REPORT FOR THE HEARING

in Case E-11/20

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

Eyjólfur Orri Sverrisson

and

The Icelandic State,

concerning the interpretation of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, in particular Article 2 thereof.

I Introduction

1. By a letter of 19 June 2020, which was received at the Court on 16 July 2020, Reykjavík District Court (*Héraðsdómur Reykjavíkur*) made a request for an Advisory Opinion in a case pending before it between Eyjólfur Orri Sverrisson ("Mr Sverrisson") and the Icelandic State.

2. The case before the referring court concerns an employment dispute between Mr Sverrisson, an aircraft mechanic, and his employer, the Icelandic Transport Authority (*Samgöngustofa*; "ICETRA"). Mr Sverrisson is an inspector in the airworthiness and registration department in ICETRA's transport division. While Mr Sverrisson's normal workplace is in Reykjavík, Iceland, in the course of his employment, he has been required by ICETRA to carry out inspection visits or to register and/or inspect aircraft abroad.

3. In the course of the national proceedings, the question has arisen whether the time spent by Mr Sverrisson travelling between his home and his destination overseas, on behalf of ICETRA, is to be considered as working time.

II Legal background

EEA law

4. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9), ("the Working Time Directive" or "the Directive"), was incorporated in the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") as point 32h of Annex XVIII (Health and safety at work, labour law, and equal treatment for men and women) to the Agreement by Decision of the EEA Joint Committee No 45/2004 (OJ 2004 L 277, p. 12, and EEA Supplement 2004 No 43, p. 11). Constitutional requirements were indicated by Iceland, and the decision entered into force on 1 August 2005.

5. Article 2 of the Directive sets out the definitions of working time and rest period:

> *1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;*
>
> *2. "rest period" means any period which is not working time;*

6. Article 18 of the Directive entitled "Derogations by collective agreements" reads:

> *Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.*
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> *Member States in which there is no statutory system ensuring the conclusion of collective agreements or agreements concluded between the two sides of industry at national or regional level, on the matters covered by this Directive, or those Member States in which there is a specific legislative framework for this purpose and within the limits thereof, may, in accordance with national legislation and/or practice, allow derogations from Articles 3, 4, 5, 8 and 16 by way of collective agreements or agreements concluded between the two sides of industry at the appropriate collective level.*
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> *The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.*

Member States may lay down rules:

(a) for the application of this Article by the two sides of industry; and

(b) for the extension of the provisions of collective agreements or agreements concluded in conformity with this Article to other workers in accordance with national legislation and/or practice.

National law

7. The Directive was implemented into Icelandic law by Act No 68/2003 on Working Environment, Health and Safety in Workplaces (Working Time Directive, EEA rules) ("Act No 68/2003")[1] which amended Act No 46/1980 on Working Environment, Health and Safety in Workplaces.[2]

8. Article 52 of the Working Environment, Health and Safety in Workplaces Act, as amended by Article 19 of Act No 68/2003 reads:[3]

For the purposes of this chapter, the following terms are defined as stated below:

(1) Working time: The time during which a worker is engaged in work, at the disposal of the employer and carrying out his/her activity or duties.
(2) Rest time: Time that is not counted as working time.

9. The first paragraph of Article 9 of the Public Employees' Collective Agreement Act No 94/1986[4] provides that working time is to be negotiated in collective agreements.

10. The first paragraph of Article 17 of the Rights and Obligations of Government Employees Act No 70/1996 provides as follows:

The agency head decides the hours of work of employees of an agency as prescribed by law or wage agreements.

11. The employment relationship between Mr Sverrisson and ICETRA is governed by the collective agreement between the Union of Icelandic Aircraft Mechanics (*Flugvirkjafélag Íslands*) for its members working for ICETRA and the Minister of Finance and Economic Affairs on behalf of the Treasury ("the Collective Agreement").[5]

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[1] *Lög nr. 68/2003 um aðbúnað, hollustuhætti og öryggi á vinnustöðum (vinnutímatilskipun, EES-reglur).*
[2] *Lög nr. 46/1980 um aðbúnað, hollustuhætti og öryggi á vinnustöðum*.
[3] All translations of national law are unofficial.
[4] *Lög nr. 94/1986 um kjarasamninga opinberra starfsmanna*.
[5] *Kjarasamningur Flugvirkjafélag Íslands vegna félagsmanna þess í starfi hjá Samgöngustofu og fjármála- og efnahagsráðherra f.h. ríkissjóðs.*

12. Section 2.2 of the Collective Agreement entitled “Daytime work” reads:

2.2.1 Daytime work shall be carried out between the hours of 08:00-17:00 from Monday to Friday.

2.2.2 The management of an institution may permit individual employees who so request flexible working hours in the period between 07:00-18:00 on working days. The approval of the contracting parties shall be sought for such permission.

2.2.3 A worker having daytime employment who discharges part of his work obligations outside daytime work hours as defined in Section 2.2.1 shall receive a payment of a premium according to Section 1.5.1 for that part of his work. If the period of daytime work has been extended pursuant to paragraph 2 of Section 2.1.2 or 2.2.2, no premium is paid for work outside the time limits prescribed in Section 2.2.1.

13. Section 2.3.1 of the Collective Agreement reads:

2.3.1 Overtime means the time worked in addition to specified daily work hours or a shift of an employee as well as work carried out in addition to the hours required on a weekly basis even though they are carried out during daytime working hours.

14. Section 5.5 of the Collective Agreement entitled “Travelling time abroad” reads:

5.5.1 When an employee goes abroad at the initiative of the employer and on the employer's behalf, the payment for such inconvenience shall be as follows:

If the departure of a flight is on a business day before 10:00 and/or arrival after 15:00 the employee shall receive a payment of three hours with a premium of 33.33% pursuant to Section 1.6.1 in each instance.

On general and statutory holidays the corresponding payment shall amount to six hours with a premium of 55% pursuant to Section 1.6.1 irrespective of the time of day of the flight.

It is permissible to agree on leave instead of payment for travelling time in such a manner that a 33.33% premium corresponds to 20 minutes of leave and a 55% premium corresponds to 33 minutes of leave.

III Facts and pre-litigation procedure

15. In its request, the referring court notes that the Icelandic State has not contested the description of the facts of the case set out in Mr Sverrisson's application. Mr Sverrisson is an aircraft mechanic, working as an "inspector" (*eftirlitsmaður*) in the airworthiness and registration department of ICETRA's transport division. His normal working place is at ICETRA's headquarters at Armuli 2, Reykjavík, Iceland. Mr Sverrisson's employment is subject to the Collective Agreement.

16. Typically, Mr Sverrisson works during daytime hours between 8 a.m. and 4 p.m. on weekdays. Mr Sverrisson also has to undertake "inspection visits" (*eftirlitsheimsóknir*), where he audits Icelandic aviation operators' line stations abroad, or responds to requests by Icelandic aviation operators to have an aircraft mechanic visit locations abroad in order to register aircraft for the first time, or to carry out airworthiness inspections of aircraft. Frequently, these involve him travelling to countries outside of Europe. Special requests, which the director of ICETRA must approve before the journey begins, are recorded by ICETRA. Mr Sverrisson and other aircraft mechanics employed by ICETRA have demanded that their travelling time be recognised, in its entirety, as working time, from the time of departure from their homes until they arrive at their final destination, the place of lodging abroad.

17. On 14 December 2016, Mr Sverrisson and other aircraft mechanics ("the aircraft mechanics") at ICETRA requested the calling of a meeting of a collaborative committee. The aircraft mechanics had wanted to discuss their demands of having their entire travelling time recognised as working time.

18. On 15 February 2017, a meeting of the collaborative committee was held. However, the aircraft mechanics' demands were rejected by the director of ICETRA. Instead, ICETRA decided to seek an opinion from the Wages, Terms and Human Resources department of the Ministry of Finance and Economic Affairs ("the Ministry"), and thus the meeting was adjourned.

19. On 20 March 2017, another meeting of the collaborative committee was held, which did not produce any results. Once the opinion of the Ministry's Wages, Terms and Human Resources department had been obtained, the aircraft mechanics requested representatives from the Ministry and from the Union of Icelandic Aircraft Mechanics to attend a meeting of the collaborative committee. While the trade union was prepared to send representatives, in early May 2017, the Ministry responded that it did not consider it necessary to attend the meeting.

20. On 12 May 2017, a representative of the aircraft mechanics wrote a letter to ICETRA's director in relation to what had happened.

21. The present case focuses on the working hours related to two trips that Mr Sverrisson undertook. The first trip was in February 2018. Mr Sverrisson took a round

trip to Tel Aviv, Israel, on behalf of Icelandair in Israel, for him to register an aircraft (TF-ISX) and grant it temporary airworthiness certification for a flight to Iceland. For this trip, Mr Sverrisson is seeking to have a total of 20.5 hours recognised as working time:

- 26 February: From 5.00 a.m. (beginning of journey) until 8.00 a.m. (beginning of daytime working hours), total 3 hours.
- 26 February: From 4.00 p.m. (end of daytime working hours) until 8.30 p.m. (arrival at hotel), total 4.5 hours.
- 1 March: From 4.00 p.m. (end of daytime working hours, beginning of journey) until 11.59 p.m., total 8 hours.
- 2 March: From 0.01 a.m. until 5.00 a.m. (end of travelling time), total 5 hours.
- Total 20.5 hours on this trip (excluding daytime working hours).

22. On 17 October 2018, Mr Sverrisson and the other aircraft mechanics sent a formal letter of claim to ICETRA, in relation to the demand that the time spent on travelling in connection with projects abroad, and also work done by aircraft mechanics abroad outside daytime working hours, be counted as working time in accordance with applicable law and the Directive. On 30 October 2018, ICETRA rejected the demand in writing. On 6 November 2018, Mr Sverrisson's lawyer responded to this letter in writing.

23. In November 2018, Mr Sverrisson undertook a second trip. He travelled to and from Saudi Arabia for the purpose of ICETRA's regular auditing of a line station and two aircraft belonging to the airline Air Atlanta. For this trip, Mr Sverrisson is seeking to have a total of 24.17 hours recognised as working time:

- 12 November: From 4.15 a.m. (beginning of journey) until 8.00 a.m. (beginning of daytime working hours), total 3.75 hours.
- 12 November: From 4.00 p.m. (end of daytime working hours) until 11.59 p.m., total 8 hours.
- 13 November: From 0.01 a.m. until 2.40 a.m. (arrival at destination), total 2.67 hours.
- 18 November: From 10.15 p.m. (beginning of journey) until 11.59 p.m., total 1.75 hours.
- 19 November: From 00.01 a.m. until 8.00 a.m. (beginning of daytime working hours), total 8 hours.
- Total 24.17 hours on this trip (excluding daytime working hours).

24. On 6 March 2019, Mr Sverrisson brought an action before the courts against the Icelandic State to have his claims recognised.

25. As was the practice of other ICETRA aircraft mechanics when undertaking such business trips abroad, Mr Sverrisson recorded the travelling time and the hours spent

working abroad outside daytime working hours as working time in the working-time recording system. However, ICETRA, having taken the view that there was no obligation for it to recognise the hours concerned, i.e. travelling time, as working hours, altered these records in the system.

26. On 2 March 2020, counsel for Mr Sverrisson requested Reykjavík District Court to seek an advisory opinion from the Court.

27. On 20 March 2020, Reykjavík District Court denied Mr Sverrisson's request that an advisory opinion be sought.

28. On 12 June 2020, the Court of Appeal overturned Reykjavík District Court's ruling and decided that an advisory opinion was to be requested. The Court of Appeal held that it had been sufficiently demonstrated that the interpretation of the provisions of Article 2 of the Directive could be of significance for resolving the claims made by Mr Sverrisson, and consequently for the resolution of the case. The Court of Appeal thus considered that an advisory opinion should be sought and that the questions should be phrased in the manner stated in the operative part of its ruling.

29. On 19 June 2020, Reykjavík District Court referred the following questions to the Court, which were received at the Court on 16 July 2020:

> **1. Should Article 2 of Directive 2003/88/EC be interpreted as meaning that time spent travelling by an employee in the service of, and at the behest of, his employer, to a workplace which is not the employee's regular workplace, is working time when it falls outside traditional daytime working hours?**
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> **2. For the purpose of answering Question 1, is it of significance whether the journey made by the employee for the employer is made domestically or between countries?**
>
> **3. For the purpose of answering Question 1, is it of significance what form the work contribution takes during the journey?**

30. On 16 July 2020, the Registrar wrote to Reykjavík District Court, making reference to Article 96 of the Rules of Procedure ("RoP") and Notice 1/99 "Note for Guidance on Requests by National Courts for Advisory Opinions". The Registrar requested that additional information be received by 1 September 2020.

31. On 26 August 2020, Reykjavík District Court submitted additional information, which was registered at the Court on 11 September 2020.

IV Written observations

32. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Eyjólfur Orri Sverrisson, represented by Jón Sigurðsson, Supreme Court Attorney;

- the Icelandic State, represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Catherine Howdle and Ewa Gromnicka, Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Donatella Recchia, Napoleón Ruiz García and Michael Wilderspin, members of its Legal Service, acting as Agents.

V Proposed answers submitted to the Court

Mr Sverrisson

33. Mr Sverrisson submits that the questions referred should be answered in the following manner:

> *The answer to the first question to the Court is that the concept working time in Article 2 of the Directive should be interpreted as the time spent on travel by an employee in the interests of and according to the employer's instructions, to and/or from a workplace that is not the habitual workplace of the employee when such time falls outside of the regular working time, as being working time.*
>
> *The answer to question 2 is that it has no bearing whether the employee´s travel on behalf of his employer is domestic or international.*
>
> *The answer to question 3 is that it does not affect when question 1 is answered how the arrangement of the work contribution is during the travel.*

The Icelandic State

34. The Icelandic State considers that an interpretation of the Directive is not relevant for solving the dispute at hand, even if the Directive, as implemented, is one of many sources of law, cited as such by Mr Sverrisson, in the dispute at the national level. The Icelandic State maintains that the request for advisory opinion is inadmissible.

35. Should the Court choose to answer the questions referred, the Icelandic State proposes the following answers:

1. *Article 2 of Directive 2003/88/EC should not be interpreted as meaning that time spent travelling by an employee in the service of and at the behest of his employer, to a workplace which is not the employee's regular workplace, is working time when it falls outside traditional daytime working hours.*

2. *Should the Court, however, attempt to answer the question, the Icelandic State submits that should the conditions be the same, as concerning the fulfilment of the cumulative conditions of the term working time, within the meaning of the Directive, as concerning the appellant and his work, the answer to the question would be the same, irrespective if the journey was made domestically or between countries. In that case the answer is no.*

3. *Should the Court, however, attempt to answer the question, the Icelandic State submits that the concept "form of the work contribution", is not a clearly defined legal concept in this context. That makes it almost impossible to answer this question with the necessary legal precision not least since it is directly linked with question 1 concerning the definitions under the Directive.*

   In the present case, as has been said above, the appellant, has not been asked to perform his specific work duties during the disputed period of time, during which he is travelling and as explained above under question 1, the conditions of the term working time, within the meaning of the Directive, are not fulfilled. The work of the appellant is taking place on-site, after completion of the trip and the travelling. That is undisputed in this case, and therefore, no need for the EFTA Court to endeavour down this road of answering hypothetical and imprecise legal questions.

ESA

36. ESA submits that the questions referred should be answered as follows:

Article 2 of Directive 2003/88/EC should be interpreted as meaning that time spent travelling by an employee in the service of, and at the behest of, his employer, to a workplace which is not the employee's regular workplace, is working time whether or not it falls outside traditional daytime working hours. It is of no significance whether the journey made by the employee for the employer is made domestically or between countries, nor what form the work contribution takes during the journey.

The Commission

37. The Commission considers that the questions referred should be answered as follows:

> *Article 2 of Directive 2003/88/EC is to be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, time spent travelling by an employee in the service of, and at the behest of, his employer, to a workplace which is not the employee's regular workplace, is working time when it falls outside ordinary daytime working hours, regardless of whether the journey is made domestically or between countries and of the form that the work contribution takes during the journey.*

Bernd Hammermann

Judge-Rapporteur