JUDGMENT OF THE COURT
25 March 2013*

(Directive 91/533/EEC – Obligation to inform employees – Amendments to a written contract of employment – Effect of non-notification of amendments)

In Case E-10/12,

REQUEST to the Court from Héraðsdómur Reykjavíkur (Reykjavík District Court) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in the case of

Yngvi Harðarson

and

Askar Capital hf.

on the interpretation of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Yngvi Harðarson ("the plaintiff"), represented by Hildur Sólveig Pétursdóttir, Supreme Court Attorney;
- Askar Capital hf. ("the defendant"), represented by Stefán Geir Þórisson, Supreme Court Attorney;

* Language of the request: Icelandic.

- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Clémence Perrin and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Johan Enegren, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard the oral argument of the plaintiff, represented by Hildur Sólveig Pétursdóttir; the defendant, represented by Stefán Geir Þórisson; ESA, represented by Clémence Perrin; and the Commission, represented by Johan Enegren, at the hearing on 1 March 2013,

gives the following

Judgment

I Legal context

EEA law

1 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship ("the Directive" or "Directive 91/533") (OJ 1991 L 288, p. 32) was incorporated into the EEA Agreement by Decision No 7/94 of the EEA Joint Committee of 21 March 1994, amending Annex XVIII to the Agreement.

2 Article 1 of the Directive on its scope reads:

> *1. This Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.*
>
> *…*

3 Article 2 of the Directive on the obligation to provide information reads:

> *1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as 'the employee', of the essential aspects of the contract or employment relationship.*
>
> *2. The information referred to in paragraph 1 shall cover at least the following:*
>
> *…*

(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;

….

4 Article 5 of the Directive on modifications reads:

1. Any change in the details referred to in Articles 2(2) and 4(1) must be the subject of a written document to be given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the change in question.

…

5 Article 6 of the Directive on the form and proof of the existence of a contract or employment relationship and procedural rules reads:

This Directive shall be without prejudice to national law and practice concerning:

- the form of the contract or employment relationship,

- proof as regards the existence and content of a contract or employment relationship,

- the relevant procedural rules.

6 Article 8 of the Directive on defence of rights reads:

1. Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

…

National law

7 The Directive was implemented in Icelandic law by Notice No 503/1997, which was published in Series B of the Law Gazette on 30 June 1997. Following consultation with the principal employers' and workers' organisations, it was decided to implement the provisions of the Directive by way of collective agreements in accordance with Article 9(1) of the Directive.

8 Under Icelandic law there is no general provision laying down formal requirements in relation to contracts of employment, although such requirements

exist in certain sectors. This entails, *inter alia*, that oral contracts, or contracts made with the assistance of electronic media are, in principle, valid.

II Facts and procedure

9 On 18 December 2006, the plaintiff and the defendant concluded a contract of employment, which took effect on 1 January 2007. Article 2 of the contract provided that the notice period for the termination of the contract amounted to 12 months. According to Article 3 of the contract, the plaintiff's monthly remuneration was fixed at EUR 15 000.

10 In the course of the plaintiff's employment, several aspects of the contract of employment were modified. This included his title and responsibilities, his remuneration and the currency in which the remuneration was paid.

11 As regards his position, the plaintiff was initially hired as the Manager of the Consulting and Risk Management Department. He was then appointed as the Manager of the Risk Management Department as from summer 2007, and as the Manager of the Hedge Fund Department as from June 2008. Finally, from October 2008 to July 2010, he was engaged as the Manager of the Risk Consulting Department.

12 From January 2009, the plaintiff's monthly remuneration was paid in Icelandic krónur (ISK). From April 2009, the monthly pay of EUR 15 000 was reduced to ISK 1 500 000 (equivalent to some EUR 9 000 according to exchange rates at the time). Based on the information given in the request from the national court, the parties in the national proceedings disagree whether such modification was temporary or permanent, and from when the reduction applied. This is due to the fact that the negotiations were conducted orally and via email between December 2008 and November 2009.

13 By a ruling of 14 July 2010, the defendant was put into winding-up proceedings.

14 By a letter of 26 July 2010 to the defendant's winding-up committee, the plaintiff declared that he considered the defendant to have defaulted on the contract and that he would not accept any deviation from the terms of the written contract as regards his terms of employment, including those relating to wages. By a letter of 27 July 2010, the winding-up committee terminated the contract of employment and informed the plaintiff that it would not take over any rights and obligations under the contract.

15 On 18 November 2010, the plaintiff lodged a claim with the defendant's winding-up committee for wages during his notice period together with vacation pay and social security tax, a total of EUR 252 836. The claim was based on a 12-month notice period and a monthly wage of EUR 15 000 as provided in the employment contract. The claim was lodged as a priority claim in the winding up under national law.

16 The winding-up committee rejected the plaintiff's full claim on the basis that, as of April 2009, the calculation of his claim should have been based on a monthly remuneration of ISK 1 500 000.

17 As a result, the winding-up committee reduced the plaintiff's claim from EUR 252 386 to EUR 150 023. Moreover, it did not consider the claim a priority claim but an ordinary one for the purpose of the winding-up proceedings. The plaintiff rejected the winding-up committee's position both with regard to the status of the claim (which is not the subject of the reference) and the amount.

18 When attempts to resolve the dispute proved unsuccessful, it was decided to refer it to Reykjavík District Court.

19 In the proceedings before the District Court, the plaintiff requested that two questions be referred to the Court. By the first question proposed, the plaintiff essentially requested the District Court to seek clarification whether Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36) ("Directive 2008/94"), and in particular Article 12(c) of Directive 2008/94, precluded an employee from being deprived of his priority status in insolvency proceedings such as those at issue in the case at hand.

20 The plaintiff also proposed a second question, by which the Court was to be asked essentially to clarify the implications of amendments to the contract of employment not being notified in accordance with Article 5 of Directive 91/533.

21 In a ruling of 7 June 2012, the District Court rejected that request.

22 An appeal was made to the Supreme Court of Iceland. In its judgment of 27 August 2012, having regard to recital 3 in the preamble to Directive 2008/94, the Supreme Court confirmed the District Court's ruling in relation to the first question. However, on the second question proposed, it overruled the District Court and decided that a reference should be made to the Court in connection with the dispute concerning the reduction of the plaintiff's claim.

23 On 14 September 2012, Reykjavík District Court referred the following question to the Court:

> *Should Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship be interpreted as meaning, in circumstances including bankruptcy proceedings or a comparable division of a limited liability company, that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the main features of the contract of employment or*

employment relationship between the parties within the time limits laid down in Article 5 of the Directive?

24 On 28 November 2012, ESA issued Iceland with a reasoned opinion concerning the implementation of Article 8 of the Directive. Those infringement proceedings have no bearing on the present case.

25 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The question referred

26 By its question, the national court essentially asks whether and, if so, to what extent it affects the calculation of the compensation due to an employee, in circumstances including bankruptcy or similar proceedings, if amendments to the written contract of employment relevant to the calculation of the compensation have not been notified to the employee by means of a written document and within the time limits established in Article 5 of the Directive.

Observations submitted to the Court

27 The plaintiff submits that the provisions of the Directive are to be interpreted as meaning that, in the event of insolvency proceedings or comparable division of a limited company, compensation to an employee, including vacation pay and pay during the notice period, should be assessed on the basis of the written contract of employment.

28 The plaintiff points out that, according to its preamble, the objective of the Directive is to subject employment relationships to formal requirements. To this end, Article 5 of the Directive states that any change in the contract of employment must be the subject of a written document to be given by the employer to the employee not later than one month after the date of entry into effect of the change in question.

29 Furthermore, under Article 2(2) of the Directive, the employer is obliged to inform the employee in a clear manner of the essential aspects of the contract of employment. Therefore, the plaintiff's view is that the position adopted by the defendant towards his claim infringes Articles 1, 2(2) and 5 of the Directive. According to the plaintiff, the fact that he approved, from month to month, a deviation from the contract of employment in the form of a reduction of his basic wage does not alter the obligation of the defendant to pay him the basic wage (EUR 15 000) and vacation pay for a period of 12 months, which is the notice period specified in the contract.

30 In the plaintiff's view, this conclusion is not altered by Article 6 of the Directive. This provision provides that the Directive shall be without prejudice to national

law and practice concerning, *inter alia*, proof as regards the existence of a contract or employment relationship. However, in his view, this provision does not apply to amendments to an existing contract, which according to Article 5 of the Directive must be the subject of a written document.

31 Moreover, the plaintiff submits that the employees of an employer which becomes bankrupt or insolvent do not lose their protection under Article 1 of the Directive. According to the plaintiff, this follows from Articles 1(1) and 2(1) of Directive 2008/94.

32 The defendant, ESA and the Commission submit that when an essential element of a contract has not been mentioned in a written document within the meaning of Article 2 of the Directive it does not follow from the Directive that that element will be regarded as inapplicable.

33 The defendant, ESA and the Commission observe that Articles 2 and 5 of the Directive require the employer to notify the employee in writing of the essential aspects of the contract, or of amendments to such aspects, within a specific time frame. However, they submit that the provisions of the Directive have no bearing on the material content of the contract of employment.

34 According to the defendant, ESA and the Commission, the aim of the written declaration required by the Directive is not to harmonise the content of employment contracts with regard to matters such as remuneration. Article 6 states that the Directive is without prejudice to national law and practice concerning the form of the contract or employment relationship, proof as regards the existence and content of a contract or employment relationship as well as the relevant procedural rules. This provision implies that proof regarding the existence of a contract or employment relationship may be produced in any form allowed under national law, even in the absence of any written notification from the employer.

35 The defendant, ESA and the Commission observe that the Directive does not provide for any penalty or sanction in the case of a failure to notify in writing any amendment to the contract of employment as required in Article 5. Instead, Article 8 leaves it to the Member States to define the penalties appropriate in the case of a failure to comply with the obligations arising from the Directive. Therefore, it is for the national legislature to introduce the necessary measures to enable employees who consider themselves wronged by a failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

36 According to ESA, the aim of the Directive is to ensure that national courts apply and interpret their national rules on evidence in the light of the purpose of the Directive. This is to provide employees with improved protection against possible infringements of their rights. Accordingly, even if the defendant failed to provide the plaintiff with the information required by a provision of the

Directive, the Directive does not release either of the parties from their obligations arising under the contract.

Findings of the Court

37 According to settled case law, Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them (see Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25, E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, paragraph 13, and E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraph 34).

38 Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case E-17/11 *Aresbank*, judgment of 22 November 2012, not yet reported, paragraph 43, and case law cited). Even if in practice the decision to submit a reference will often be made on an application by one or both parties in the national proceedings, the cooperation between the Court and the national court is completely independent of any initiative by the parties (see Case E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraph 55).

39 In order to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law, the Court may extract from all the factors provided by the national court and, in particular, from the statement of grounds in the order for reference, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute and to restrict its analysis to the provisions of EEA law and provide an interpretation of them which will be of use to the national court, which has the task of interpreting the provisions of national law and determining their compatibility with EEA law (see *Irish Bank*, cited above, paragraph 56, and case law cited).

40 In its written and oral submissions to the Court, the plaintiff has argued that Directive 2008/94 is relevant for the outcome of the case in the main proceedings notwithstanding the findings of the referring court to the contrary in its reasoned ruling of 7 June 2012, subsequently upheld by the Supreme Court.

41 Having regard to the system of judicial cooperation noted in paragraphs 38 to 40 of this judgment, the questions referred to the Court by national courts enjoy a presumption of relevance. The same presumption also applies in relation to reasoned decisions of national courts as regards the content and scope of the questions referred (see *Aresbank*, cited above, paragraph 44, and case law cited).

42 The Court has not found any cause to question the findings of the national court on the applicability of Directive 2008/94 for the purposes of the present case. Therefore, it sees no need to consider the plaintiff's arguments on that point. Therefore, the Court will answer the question referred solely in light of Directive 91/553.

43 As noted in paragraph 26 above, the national court essentially asks whether and, if so, to what extent it affects the calculation of the compensation due to an employee, in circumstances including bankruptcy or similar proceedings, if amendments to the written contract of employment relevant to the calculation of the compensation have not been notified to the employee by means of a written document and within the time limits established in Article 5 of the Directive.

44 It is apparent from the preamble to the Directive (recitals 1 and 3) that new forms of work have led to an increase in the number of types of employment relationships and that national legislation differs considerably on fundamental points such as the requirement to inform employees in writing of the main terms of the contract or employment relationship.

45 Thus, the purpose of the Directive is to provide employees with improved protection against possible infringements of their rights and create greater transparency in the labour market (recital 2). Therefore, the general requirement that every employee must be provided with a document containing information on the essential elements of his contract or employment relationship has been established at EEA level (recital 7).

46 To that end, Article 2(1) of the Directive lays down the principle that the employer is obliged to notify employees of the essential aspects of the contract or employment relationship. Article 2(2) provides a non-exhaustive list of what that information at least shall cover. That list includes the remuneration and the amount of paid leave to which the employee is entitled, and the length of the periods of notice to be observed.

47 According to Article 3(1) of the Directive, the information referred to in Article 2(2) must be given to the employee in a written contract of employment; a letter of engagement; and/or one or more other written documents, not later than two months after the commencement of employment.

48 Moreover, Article 5 of the Directive provides that any amendments to an essential aspect of the contract or the employment relationship must be the subject of a written document given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the amendments in question.

49 Where a notification is made in accordance with Articles 3 and 5, it must be given such evidential weight as to allow it to serve as factual proof of the essential aspects of the contract of employment, including a certain presumption of correctness as enjoyed by similar documents under domestic law (see, for

comparison, Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraphs 30 to 34).

50 However, the present case concerns the consequences of a notification not being made, that is whether an amendment to a contract of employment must be considered ineffective if it has not been notified in accordance with Article 5 of the Directive.

51 It follows from the Directive that a distinction must be made between the terms and conditions of the contract of employment and the employer's duty to inform the employee of those terms and conditions. Its provisions presuppose that a contract of employment or amendments thereto may take effect regardless of whether the employee has been notified of them in writing.

52 Moreover, it follows plainly from the second indent of Article 6 that the Directive is to be without prejudice to the rules on proof of the existence of a contract or employment relationship under national law. That provision implies that such proof may be produced in any form allowed by national law, even in the absence of any written notification from the employer (see, for comparison, Case C-350/99 *Lange* [2001] ECR I-1061, paragraph 27).

53 The Directive does not itself lay down any rules of evidence. Thus, proof of the essential aspects of the contract or employment relationship cannot depend solely on the employer's notifications under Articles 2(1) and 5, or the lack of such notifications. The employer must therefore be allowed to bring any evidence to the contrary, by showing that the information in the notification provided under Article 2(1) has been subsequently altered (compare, *mutatis mutandis*, *Kampelmann and Others*, cited above, paragraph 34).

54 In other words, the Directive has no bearing on the material content of the contract of employment. It is a matter for the courts of the EEA States to apply national rules of evidence as to the existence and content of contracts or employment relationships. It follows from the system of Articles 3 and 5 that no distinction in this regard should be made between the existence of and amendments to a contract.

55 Furthermore, Article 8(1) of the Directive provides that EEA States are to introduce such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities. It follows from that provision that the Directive cannot be interpreted as meaning that a failure to give an employee the requisite information concerning an essential aspect of the contract or employment relationship will render that aspect ineffective. The Directive leaves to the EEA States the power to define the penalties appropriate to such circumstances, subject to the proviso that employees must be able to pursue their claims by judicial process (see, for comparison, *Lange*, cited above, paragraph 28).

56 Consequently, the Directive does not require any amendments to an essential aspect of the contract or employment relationship that has not been mentioned in a written document delivered to the employee, or has not been mentioned therein with sufficient precision, to be regarded as ineffective (compare *Lange*, cited above, paragraph 29).

57 The question from the national court has arisen in the context of bankruptcy proceedings. However, the Directive applies generally to employment relationships. It therefore applies in the same manner also in bankruptcy proceedings or a comparable division of a limited company.

58 The answer to the question must therefore be as follows:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as not requiring that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the essential aspects of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive. This applies also in the context of bankruptcy proceedings or a comparable division of a limited liability company.

IV Costs

59 The costs incurred by ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Reykjavík District Court, any decision on the costs of the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as not requiring that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the essential aspects of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive. This applies also in the context of bankruptcy proceedings or a comparable division of a limited liability company.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 25 March 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President