Decision 12/2020 (VI. 22.) AB

On a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Judgement No Mfv.II.10.279/2018/13 of the Curia in the matter of on-call allowance

In the matter of a constitutional complaint, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

The Constitutional Court holds that Judgement No Mfv.II.10.279/2018/13 of the Curia as a court of review is contrary to the Fundamental Law and, therefore, annuls said Judgement.

The Constitutional shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The petitioners, through their legal representative, submitted a constitutional complaint under Article 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), requesting the Constitutional Court to declare that the Judgement No Mfv.II.10.10.279/2018/13 of the Curia as the court of review is in violation of the Fundamental Law, since it infringes Article R (2), Article 25 (1), Article 26 (1), Article 28, Article XIII (1), Article XVII (4), Article XXVIII (1) and (7) of the Fundamental Law.

[2] 1.1 The underlying facts of the complaint reveal that the defendant hospital carried on activities without interruption, which it provided by organising shifts, standby duty and on-call duty. The petitioners (in the main proceedings: the claimants) were employed on one shift, introducing a bank of hours, with irregular working hours. A Collective Agreement was in force at the defendant as of 26 April 2006, which was amended by the parties on 7 October 2008 to stipulate that the normal weekly rest day for single-shift workers on call for medical purposes is Saturday and Sunday on a permanent basis. The detailed rules for implementing the amendment were set out in Director-General Instruction No 33/2008, which provided that Saturday and Sunday were to be indicated in a separate colour on the attendance sheet.

[3] [3] The defendant's Director General terminated the Collective Agreement in view of the entry into force of Act I of 2012 on the Labour Code (hereinafter referred to as the "Labour Code") and the defendant and the intervening party concluded a new Collective Agreement on 22 November 2012, which entered into force on 1 December 2012. That Collective Agreement

no longer contained a provision specifying which days were rest days for each public employee. The defendant did not change the established pattern of working hours during the period covered by the new Collective Agreement, and the on-call duty on Saturdays and Sundays continued to be indicated in a different colour on the attendance sheets.

[4] From July 2012 to 31 December 2012, the defendant had a six-month bank of hours; from 1 January 2013 to 30 September 2015, a two-month bank of hours. The claimants' place of employment was the Central Operating Theatre Service. The claimants were not given a specific work schedule, but were informed of the days on which they were required to be at work by the monthly on-call and weekly operating theatre schedules.

[5] The claimants worked their normal working hours from 7.35 am to 4 pm from Monday to Friday, in accordance with point 3.1 of the Departmental Working Schedule for the Central Operating Theatre Service. In addition, they performed on call duty for medical purposes from 4 pm on weekdays until 8 am the following morning, depending on their working hours, and also carried out on-call duty for medical purposes from 8 am on Saturday or Sunday until 8 am the following morning, depending on their schedules. The day after the on-call duty was completed, the defendant issued the claimants with a weekly rest day. At the same time as the weekly rest day, the defendant also considered the 8-hour daily rest period under Section 12/G (1) of Act LXXXIV of 2003 on Certain Issues of the Performance of Health Care Activities (hereinafter referred to as the "Act on Health Care Activities") to have been issued, the fact of which was indicated as "off" in the weekly work schedule.

[6] With regard to remuneration for on-call duty, both the previous and the current Collective Agreement provided for differentiated remuneration for on-call duty depending on whether the on-call duty was performed on a weekday, Saturday, Sunday or public holiday, but the 2008 amendment to the Collective Agreement made explicit provision for on-call duty performed on a weekly rest day. For the period prior to 1 December 2012, the defendant, in the belief that it had provided another day of rest instead of a Saturday or Sunday, paid the claimants only the on-call allowance prescribed for Saturday and Sunday when calculating the on-call allowance.

[7] 1.2 The claimants brought an action before Budapest-Capital Administrative and Labour Court seeking an order that the defendant pay the difference in the on-call allowance and default interest for the period from 1 July 2012 to 31 December 2016, in addition to the costs of the proceedings. Their claim was based on the fact that they had been regularly on call for medical purposes on their weekly rest days. They argued that the single-shift working pattern could not be interpreted as meaning that their rest days always fell on weekends In their view, the defendant also infringed the law by counting the mandatory on-call rest period after on-call duty as part of their mandatory weekly rest days. This effectively resulted in the defendant's records and accounts showing that employees who were not working on mandatory rest periods after on-call time were absent under two titles at the same time during their mandatory on-call rest periods Their compensated absences must be considered as on-call rest period in the first instance, and only then may and must the weekly rest day be issued. Consequently, since the defendant did not grant them the compulsory weekly rest period in addition to the 8 hours of weekly rest period, they are liable to pay, in addition to the remuneration for the

period of on-call duty for medical purposes, the on-call allowance increased by 50% pursuant to Section 13/B (2) (a) of the Act on Health Care Activities.

[8] By its Judgement No 34.M.1544/2015/44 of 20 January 2017, Budapest-Capital Administrative and Labour Court ordered the defendant to pay the claimants the sums specified and default interest on those sums as from 15 October 2012, and, as to the remainder, dismissed the action of the claimants.

[9] In the grounds of its judgement, the court found that the claimants had based their claim for payment of the difference in the on-call allowance on the following facts: 1. Their weekly rest days were Saturday and Sunday on a permanent basis. 2. On the weekly rest days, they were on call according to the work schedule, after which they did not receive their mandatory rest period due to the defendant's unlawful practice of granting them their daily rest period in accordance with Section 12/G (1) of the Act on Health Care Activities and the weekly rest day in parallel. 3. They were not actually granted the rest day to which they were entitled, since it did not satisfy either the statutory requirement of 24 hours without interruption or the statutory requirement of a period from 7 am to 10 pm. 4. Since the defendant employer did not grant them the rest day to which they were entitled pursuant to Section 13/B (2) of the Act on Health Care Activities for their on-call work on the rest day, they are obliged to pay the higher on-call allowance provided for by law.

[10] The court distinguished between the period prior to and following 1 December 2012. The court found that from 1 July 2012 to 30 November 2012, the claimants' rest days were Saturdays and Sundays and that the on-call duty carried out by the claimants on Saturdays and Sundays during that period constituted on-call duty carried out on a rest day. For the period subsequent to 1 December 2012, the court was unable to find beyond reasonable doubt that Saturday and Sunday constituted rest days for the claimants. Since the claimants based their action essentially on the fact that they had performed on-call duty for medical purposes on their rest days in accordance with their work schedule, the court found that their action was unfounded in respect of the period after 1 December 2012.

[11] The court held that it is clear from Section 12/G (1) of the Act on Health Care Activities, Section 2 (2) of Act XXXIII of 1992 on the Status of Public Sector Employees and Section 105 (1) of the Labour Code that daily rest periods and weekly rest days are two distinct and separate concepts. However, it does not follow from that fact alone, in the court's view, that a daily rest period and a weekly rest day cannot be granted at the same time for the same period.

[12] The court also found that, under Section 13/B (1) (a) of the Act on Health Care Activities, the claimants were entitled to at least 24 hours of uninterrupted rest, which the defendant did not grant them for reasons of work organisation. The defendant did not dispute that fact in the proceedings, but argued that it did not follow that the claimants were entitled to the increased on-call allowance for the full on-call time, but only that the defendant had obliged the claimants to work on their rest day, which meant that they were entitled to compensatory offsetting for their extraordinary working time for a maximum of 25 minutes. The court found that the claimants' action was well-founded in that regard.

[13] The court pointed out that the claimants had based their action on Section 13/B (2) of the Act on Health Care Activities, that is to say, on the performance of on-call duty on the rest day. According to the court, whether they had otherwise received the full amount of their statutory rest days was a separate and independent issue. The consequence of the latter is not linked to the remuneration for on-call duty, but to the payment of the allowance for extraordinary working time, which presupposes different factual findings and thus different proof and different amounts.

[14] 1.3 Budapest-Capital Regional Court, seised of the matter on appeal of the claimants and the intervening party, by its Judgement No 7.Mf.680.869/2017/9 of 7 March 2018, did not disturb the non-appealed part of the judgement of the court of first instance, reversed it in its appealed part and ordered the defendant to pay the amounts set out in the operative part of the Judgement.

[15] The court of appeal at second instance held that the court of first instance had conducted the necessary evidentiary proceedings, but had not properly assessed the evidence and had therefore incorrectly established the facts and had not correctly applied the relevant legal provisions, and that its judgement was therefore unlawful.

[16] The court of second instance supplemented the findings of fact by stating that from July 2012 to 31 December 2012, the defendant had a six-month bank of hours, from 1 January 2013 to 30 September 2015, a two-month bank of hours. The claimants' place of employment was the Central Operating Theatre Service.

[17] The court of second instance disagreed with the finding of the court of first instance that the defendant had applied an irregular work schedule to the claimants as from 1 December 2012, rather than the general work schedule.

[18] The court of second instance held that the point of departure could have been the work schedule drawn up by the defendant, but that, contrary to the provisions of Section 97 of the Labour Code and Section 13 of the Act on Health Care Activities, the employees were not given such a schedule, but were only assigned to on-call duty schedule and operating theatre duty schedule, without rest days being indicated. Pursuant to Section 13 (1) to (4) of the Act on Health Care Activities, normal working hours and on-call duty for medical purposes must be recorded separately and rest days must be shown separately in the work schedule. It is not disputed that the defendant did not provide the claimants with such a schedule. The on-call duty schedule and the operating theatre duty schedule do not comply with that requirement.

[19] In the view of the court of second instance, the mandatory rest period for on-call duty for medical purposes in accordance with Section 12/G (1) of the Act on Health Care Activities cannot be aggregated with the weekly rest day, since the functions and legal purpose of the two institutions are completely different. The rest period which must be granted after on-call duty for medical purposes is intended to ensure that workers can recuperate and rest between the end of the health care activity and the start of the next health care activity under the next work schedule. The weekly rest period provides for a period of recuperation between two working weeks, which is a longer period during which the worker can spend time off with his family. The two arrangements cannot be granted together, as this would make it impossible

for them to fulfil their intended purpose. It is not disputed that the defendant provided for the use of a rest day instead of a rest period, but the definition of a rest day is laid down in Section 87 (2) of the Labour Code, which provides that the period between 7 am and 10 pm is to be regarded as a weekly rest day or a public holiday. However, since the claimants started their rest at 8.01 am, that day can therefore no longer be regarded as a weekly rest day. Nor can that period be regarded as a rest period with the same content as on-call duty for medical purposes within the meaning of Section 13/B (2) of the Act on Health Care Activities, since that does not amount to 24 hours with a starting time of 7.35 am, and the claimants performed on-call duty for medical purposes for that period on Saturdays and Sundays.

[20] In the light of the above, the court of second instance reversed the judgement of the court of first instance and ordered the defendant to pay the disputed arrears of on-call allowances.

[21] 1.4 The Curia, acting on the defendant's request for review, quashed the final judgement at second instance and upheld the judgement of the court of first instance by its judgement No Mfv.II.10.279/2018/13 of 28 November 2018.

[22] In the grounds of its judgement, the Curia stated that, in the absence of a request to that effect, the litigation and thus the subject of the review was not the assessment of whether the claimants had received the rest days to which they were entitled under the law, the claimants did not rely on the fact that they worked overtime, and their action was based on Section 13/B (2) of the Act on Health Care Activities.

[23] In the grounds of its judgement, the Curia explained that the court of first instance had correctly held that the fact that the claimants worked a single-shift schedule did not lead to the conclusion that they were employed according to the general work schedule; therefore, their weekly rest days would always have fallen on the same two consecutive calendar days. From July 2012 to 31 December 2012, the defendant applied a six-month bank of hours, from 1 January 2013 to 30 September 2015, a two-month bank of hours; therefore, the defendant was entitled, under Section 97 (3) of the Labour Code, to allocate the claimants' working hours to each day of the week or to each day irregularly.

[24] The Curia held that the concept of on-call duty for medical purposes is not identical to on-call duty as defined in the Labour Code, and that working on-call duty for medical purposes does not constitute extraordinary work, contrary to the provisions of Section 107 (d) of the Labour Code. Pursuant to Section 107 (a) of the Labour Code, such overtime are working hours that are not in accordance with the work schedule. Accordingly, activities performed not only on a shift basis but also in the context of on-call health care services shall be considered as regular working hours on the working day referred to in Section 88 (2) of the Labour Code. The claimants were assigned to work in the context of on-call duty for medical purposes for a different period of time from that for which they were assigned to work shift work, thus giving rise to irregular working hours. Although the defendant did not provide the claimants with an explicit work schedule, the weekly operating theatre duty schedule and the monthly on-call duty schedule used by the employer allowed them to determine which days they would be required to work and which days would be their days off as rest days.

[25] According to the Curia, the court of second instance correctly held that the employer may order work not only on a working day but also on a rest day, provided that the legal conditions for this are met, but that in this case the work is an activity carried out during overtime. However, the days on which the claimants carried out medical activities were the claimants' scheduled working days, in view of the irregular working hours.

[26] The Curia also disagreed with the view of the court of second instance that the mandatory rest period to be granted under Section 12/G (1) of the Act on Health Care Activities cannot be aggregated with the weekly rest period. Both the rest period and the rest day ensure that the public sector employee is able to recuperate and, in the absence of a rule prohibiting them, there is no impediment to their being granted at the same time, where appropriate, and the objective of ensuring that the public sector employee has enough rest after being on duty for medical purposes to be able to carry out his work on the next working day of his schedule without rest is also met.

[27] According to the Curia, the defendant was correct in its request for review to claim that the public sector employee was entitled to his remuneration for the month in question for the time worked during working hours. Having worked during on-call hours, the employee is entitled to the allowance provided for in Section 13/B (1) of the Act on Health Care Activities. Section 13/B (2) of the Act on Health Care Activities contains a provision for cases where a health care worker has worked on call on a rest day instead of the working hours according to the work schedule applicable to him or her. Since, in the case in the main proceedings, the claimants did not perform on-call duty on a rest day in accordance with the work schedule applicable to them, that provision of the legislation did not apply to them and they were not entitled to what is known as compensatory rest periods. That would have been the case if the claimants had been required to perform on-call duty for medical purposes on their scheduled rest day, in which case they would have been entitled to a 50% increase in the on-call duty allowance or compensatory rest as compensation for working at a time other than their scheduled working hours. Since that was not done in the case in the main proceedings, the court of second instance wrongly ordered the employer to pay that amount.

[28] 2. In their initial petition, the petitioners alleged a violation of Article R (2), Article XV (2), Article XVII (3) to (4), Article XX (2), Article 25 (1) and Article 26 (1) of the Fundamental Law and requested the annulment of the impugned judicial decision.

[29] The petitioners submit that the contested judgement infringes the provisions of the Fundamental Law relied on because, first, it allows the defendant to grant the claimant worker the leave of absence under several separate titles, thereby infringing the worker's right to daily and weekly rest periods separately and, indirectly, his right to additional remuneration for work performed on that day.

[30] The petitioners explained that the preamble to the Act on Health Care Activities also declares the right to rest of a health care worker, and that Section 105 (1) and Section 106 (1) of the Labour Code define the concepts of rest period and rest day separately. The petitioner contends that, in the absence of a rule prohibiting the amalgamation of the two periods of

time, the Curia should have taken the preamble to the Act on Health Care Activities and the legislature's intention as a point of departure.

[31] The petitioners argued that the innovation of Article XVII (4) of the Fundamental Law is the separate specific mention of daily and weekly rest periods. In their view, it follows from the conjunction 'and' that these rights, which are now separate rights, are granted to workers individually and separately, and that their simultaneous granting is therefore unconstitutional.

[32] The petitioners also requested the Constitutional Court to call upon the court of first instance to order a stay of enforcement of the contested judicial decision on the basis of Section 61 (1) of the Constitutional Court Act.

[33] The petitioners supplemented their petition following a deficiency notice. In it, they also pleaded a violation of Article XIII (1), Article XXVIII (1) and (7) and Article 28 of the Fundamental Law.

[34] In connection with the violation of the right to property, the petitioners alleged that the on-call allowance difference for activities performed during on-call duty as remuneration for work already performed but not paid (as property already acquired) is protected by the constitutional right to property, which was violated by the judgement of the Curia.

[35] The violation of Article 28 was alleged in connection with Article XVII (4) of the Fundamental Law. The petitioners stressed that the Curia had failed to take into account the purpose and the intention of the legislature and had not interpreted the legal provisions applied in accordance with the Fundamental Law, which states that workers have the right to daily and weekly rest periods. If the interpretation of the Curia were followed, on-call workers would lose their daily rest period if they were on call on weekdays and lose their weekly rest day if being on call at the weekend.

[36] In the context of Article XXVIII (1) of the Fundamental Law, the petitioners argued that the neutrality of the Curia is called into question by the fact that the Curia did not even present the submissions of the petitioners' legal counsel and the intervening party's counsel at the hearing and in the reasoning of the judgement, while it did explore the defendant's motion in detail. In connection with the infringement of the right to a fair trial, the right to a legal remedy was also alleged.

[37] In a further supplement to the petition, the petitioner added that the right to a fair trial had been infringed on the ground that the Curia had failed to distinguish between the work schedule of on-call staff working in health and that of shift workers.

II

[38] The provisions of the Fundamental Law relevant in respect of the petition are as follows:

"Article XIII (1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity."

"Article XVII (4) Every employee shall have the right to daily and weekly rest periods and to a period of annual paid leave."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[...]

(7) Everyone shall have the right to seek legal remedy against decisions of the courts, the public administration or other authorities, which infringe their rights or legitimate interests."

III

[39] Section 56 (1) of the Constitutional Court Act provides that a decision on the admissibility of a constitutional complaint must be made before the complaint is considered on its merits. A complaint may be admitted if it meets the formal and substantive requirements prescribed by the Act, in particular the conditions set out in Sections 26 and 27 as well as Sections 29 to 31 of the Constitutional Court Act. In addition, pursuant to Section 52 (1) of the Constitutional Court Act, the petition must contain an explicit request. A request is deemed definite if it meets the criteria set out in Section 52 (1b) (a) to (f) of the Constitutional Court Act.

[40] The Panel of the Constitutional Court conducted an assessment as to whether the constitutional complaint met the formal and substantive requirements for admissibility and decided on 28 January 2019 to admit the petition; also determining as a constitutional law issue of fundamental importance under Section 29 of the Constitutional Court Act what falls within the scope of Article XVII (4) of the Fundamental Law, and whether the interpretation of the Curia whereby there is no impediment to the simultaneous granting of a daily rest period and a weekly rest day in such a manner that the daily rest period is merged into the weekly rest day is compatible therewith.

[41] However, the request only partly satisfies the requirements of being explicit as set out in Section 52 (1b) of the Constitutional Court Act, since the petitioner has not submitted a separate statement of reasons in respect of the infringement of Article XX (1) of the Fundamental Law. In addition to the above, the petition cannot be assessed independently with regard to rights not enshrined in the Fundamental Law [Article (R) (2), Article 25 (1), Article 26 (1), Article 28]. In a similar fashion, Similarly, no consideration on the merits is possible in connection with the right to property under Article XIII of the Fundamental Law, due to the absence of a substantive connection of constitutionality, since the difference in the on-call allowance in the present case is a contractual claim which does not constitute acquired property. Moreover, with regard to Article XXVIII (1) and (7) of the Fundamental Law, there is

no constitutional law issue of fundamental importance or an infringement of the Fundamental Law which would substantively affect the judgement of the courts, as set out in the petition.

IV

[42] The constitutional complaint is well-founded.

[43] 1. The Constitutional Court is the supreme body for the protection of the Fundamental Law within the meaning of Article 24 (1) of the Fundamental Law. Accordingly, under Article 24 (2) (d) of the Fundamental Law, the Constitutional Court may review judicial decisions from the point of view of constitutionality and its competence is limited to the assessment and elimination of any unconstitutionality which has a material effect on the merits of the judicial decision. The Constitutional Court, acting within the scope of its competences regulated in Section 27 of the Constitutional Court Act, ensures the consistency of the judicial decision with the Fundamental Law {Decision 25/2013 (X. 4.) AB, Reasoning [49]}. In Decision 3/2015 (II 2.) AB, the Constitutional Court emphasised that

"Under Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. This provision of the Fundamental Law lays down as a constitutional requirement for the courts in the course of the application of the law to interpret the law primarily in accordance with the Fundamental Law [...]. Based on this obligation, the courts should identify the fundamental rights' aspects of the relevant case within the limits of interpretation provided by the law, and it should interpret the law applied in the judicial decisions with due account to the constitutional content of the fundamental right involved.

The constitutional complaint (Article 27 of the Constitutional Court Act), which allows for the review of the constitutionality of judicial decisions, is a legal institution for the enforcement of Article 28 of the Fundamental Law. On the basis of such a complaint, the Court shall review the consistency with the Fundamental Law of the interpretation of law found in the judicial decision, that is, whether the court enforced the constitutional content of the rights granted under the Fundamental Law. If the court acts without paying due attention to the fundamental rights affected by the relevant case and if the interpretation of the law developed by the court is not consistent with the constitutional content of this right, then the adopted judicial decision is contrary to the Fundamental Law." (Reasoning [17]-[18])

[44] 2. In his constitutional complaint, the petitioner claimed that Judgement No Mftv.II.10.279/2018/13 of the Curia as the court of review violates the right to daily and weekly rest periods guaranteed by Article XVII (1) of the Fundamental Law because the impugned judicial decision allows the employer to aggregately grant the daily and weekly rest periods to which the employee is entitled, as well as the additional remuneration. Therefore, the Constitutional Court was first required to review the case law relevant to the matter at issue.

[45] Subsequent to the entry into force of the Fundamental Law, the Constitutional Court has interpreted Article XVII (1) of the Fundamental Law in the context of the right to annual paid leave. The Constitutional Court stated in its Decision 3341/2017 (XII. 20.) AB that "Article XVII (4) of the Fundamental Law, very similarly to Article 70/B (4) of the Constitution, establishes as a fundamental right of the employee both the right to daily rest directly related to work and the right to weekly rest for the employee's long-term rest, as well as the employee's right to annual paid leave. Anyone who works in the context of an employment relationship (contract of employment or other employment relationship) and does not decide how to use his or her working time (also known as contingent work) is entitled to these rights. This right should not, of course, apply to persons who are not in an employment relationship (such as self-employed persons or persons in a liberal profession), since they decide for themselves, without the consent of others, when to rest and when to work. The Fundamental Law defines the substance of the right to rest in more detail than the Constitution, because it refers separately to daily and weekly rest periods directly linked to work, in addition to annual paid leave to ensure the worker's long-term rest." (Reasoning [40])

[46] In the light of the foregoing considerations, the Constitutional Court held in the present case that Article XVII (4) of the Fundamental Law guarantees the right to rest as a fundamental right, within which, as in the wording of the Labour Code, it distinguishes between the right to daily and weekly rest periods. Article XVII (4) of the Fundamental Law addresses a right, the content of which is established by an Act of Parliament, but its essential content derives from the right to health guaranteed by Article XX (1) of the Fundamental Law, which is explicitly affirmed for workers in Article XVII (3) of the Fundamental Law: Every employee shall have the right to working conditions which ensure respect for his or her health, safety and dignity. Securing the right to rest is essential to guaranteeing working conditions that respect health, because it ensures the replenishment of the resources, physical and mental energy expended during regular work, and the worker's physical and mental recuperation.

[47] Article XVII (4) of the Fundamental Law is also closely linked to the right to privacy guaranteed by Article VI (1) of the Fundamental Law, which comprehensively protects privacy: the private and family life of the individual {Decision 32/2013 (XI. 22.) AB, Reasoning [82]}. Indeed, without time off outside working hours, the worker has no opportunity for private and family life. Correspondingly, Article XVII (4) of the Fundamental Law provides for daily and weekly rest periods for workers in order to preserve their identity and physical and mental integrity.

[48] The conditions of entitlement and the precise extent of that entitlement do not follow from the Fundamental Law, but it does follow from the Fundamental Law that daily and weekly rest periods are granted to workers under separate legal titles, since their purpose is different. While daily rest periods are intended to allow workers to recuperate between two working days, weekly rest periods are intended to compensate for the physical and mental strain caused by successive working days.

[49] The right to daily and weekly rest periods is not, however, an inalienable fundamental right, but may be restricted in accordance with Article I (3) of the Fundamental Law. The right to rest

may be limited by the operation of a continuous and institutional health service, as provided for in Article XX (2) of the Fundamental Law.

[50] 3. The performance of on-call duty restricts the right to daily and weekly rest periods of health care workers guaranteed by Article XVII (4) of the Fundamental Law, and therefore an Act has established the guarantees for the restriction of the fundamental right, the upper limit of the time of on-call duty and the remuneration for on-call duty. In its Judgement under consideration, the Curia interpreted these guarantee provisions, and the Constitutional Court therefore determined whether, in interpreting the law, the court had given effect to the fundamental right enshrined in Article XVII (4) of the Fundamental Law.

[51] Establishing the facts of the case as well as evaluating and weighing pieces of evidence is a duty reserved in the rules of procedural law for the law-applying entity {see first in Order 3237/2012 (IX. 28.) AB, Reasoning [12]}; with respect to the facts; therefore, the Constitutional Court shall rely on the facts established by the general court. It is also for the general court to decide whether the on-call duty in the underlying employment dispute was performed during regular working hours in accordance with the work schedule, during on-call duty in addition to working hours ordered by the employer or during overtime.

[52] In Decision 3/2015 (II 2.) AB, the Constitutional Court established that "[u]nder Article I (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right. This test for the restriction of a fundamental right is first and foremost an obligation for the legislator, but also a constitutional requirement for those who administer the law, in accordance with their respective competences. That requirement, having regard to Article 28 of the Fundamental Law, imposes an obligation on the courts, in construing a rule of law which restricts the exercise of a fundamental right, to limit the restriction of that right, within the margin of interpretation allowed by the law, to the necessary and proportionate degree of interference." (Reasoning [21]) Accordingly, the Constitutional Court examined whether the court had interpreted the restriction on the right to daily and weekly rest periods guaranteed by Article XVII (4) of the Fundamental Law in the manner set out above.

[53] The defendant's conduct in treating the daily rest period as being granted jointly with the weekly rest period affects the petitioners' right to rest. The provision of on-call duty is a means of ensuring continuity of health care as guaranteed by Article XX (2) of the fundamental Law and therefore may be a legitimate objective of limiting the rest periods of health care workers.

[54] In accordance with the Fundamental Law, the Labour Code and the Act on Health Care Activities distinguish between daily and weekly rest periods. Section 104 of the Labour Code and, for health care workers under public sector employment, Section 12/G (1) of the Act on Health Care Activities provide for a minimum of 11 hours of rest between the end of the day's work or health care activity and the start of the next working day or the next health care activity commenced according to the work schedule, or, in the case of health care providers who work without interruption, at least 8 hours, that is, a shorter period of rest for physical and mental

recuperation following the working day or the health care activity according to the work schedule, if the parties so agree. Section 105 (1) of the Labour Code provides for the scheduling of two rest days per week, Section 105 (2) expressly provides for the scheduling of a weekly rest day in the case of irregular working hours, and Section 105 (4) states that at least one weekly rest day shall be allocated at least once in a given month on a Sunday.

[55] In line with this, Section 13/B (2) (b) of the Act on Health Care Activities, in the context of the application of Sections 105 and 106 of the Labour Code, provides that the weekly rest day (rest period) lost must be compensated by providing at least 24 hours of uninterrupted rest within seven calendar days. Where this is not the case, the employer must pay the on-call allowance increased by 50%.

[56] However, the interpretation by the Curia that a daily rest period and a weekly rest day may be granted at the same time is incompatible with Article XVII (4) of the Fundamental Law, since it follows from that provision that, in view of the different purposes of rest periods, daily and weekly rest periods are granted to workers under separate legal titles.

[57] By interpreting Section 105 (1) of the Labour Code and Section 12/G (1) and Section 13/B (2) of the Act on Health Care Activities, the Curia thus narrowed the intended scope of the daily and weekly rest periods granted to health care workers to such an extent that it infringed Article XVII (4) of the Fundamental Law.

[58] The Constitutional Court, on the basis of the foregoing, established that Judgement No Mfv.II.10.279/2018/13 of the Curia as a court of review is contrary to the Fundamental Law and, therefore, annuls said Judgement.

[59] 4. Due to the importance of the matter it has been seised of in the present case, the Constitutional Court ordered the publication of this decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 26 May 2020

Dr. Tamás Sulyok sgd., Chief Justice of the Constitutional Court

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Ágnes Czine, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Egon Dienes-Oehm, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Attila Horváth, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Tünde Handó, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief , Justice of the Constitutional Court, on behalf of dr. Imre Juhász, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Ildikó Hörcher-Marosi, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. László Salamon, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Miklós Juhász, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Balázs Schanda, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Marcel Szabó, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Péter Szalay, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Béla Pokol, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. András Varga Zs, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of dr. Mária Szívós, Justice of the Constitutional Court, prevented from signing