Considerations regarding the inclusion in working time of periods during which the worker participates in team building activities

Anghel, Răzvan

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Considerations regarding the inclusion in working time of periods during which the worker participates in *team building* activities*

Răzvan Anghel,
judge, Constanţa Court of Appeal
trainer, Romanian National Institute of Magistracy

Abstract: *Team building activities are often combined with professional training activities or purely recreational activities. For this reason, the legal regime of these activities can be unclear and difficult to determine, with multiple implications in the relationship between employer and employee. The article examines the issue of the existence of the subordination relationship specific to labor law in the period affected by team-building activities and the meeting of the constitutive elements of the notion of working time. For this purpose, a multidisciplinary examination is carried out, namely of the fiscal regime of the expenses incurred by the employer for the organization of these activities, of the criminal liability for events that occurred on this occasion and of the incidence of the rules regarding work accidents, illustrated with jurisprudential examples and taking into account the jurisprudence of the CJEU regarding Directive 2003/88/EC. Concluding, given the conditions in which team-building activities are imposed on employees by the employer, under the aspects of the period, place, and way of organization, pursuing a specific goal of improving labor relations, the workers being at the disposal of the employer, without being able to freely dispose of the time declared as rest time and to devote themselves to their own interests, the time allocated to these activities should be considered working time within the meaning of Directive 2003/88, so only for the purpose of protecting health and safety at work.*

I. Introduction

Although carried out and studied since the[1] 1960s, *team building* activities gained popularity in Romania around 2000, when their organisation entered the offers of travel agencies, currently considering that the market for these services in our country is constantly growing[2].

Inevitably, the increase in these activities has increased the likelihood of conflict situations occurring in the course of their conduct, some of which have led to the referral to the courts, which makes it useful to analyse the legal regime of those activities and their time, especially since such activities often take place during daily or weekly rest periods or public holidays[3].

Team building activities have the appearance of pleasant, recreational activities, which would not have the characteristics of an activity falling within the duties of the employees, being able to take many forms such as activities in the free space, excursions, hiking, games, discussions, celebrations, etc., generally outside the workplace, whether or not associated with vocational training activities. The disputes identified in judicial practice have, however, called into question this appearance, being necessary in order to clarify the legal regime of this activity a multidisciplinary approach.

II. Terminology and conceptual clarifications

Team building is characterised in the literature as the most popular and frequently used method of organizational development intervention[4]. The purpose of this activity in which the

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[1] see De Meuse, K.P., Liebowitz, S. J., *An empirical analysis of team-building research,* Group & Organisation Studies, 1981, 6.3, p. 359-360;

[2]Cutieru I., *"A constantly growing market: the training, team building and consulting services in HR reached EUR 20 million in 2018"*, Ziarul Financiar, 20.5.2009, "https://www.zf.ro/eveniment/o-piata-in-continua-crestere-serviciile-de-training-team-building-si-consultanta-in-hr-au-ajuns-la-20-milioane-euro-in-2018-18136146", (accessed 19.1.2020); Dobrescu B., *'Team building, at another level'*, Capital, 20.5.2017, 'https://www.capital.ro/weekend-team-building-la-un-alt-nivel.html' (accessed 19.1.2020); Pescaru C., *"How much did Romanian companies spend on teambuilding and training programs in 2016"*, Revista Careers, 8.2.2017, "https://revistacariere.ro/leadership/piata-muncii-employment/cat-au-cheltuit-companiile-din-romania-pentru-programele-de-teambuilding-si-training-in-2016/", (accessed 19.1.2020);

[3] Mihai A.,I. – *"The advice of experts in leadership development programs: Give up team building programs organised on weekends! This practice shows that managers do not take teamwork seriously",*Ziarul Financiar, 2.6.2019, "https://www.zf.ro/profesii/sfatul-expertilor-in-programe-de-leadership-development-renuntati-la-programele-de-team-building-organizate-in-weekend-aceasta-practica-arata-ca-managerii-nu-iau-in-serios-munca-in-echipa-18149081" (accessed 19.1.2020);

[4] Salas, E., Rozell, D., Mullen, B., Driskell, J. E., *"The effect of team building on performance: An integration"*, Small group research, 30(3),1999, p. 309-310; Klein, C., Diaz Granados, D., Salas, E., Le, H., Burke, C. S., Lyons, R., Goodwin, G. F.,*'Does team building work?',* Small Group Research, 40(2),(2009), p. 182; By Meuse, K.P., Liebowitz, S.J., op.cit. p. 358,

members of a team participate is its development, increasing[5] its efficiency with positive financial consequences for the employer, improving social relations between team members, clarifying roles, solving tasks and interpersonal problems affecting the functioning of the team, achieving results, setting and achieving targets[6]. At the same time, it has been shown in the doctrine that *team building* aims to develop problem-solving capacity or to acquire new skills and perceptions that facilitate participation in the realisation of a proposed change[7] being an adaptive mechanism for organizational changes[8.] Another goal of this activity is to increase the cohesion of the team so that it works more efficiently and easily[9].

Team building activities are sometimes correlated, combined, or associated with *team training activities;* however, this type of activity differs significantly from *team building* in that the latter is in principle not oriented towards professional skills, is not systematic and usually takes place in places that do not simulate workspace[10]. However, given that communication and networking skills acquire professional relevance, it can be difficult to distinguish between the two activities.

Finally, *team building* should not be confused with purely recreational activities organised jointly by the members of a team themselves, at their own expense, even at the initiative of the formal leader of the team but outside the employer's organisational framework, and must be separated from the *motivational activities* offered by the employer, purely *recreational activities* offered to employees as a gift, rewards, by bearing costs and without pursuing any purpose, with the voluntary participation of team members, this type of reward having the exclusive role of stimulating performance [such as individual or group trips *(incentive trips)* whose costs are borne by the employer][11].

III. Jurisprudential Examination

It is interesting, however, that, from a legal point of view, the classification of these activities is presented differently by employers in conflicting situations, depending on the interest pursued, which requires a correlated analysis by the courts.

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[5] Salas, E., Rozell, D., Mullen, B., & Driskell, J. E. op.cit. p. 310;
[6] Klein, C., Diaz Granados, D., Salas, E., Le, H., Burke, C.S., Lyons, R., & Goodwin, G. F., op.cit. p. 183 and 185; Salas, E., Rozell, D., Mullen, B., & Driskell, J. E. op.cit. p. 314;
[7] Salas, E., Rozell, D., Mullen, B., & Driskell, J. E., op.cit. p,311;
[8]By Meuse, K.P., Liebowitz, S.J., op.cit. p. 357,
[9] Newman B., *"Expediency as benefactor: How team building saves time and gets the job done*", Training and Development Journal, 38(1984) p.
[10] Klein, C., Diaz Granados, D., Salas, E., Le, H., Burke, C.S., Lyons, R., & Goodwin, G. F. op.cit., p. 183;
[11] see Incentive Federation inc. – *"Incentive Market Study october 2013"* available at www.inentivefederation.org, p. 5 (see 19.1.2020).

In situations where the institution competent to carry out the tax audit considered that the expenses involved in organising the team building activities were expenses for the remuneration of staff, which entailed certain tax burdens, the employers argued that those expenses were incurred for the purpose of carrying out the activity and obtaining profit, statement accepted or not by the courts in the cases identified, in relation to the established facts.

For example, in a dispute, it was held[12] that 'the *team building activities were carried out in the interests of the employer, namely to obtain profit from the team's work*', and the fact that they took place on weekly rest days is not such as to dispel that conclusion. In another case, the complainant claimed[13] that certain expenses relating to team-building activities are deductible as this action aimed at "*improving the team through discussions on how information flows within the company; identifying the factors that can lead to the optimisation of expenditure; better capitalisation of working time; identification and dimensioning of investment needs in the next period; discussions on marketing activity and identification of ways that may lead to the possibility of obtaining contracts on the external market*'; in that case, however, the court rejected those arguments, holding, in essence, that the purpose and necessity of the expenditure for the company's revenue-generating activity had not been established. Also, in another case, in which the same arguments were raised, the appeal court considered that costs for *team building* actions were not deductible because they were unrelated to the training of employees and therefore unrelated to the company's income[14]. Also, on the grounds that the activity of *team building* were not related to the training of employees, the administrative court considered the conclusions of the Court of Auditors to be correct regarding the employer's (public institution) obligation to recover the costs incurred for that purpose, since those activities were for relaxing[15] and, therefore, not allowed by the public budget rules.

On the contrary, however, in situations where the employer's liability for the organisation of this type of activity was sought, the defences were diametrically opposed, and in some cases they were accepted by the courts in the cases identified, and in other cases rejected.

For example, in a case in which an employee applied for additional salary entitlements on the grounds that the period allocated to team building activities must be regarded as working

[12]C.A.Cluj, S. III c.a.f., Dec. 534/10 March 2017 (www.rolii.ro);
[13] As follows from C.A.Ploiesti, S. II c.a.f., judgment No 214/5 December 2017 (www.rolii.ro)
[14]HCCJ, S. c.a.f., Dec. No 4206/19 November 2008 (www.scj.ro)
[15]HCCJ, S. c.a.f., Dec. No 5041/18 April 2013 (www.scj.ro)

time and participation in those activities must even be considered additional work or work performed during the weekly rest days, the employer claimed that she did not owe those rights, essentially stating[16] that those activities, carried out on weekends, were optional and did not, in essence, involve the performance of work, being organised to improve the interpersonal relationships within that company. The specialized labor court held in that case that none of the activities indicated by the applicant were part of her duties, since they were activities which do not constitute a performance of work, with the result that it was not possible to claim payment of a salary, but possibly civil compensation, provided that the actual damage that had occurred to her was demonstrated.

On the contrary, in another case, an employee was accused by the employer that '*he had committed a serious misconduct, namely that the employee... left the group and the space where the team-building was organised, without notifying anyone'*[17].

The question of the employer's liability for the organisation of *team building* activities was also raised in criminal matters, in case of personal injury in the course of those activities.

For example, in one case, several employees took part in a trip organised by the director of the company, on which occasion they rented ATV-type vehicles and one of the employees caused an accident resulting in personal injury to another employee, the former being convicted of the offence of personal injury due to fault. The court seised dismissed the employer's liability as a civilly responsible person for finding, in essence, that the[18] act of the defendant employee was not committed in the performance of the duties entrusted to him because both the defendant and the victim were in their free time, choosing to carry out an activity which was not part of a predetermined programme, so that *"the fact that the trip was organised by the employer is not such as to create even a necessary correlation between the performance of the office which the defendant performed and the commission of the wrongful act; moreover, the wrongdoing was not only not committed in the interests of the principal, but there is not even an appearance in this regard".*

It is worth noting that, in the same case, by a previous decision[19], which quashed the sentence of the court of first instance and referred the case back to it, it was noted in the statement of the facts that *'[t]he documents in the file (declarations of the injured party, the*

[16] As it follows from the Trib. Bucharest,S. VIII, c.m.a.s., Judgment No 7792 of 1 October 2012 (www.rolii.ro);
[17] As follows from C.A. Suceava, S.I. Civ., Dec. 726 of 13 November 2014; in the present case, the dismissal decision was annulled because the employer did not summon the employee to carry out the disciplinary investigation, without further examination of the merits of the case, the employer relying on the existence of other unreasoned absences (www.rolii.ro);
[18]C.A. Bucharest – S. II pen, Dec. No 786/A/18 June 2014 (www.rolii.ro)
[19]C.A. Bucureşti, S. I pen., Dec. no. 573/27 March 2013 (www.rolii.ro)

defendant's statements and witness statements) resulted in the fact that the schedule of the trip was not established by someone, but he was made according to the choice of each of the participants'.

In another case, where, in the company where the victim was employed, a *'exit'* was organised with colleagues in order to have fun at a karting runway, on which occasion she suffered an accident and serious bodily injury, neither was the question of the employer's liability but only a question of the legal person organising that activity for customers[20].

IV. Legal regime of *team building* activities and their time

From a theoretical point of view, it is certain that the *team building* activity is, in the employers' conception, a useful practice for their work from the point of view of the efficiency of the employees, which they organise and finance and which they regard as an investment in human resources which, like any investment, is meant to generate profit.

It is true that, from the point of view of the fiscal regime, as a connection between this activity and obtaining income by the employer for the deduction expenses being necessary, it seems that the demands of probation are higher and the taxable subject does not always manage to prove this connection, especially in the context where, even in specialized literature has shown that, despite the common belief about effectiveness of *team-building*, there is no very clear evidence in this regard[21]. However, even in the light of those doubts, the effectiveness of those practices and their usefulness for the employer's activity cannot be ruled out simply because they do not concern the training of employees, since those two activities are, as I have pointed out, different in their object and nature, even though the general aim is also to improve the activity of employees. In addition, any initiative aimed at improving the work can be a failure and may prove ineffective for many reasons, which in itself does not mean that it did not have the stated purpose. The analysis should be made, in this case, in relation to the purpose and object of *team building* activities, in which, indeed, some purely recreational and entertainment activities, declared fictional as *team building* activities, could not be classified in this category.

But in the employment relationships, in the relationship between the employer and the employee, the *team building* activity is, theoretically, always an activity organised by the employer for its own use.

[20]C.A. Bucharest – S. II pen, Dec. No 832/A/30 May 2017 (www.rolii.ro)
[21] Klein, C., Diaz Granados, D., Salas, E., Le, H., Burke, C.S., Lyons, R., & Goodwin, G. F., op.cit.p. 182; Salas, E., Rozell, D., Mullen, B., & Driskell, J. E., op.cit. p. 310;

The question which arises in order to determine whether participation in those activities forms part of the employee's professional activity is whether or not the subordination relationship subsists during the period concerned.

The difficulty of the disputes arising in this context lies not so much in the theoretical aspects as in the correct classification of an activity which does not constitute the main professional activity of the employee.

This difficulty arises, as is apparent from the case-law identified, from the overlapping and combination of *team building* activities with professional training activities, but also with purely recreational activities, offered to employees as gifts and rewards. From this point of view, tax matters can only constitute an element which, among others, leads to a correct determination of the nature of the activity.

I believe that the time allocated to *team building* activities, once their character is certain, should be included in working time, but not for the purpose of remuneration, but for the protection of health and safety at work.

In contrast to the provisions of Art.111 of the Romanian Labor Code, which, for the purpose of determining remuneration, provides for the actual performance of work for the inclusion of a period in the working time, and the provisions of Article 120 of the Romanian Labor Code, which defines additional work as a work actually performed, the time allocated to participating in *team-building* activities cannot be included in the working time envisaged when quantifying the remuneration and those activities cannot be considered as additional work.

A different situation, with an exceptional nature, can possibly be identified only in the person of an employee who is responsible for organising the *team-building* activities at their place, who is not only in the position of participant and actually performs the work, performing tasks established by the employer to organize the team building activities.

From the perspective of Directive 2003/88, for the sole purpose of protecting health and safety at work, the time spent on participating in *team-building* activities may be included in working time if the conditions laid down by the definition contained in Article 2(1) of the Directive, as interpreted by the CJEU, are met.

In this respect, since *team-building* activities are apparently unrelated to the work performed by employees, members of the team, it is rather useful to check whether the period affected by this activity may constitute resting time.

In a recent judgment, the[22] CJEU summarized the features of rest time on the basis of its previous case-law, holding, in essence, that a period during which no work is actually carried out in favour of the employer does not necessarily constitute rest time, but only those in which the constraints imposed on the worker do not reach such a degree of intensity preventing him from managing and dedicating himself to his own interests and the constraints must result from employer requirements or imposed by laws, regulations or collective agreements and not from natural elements or choices of the employee or from the lack of special recreational possibilities (parag.32, 38, 40-42).

In the same vein, the Court added new elements in its analysis of the constraints to which the worker is subject to the management of his own time, holding that the actual possibility for the worker to carry out another paid activity during the guard at home or the possibility of refusing to participate in part of the interventions requested from him constitutes an important indication that such constraints are limited in nature[23]. It has also been established that, in the analysis of the existence of these constraints, account should not be taken of those inherent in a short rest period (e.g. several tens of minutes of a break which does not allow long distance travel outside the workplace) and in general those which would exist independently of the requirements of the function[24]. Similarly, in this analysis, account must not be taken of the consequences of the worker's free choices with regard to the determination of his residence which determines the distance from work, the duration of the journey and the reaction time if he is required to intervene or those determined by natural elements[25].

It can therefore be concluded from the case-law of the CJEU that rest time is a period during which, although the employment relationship and the obligations of the employee subsist, they involve some minor constraints which allow the worker, in fact, to rest and devote himself to leisure and leisure activities, to manage his time with a sufficient degree of freedom to be able to pursue his own interests reasonably and to remain within his social environment and with his family, in order to recover the ability to work lessened by the fatigue generated by the performance of the tasks incumbent on him under the individual employment contract, so as to prevent the risk arising from the accumulation of periods of work without rest in terms of

[22] CJEU (Grand Chamber), judgment of 9 March 2021, Radiotelevizija Slovenija, in case C-344/19, EU:C:2021:182;
[23]CJEU (Fifth Chamber), judgment of 11 November 2021, Dublin City Council, C-214/20, EU:C:2021:909.
[24] CJEU (Tenth Chamber), judgment of 9 September 2021, Dopravní podnik hl. m. Prahy, C-107/19, EU:C:2021:722, parag.32.
[25] CJEU (Grand Chamber), judgment of 9 March 2021, Stadt Offenbach am Main, C-580/19, EU:C:2021:183, parag.41.

occupational safety and health, understood as complete physical, mental and social well-being, in the perspective of continuing professional activity.

Finally, in the recent case-law to which reference has been made, there appears to be a tendency of the CJEU to refrain from laying down solutions to the specific situation at issue and to transfer to the national court the analysis of the classification of a given period in working time or rest time, indicating indicative elements which should be analysed in an 'overall assessment of all the circumstances of the case in order to determine whether the worker is subject to constraints which objectively and very significantly affect his or her ability to manage his time freely'.[26]

To this end, it is necessary to examine some relevant elements in order to verify whether, during that period, the employee is free from any obligation towards the employer and can dispose of his time according to his own will:

§1. **Initiative, responsibility for organisation and purpose of the work**

From the point of view of human resources theory, *team building* activities are by nature some organised by the employer in his own interest, on his initiative, essentially to increase the efficiency of employee teams. Their organisation can be systematic, planned and with an allocated or sporadic budget, depending on the needs and funding possibilities. As a result, it is necessary to check whether the place, date and manner of organisation are required by the employer.

A relevant element may be the source of the financing of those activities and the accounting regime applied by the employer himself, which is relevant to the administrative-fiscal case-law. However, this must be analysed in the broader context of the other relevant factors, since sometimes expenses for apparently *team building* activities form part of a system of rewards consisting of trips and excursions, in order to evade the tax on income of a salary nature, as is apparent from the court ruling in a case in which the employee responsible was penalised disciplinaryly for that practice[27].

§2. **Mandatory nature of participation**

This character should be checked in the least restrictive manner possible. Thus, there is no need for a formal provision of the employer for the participation of employees in that activity, and there may also be a mere invitation or notice. It must be verified, however, whether the non-participation in these activities has consequences for the employment relationship, such as the situation in which it is relevant in the context of a professional evaluation, promotion

[26] CJEU, Hot. in C 107/19-, cit.; CJEU, Hot. in C 214/20-, cit.; CJEU, Hot. in C 580/19-, cit.
[27] C.A. Bucharest, S. VII, c.m.a.s., Dec.2044/09 May 2018 (www.rolii.ro);

process, or leads to the conclusion that the employee concerned does not have the skills and competences the improvement of which has been sought through *team-building* actions, with effects of the same type. The binding nature may also result from factual aspects leading to the conclusion that non-participation in such activities leads to pressure on the employee or *mobbing* actions. A fortiori is binding when the non-participation, leaving the activity or acts committed during that activity entail disciplinary liability.

Such an analysis may be facilitated by the existence of internal regulations of the employer. For example, it follows from the content of a judgment of the French Court of Cassation that a corporate culture suggestively called *"fun & pro"* was formally implemented at the level of a company, implying the obligation of employees to attend seminars and celebrating employer's achievements; the refusal to participate in these events, together with the imputation of communication deficiencies in the employment relations, was the reason for the dismissal of the employee concerned; the French court annulled the dismissal decision on the ground that the obligation to participate in those activities organised by the employer infringed the employee's freedom of expression but correlated with the finding that the employer encouraged promiscuity, excesses, including alcohol consumption and intimidation of employees during those festivities[28]. Therefore, the possibility that participation in such activities would be binding was not ruled out in the present case, since the decision to annul the dismissal decision was based rather on the justified nature of the refusal to participate; however, even in such a case, when the employee accepts the way the *team-building* activities are carried out, if participation is mandatory and the refusal attracts disciplinary responsibility, the time affected should be considered as working time.

V. Conclusions

Therefore, when and if *team-building* activities are imposed on employees by the employer, in terms of time, place and organization, pursuing employer's own aim of improving employment relationships, workers being at the employer's disposal, without being able to freely dispose of the time declared as rest time and to devote themselves to their own interests, the time allocated to those activities should be regarded as working time within the meaning of Directive 2003/88, that is to say, for the sole purpose of protecting health and safety at work.

In the light of Articles 111 and 120 of the Romanian Labor Code, the time allocated to participating in *team-building* activities cannot be included in the working time taken into

[28]Cass. Soc., 09 November 2022, 21-15.208, FR:CCASS:2022:SO01164 (published 'https://www.legifrance.gouv.fr/juri/id/JURITEXT000046555948', accesed 26.11.2022);

account when quantifying the remuneration and those activities cannot be considered as additional work either.

If *team-building* activities overlap with professional training activities carried out outside the locality where the place of work is located, they follow their regime and that of travel for the purpose of work[29].

[29] See CJEU (Tenth Chamber), judgment of 28 October 2021, Territorial Administrative Unit D., C-909/19, EU:C:2021:893; CJEU (Fourth Chamber), judgment of 9 July 2015, European Commission v Ireland, C-87/14, EU:C:2015:449; see also Anghel, R.,*"Professional training of doctors in trainees (residents). Inclusion of the duration of training activities in working time. Conditions. Judgment of the Court of Justice of the European Union on the action for failure to fulfil obligations brought by the European Commission against Ireland*" in Revista de Jurisprudență Europeană (European Case-law Journal), No 2/2015, pp. 4-7;