.

Conclusion The solution is to amend legal regulations that need to regulate in detail and unequivocally the manner of payment of salary supplements for healthcare workers in order to avoid any doubts and contentious situations.

Keywords: healthcare worker; overtime work; reduced working hours; salary supplements

INTRODUCTION AND BACKGROUND OF THE STUDY

The Labor Law of the Republic of Serbia stipulates that full-time job equals a 40-hour-week, with that a collective agreement may specify working hours of less than 40 hours but not shorter than 36 hours [1]. In this case, there is a legal fiction about the existence of a full-time position, so that employees fulfill all their employment rights, as well as employees who work 40 hours a week.

Working time means the period from the beginning to the end of daily work performance during which an employee effectively carries out work, that is, they are at the disposal of their employer, performing their duties in a workplace or other place designated by employer, in accordance with applicable law [2]. Directive 2003/88/EC of the European Parliament and of the Council of November 4, 2003, Concerning Certain Aspects of the Organisation of Working Time, within the concept of working time implies the period during which the worker performs work, is available to the employer and carries out his activities and duties in accordance with the national law [3]. As a rule, the duration of an employee's work time is prescribed as full time during working day and during the working week [4].

An employee must have sufficient time to rest, to renew his/her physical and intellectual potential, for quality time with family, education and cultural uplift. "All the well-being a person possesses includes current consumption, future consumption (savings), possession of property and enjoyment of leisure" [5]. Long working hours on regular bases not only adversely affect health and safety of employees, but also affect productivity. Researches indicate detrimental effect of performing work of particular occupations on health, especially jobs in healthcare as well as overtime work [6–9]. An employer who does not respect the obligations regarding working hours becomes a "silent killer" of free time and private life of his employees [10].

Overtime is work longer than full time which is generally paid more [definition by the Organisation for Economic Co-operation and Development (2001)] [11]. As a rule, this work is forbidden. The Constitution of the Republic of Serbia stipulates that employees are entitled to a limited working time and this right cannot be denied or waived [12, 13]. Overtime should be understood as a "necessary evil" and avoided in situations where the jobs for which it is introduced can be done by rational organization, redistribution of working hours or employment of new workers [14].

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Overtime work of healthcare professionals is regulated by the Law of Healthcare, such as on-call time, on-call duty and stand-by time [15]. Healthcare institution can introduce on-call time work as overtime (on-call time is one of the widespread forms of overtime work [16]) only if it is not able to ensure continuity in providing healthcare by organizing shift work and scheduling working hours of employees. During on-call time, healthcare worker must be present at the healthcare facility. According to the Court of Justice of the European Union, on-call time where a worker is required to be physically present at a place determined by his employer must be considered working time regardless of the fact that the person does not perform continuous professional activity during the on-call period. This conclusion is not changed by the fact that the employer provides the doctor with a rest room in which he can stay as long as his professional services are not needed. [17, 18]. Also, the Court of Justice of the European Union has taken the position that time spent on stand-by time should be recognized as working time, if a doctor is required to come to work during the stand-by period. Otherwise, if the doctor was not called, despite the obligation to be available to the employer, he enjoys a greater degree of freedom than the worker in the workplace, i.e., he can use his time in his own interest, with fewer restrictions [19]. The average weekly working time, with overtime work, i.e., on-call time and on-call duty, at the four-month level, cannot last more than 48 hours per week for a healthcare professional. 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 provides an opportunity for Member States to be excluded from the 48-hour working week limit, provided that safety and health at work are respected and with the express consent of the employee [11]. Collective agreement may stipulate that the average working time is tied to period longer than four months and maximum of nine months. Healthcare facility can introduce on-call work as overtime work and stand-by time. On-call work is a special form of overtime work where a healthcare professional comes on-call to provide healthcare outside of his fixed hours and can be introduced for employees who are at stand-by time. Exceptionally, on-call work may also be introduced for off-duty employees in the event of natural and other major incidents, traffic accidents, crises and emergencies, in accordance with the law. During stand-by time, healthcare provider is not present in healthcare facility, but must be available to provide emergency medical care in healthcare facility and respond to a call from a competent person. According to the standards of the International Labor Organization, stand-by time can be considered working time only if the restrictions imposed on him during that period prevent the employee from actually using this time for personal purposes [20].

The legislator indicates by work what does not represent work (on standby and on-call work), but such a qualification should be conditionally understood, in terms of work as a potential possibility. These types of overtime work eliminate the risk of possible non-provision of health services by health care institutions [21]. Healthcare professionals

must not leave workplace until they are provided with a replacement during working hours or after expiry of working hours, if this would impair the performance of healthcare and endanger health of a patient. An employee who has resumed work after expiry of working time, which is considered as overtime work, is obliged to notify the immediate supervisor in writing at latest on the next working day.

A special question is the possibility of working overtime on a reduced working hours basis. Reduced working hours work, unlike part-time work, is legally equated from the point of view of the employee's right to a salary and other rights of full-time employees – legal fiction about exercising employment rights as well as full-time employees [10]. An employee working on jobs to which reduced working hours are assigned, cannot be assigned overtime work as well, unless otherwise provided by law [1]. The Law of Healthcare defines it otherwise: an employee who does reduced working hours jobs, in accordance with the law which governs labor, may be assigned to overtime in those jobs, in the cases we cited, as well as in cases where healthcare provision cannot be otherwise organized.

In modern labor legislation, working time regulations generally have protective characteristics. Thus, in the world of work, there is a general tendency for shortening working time [16]. Although there is a tendency in the world for the introduction of a four-day work week [22], due to lack of healthcare workforce in Serbia the overtime work of employees who work reduced working hours is widespread [23].

Due to increased risks during overtime work, the legislator prescribes compensation in the form of a salary supplement. An employed healthcare worker who works overtime is entitled to a salary supplement for overtime work, which is stipulated by the Special Collective Agreement [24]. Upon the employee's written request, overtime work is converted into free hours on the quarterly basis instead of the right to a salary supplement. For every hour of overtime work, an employee is entitled to one and a half hours of free time. For time spent on stand-by time, when employed healthcare workers do not work, they are entitled to a salary supplement. Stand-by time on weekdays can last up to maximum 16 hours, and on Saturdays, Sundays and public holidays 24 hours. On-call time, on-call duty and stand-by time hours are mutually exclusive. An employed healthcare worker is entitled to overtime pay bonuses (on-call time and on-call duty) – 26% of the basic salary. During stand-by time, an employee is entitled to a supplement for each hour spent on stand-by time in the amount of 10% of the value of the basic salary's working hour. All of the above also applies to health workers employed by the Ministry of Justice, in the system of execution of criminal sanctions, given that the right to health care is one of the basic rights listed in the provisions of the Law on Execution of Criminal Sanctions [25, 26]. However, labor regulations do not apply to health workers who practice the profession as self-employed (private practice) as they have the status of self-employed. When entrepreneurs perform the activity personally and have no employees, they maintain the

status of a self-employed person and the Labor Law does not apply to them [27, 28]. A natural person registered in a special register, who performs the activity of a free profession regulated by special regulations, is considered an entrepreneur. Free profession is a profession that is qualified as such and defined by law – practice of law, notary and health services, engineering, auditing, tax and actuarial consulting, art, journalism, veterinary medicine, etc. [29].

In practice, for over 10 years, the litigations between healthcare institutions and healthcare workers regarding salary supplement for overtime work (on-call time, on-call duty, stand-by time) have been conducted, that is to say, the healthcare workers who have been assigned reduced working hours, which is why healthcare institutions have large court costs. The aim of this paper is to analyze the problem and propose a solution in order to stop disputes and eliminate uncertainty.

METHODS

Case study method, comparative method and normative method were used in this paper. The legal solutions and court practice regarding a large number of litigation procedures related to the payment of overtime salary supplements to reduced working hours of healthcare workers have been analyzed. Judgments of courts of all levels were analyzed, namely the Basic Court in Valjevo, the Court of Appeal in Belgrade, the Supreme Court of Cassation of Serbia and the Constitutional Court of Serbia and Court of Justice of the European Union. Therewith, the opinion of the State Audit Institution of the Republic of Serbia and the Ministry of State Administration and Local Self-Government on the specific issue were analyzed.

CASE STUDY

A large number of employed healthcare workers at the General Hospital in Valjevo, who have been assigned reduced working hours in accordance with Law, have filed lawsuits against their employer for less paid supplement based on overtime work, as well as on-call work and stand-by time, citing that hourly price of their overtime work is not equal to hourly price of healthcare workers who have not been assigned reduced working hours. For example, a psychiatrist healthcare professional at the Neurology Department is assigned working time of 36 hours per week which is considered a full-working time. Aforementioned believed that his hourly work price should be determined by dividing basic salary on a weekly basis by 36 rather than 40, so consequently the price of his overtime hour was higher than the price of working hour of an employee who does not work reduced working hours.

The defendant emphasized that it is stipulated that when calculating employees' salaries, one starts from the average working hour fund of 174 hours a month, hence in this way of calculating value of working hours as the basis on which

salaries and supplements are calculated, it is multiplied by the number of working days, that is to say, of working hours in a particular month, and salary supplements are calculated according to the number of recorded hours spent on-call time, stand-by time, etc. It was pointed out that the fact that the plaintiff works shorter does not affect the amount of the value of his working hour, because the value of the working hour is fixed and based on a 40-hour working week. Reduced working hours work is a protective measure aimed at protecting an employee working in jobs with increased risk from exposure to the harmful effects of the working environment and working conditions. The purpose of this protective measure is fulfilled by the shortening of working hours.

The Basic Court upheld the claimant's claim, stating that the defendant was under an obligation to calculate salary on a fixed basis, pursuant to Art. 4 and 6 of the Law on Salaries in State Bodies and Public Services while accepting allegations made by the Claimant [30, 31]. In the aforementioned factual and legal situation, the Court of Appeal in Belgrade first, by one judgment, quashed the judgment of the Basic Court of Valjevo and remitted the case for retrial, taking the stand that unique price of a working hour, both for regular work and for salary supplement is determined on the basis of a full fund of hours, that is, 40-hour working week, because basic salary is paid for full-time work and work which is considered full-time, while percentages of the increase based on the salary supplement are applied to basic salary [32]. It further cited that the claimant is paid a full-time salary as if he worked 40 hours rather than 36 hours, and for salary supplements price of working hours is increased in proportion to the time spent at work, and since one base cannot be used for full working time, and the other for salary supplements aforementioned overturned the first-instance judgment and ordered the removal of ambiguities. However, in the judgments given later, the Court of Appeal affirmed the judgments of the Basic Court, which upheld the claims [33, 34].

Ruling on a separate revision as an extraordinary remedy, the Supreme Court of Cassation of Serbia issued a decision dismissing it as an impermissible revision against the judgment of the Court of Appeal in Belgrade [35]. In the reasoning of the decision, the court stated that it considered that conditions to allow a decision on revision were not fulfilled since there was no need to harmonize case law or to decide on a revision in order to consider a legal issue of general interest.

Constitutional appeals were also decided by the Constitutional Court of Serbia. By the same decision, it rejected the constitutional complaint of the Valjevo General Hospital against the judgment of the Belgrade Court of Appeal, stating that the reasoning of the Belgrade Court of Appeal contained a constitutionally acceptable application of substantive law [36]. The aforementioned estimated that when calculating increased earnings on the basis of overtime work, night work and work on non-working days, it should start from the fact that the claimant's full time work is 36 hours per week, which is the basic parameter for determining value of working hours.

At the request of Valjevo General Hospital, the Ministry of State Administration and Local Self-Government of the Republic of Serbia gave an opinion that reduced working hours is an issue of protective character applicable to specific categories of jobs (high-risk jobs) and that additional privileges cannot be extracted from that special regime in terms of calculating the base on a weekly basis of less than 40 hours per week, but not less than 36 hours per week and in a situation when a reduced working hours at the certain position was introduced by a risk assessment act [37].

The whole problem is complicated by different interpretations of salary supplement calculation base. In this regard, the opinion of the State Audit Institution, which stated in its report on the audit of the final account and regularity of operations of the Valjevo General Hospital for 2016 that based on the insight into the program for the calculation of salaries, bonuses and employee benefits and payroll of employees, it is determined that the parameters set in the payroll program are incorrectly defined in the calculation of all salary supplements, except past work, in such a way that employees who have an additional management coefficient do not take its value, if stated in the base separately from the basic coefficient, but only the value of the coefficient first entered into the system (usually this is the basic one) [38].

DISCUSSION

From the presented case, it can be concluded that the main problem is that in practice there are two different legal positions on method of calculating salary supplement for employed healthcare workers who have fixed reduced working hours.

By analyzing a specific case, we are giving our opinion on the legality and regularity of salary calculation. At first glance, the logic of the courts and the Constitutional Court of Serbia. On the other hand, in practice, it means that two doctors who have the same salary under a contract of employment, where one works reduced working hours and the other full time, will not receive the same compensation when calculating 10% salary supplement even though they both do not work. A reduced working hours doctor will also have a higher salary bonus on stand-by time than a full-time doctor, even though they do not work, which is not fair given that they have the same basic salary.

Firstly, we should start from legal provisions, namely the provisions of Art. 2 par. 3 of the Law on Salaries in State Bodies and Public Services, which stipulates that the basic salary of employees in public services shall be the product of base and coefficient and the provisions of Art. 4. which stipulates that the coefficient expresses complexity of work, responsibility, working conditions and qualifications [39]. Then the provision of Art. 5th par. 4. stipulates that the basis for calculating the salary supplement is the basic salary established by this law. The provision of Art. 6 of the same law stipulates that salary determined for the purposes of Article 2 of this Law shall be paid for full-time work, or the work which is considered full time work. Bearing in mind opinions expressed, the most correct position was taken by

the Court of Appeal in Belgrade in judgment Gž1 3149/13 of 20 June 2014 in which it cited that the uniform price of working hour for both regular work and salary supplements is determined on the basis of the full fund of hours, that is, 40-hour work week, since the basic salary is paid for full-time work and work which is considered full-time, while percentages of pay increase are applied to the basic salary. A reduced working hours employee cannot be paid a full-time salary as if he works 40 hours rather than 36 hours, and for salary supplements price of working hours should be increased in proportion to time spent at work, that is, one base cannot be used for full-time work and the other for salary supplements. In this regard, we believe that the stated opinion of the State Audit Institution is correct, since the basic salary includes managerial supplement for, i.e., the base used for calculation of salary must also be used for calculation of salary supplement.

In comparative law, for example in Croatia, the Collective Agreement for Health and Health Insurance stipulates that for workers who have a position allowance contained in the job complexity coefficient or receive that allowance based on the provisions of this Agreement, on-call and stand-by time benefits are calculated in relation to the basic salary of the job where the employee is on standby (Articles 51–52) [40]. This specification is the result of numerous court disputes on the occasion of which the Supreme Court of Croatia took a stand at the session of the Civil Department on December 9, 2019, in which it is said: “Healthcare workers during the validity of the Collective Agreement for activities of healthcare industry and health insurance (The People’s Newspaper, 143/13 and 96/15) who, in regular work, are entitled to an increase in salary for special working conditions referred to in Art. 57 of the Collective Agreement and the right to increase salary for exceptional responsibility for life and health referred to in Art. 59. are entitled to supplements (cumulatively) and to overtime hours” [41].

In the Republic of Slovenia, for each hour of stand-by, the employee is entitled to payment in the amount of 30% of the basic salary of the job for which he is on standby. For each hour on duty, the employee is entitled to a payment in the amount of 90% of the value of the basic salary for the job for which he performs his duty. If on-call hours coincide with a Sunday, holiday or night hour, the employee is also entitled to an allowance of 30% of the basic salary [42].

Finally, we will consider percentage increase of salary based on overtime work which in Serbian law is minimum 26%. Considered by comparative law in the Republic of Croatia, the basic salary of a healthcare worker is increased by 50% for overtime work [40] and the same percentage increase is in the Republic of Slovenia [42]. The solutions of some collective agreements in Serbia are also significant. For example, the Collective Agreement for State-owned enterprise “Pošta Srbije” (Serbian Postal Service) in Belgrade stipulates a 45% increase in salary for overtime work [43]. The Special Collective Agreement for Police Officers stipulates the right to an overtime work supplement of 28.6% of the basic salary [44]. The Special Collective Agreement for Electric Power Industry of Serbia stipulates a 45% increase in overtime work salary [45].

CONCLUSION

Overtime work is extremely permissible because it represents an exception to the rule that an employee is entitled to limited working hours. An even bigger exception is overtime work of employees who have been assigned reducing working hours job, which is why every effort should be made to minimize this work.

Regarding the problem of paying salary supplement for overtime work of healthcare workers, we believe that the solution to the problem is to change legal regulations that need to regulate in detail and unequivocally the method of

payment of supplements for healthcare workers in order to avoid any doubts and controversy situations. Healthcare providers would have to adjust their salary calculations in accordance with court decisions in order to avoid damages caused by conducting court proceedings.

In addition, increase of salary for overtime work of 26% of the base should be revised in the light of comparative law solutions as well as solutions of some collective agreements in Serbia.

Conflict of interest: None declared.

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Прековремени рад здравствених радника – студија случаја Опште болнице Ваљево

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САЖЕТАК

Увод/Циљ У пракси се већ више од десет година воде судски спорови између здравствених установа и здравствених радника којима је утврђено скраћено радно време поводом исплате додатака на плату за прековремени рад (дежурства, рад по позиву, приправност).

Циљ рада је анализа проблема и предлог решења како би се обуставили спорови и отклонила неизвесност.

Метод У раду је коришћен метод студије случаја, упоредни метод и нормативни метод. Анализирана је судска пракса поводом већег броја парничних поступака као и мишљења Државне ревизорске институције Републике Србије и Министарства државне управе и локалне самоуправе по конкретном случају.

Резултати Здравствени радници и здравствене установе имају различите правне ставове о праву на додатке на плату по основу прековременог рада здравствених радника који раде са скраћеним радним временом. Иако је суд заузео став на страни здравствених радника, спорови не престају јер здравствене установе не мењају свој начин обрачуна.

Закључак Решење проблема је у измени правних прописа којима треба детаљно и недвосмислено уредити начин исплате додатака на плату за здравствене раднике како би се избегле све недоумице и спорне ситуације.

Кључне речи: здравствени радник; прековремени рад; скраћено радно време; додаци на плату