E-3/24-12

REPORT FOR THE HEARING

in Case E-3/24

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

Margrét Rósa Kristjánsdóttir

and

Icelandic Health Insurance (*Sjúkratryggingar Íslands*),

concerning the interpretation of Articles 1 and 6 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

I INTRODUCTION

1. By letter of 19 February 2024, registered at the Court on 20 February 2024, Reykjavík District Court (*Héraðsdómur Reykjavíkur*) requested an advisory opinion in the case pending before it between Margrét Rósa Kristjánsdóttir and Icelandic Health Insurance (*Sjúkratryggingar Íslands*).

2. The case referred concerns the interpretation of the notion of "worker" in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. At issue, in particular, is whether board members of a legal entity that operates in the public interest can fall within the notion of "worker". Further, the request seeks clarification on the interpretation of Article 6 of that directive, which lays down the obligation for the EEA States to ensure that judicial and/or administrative procedures for the enforcement of obligations under that directive are available to the workers' representatives and/or workers.

II LEGAL BACKGROUND

EEA law

3. Article 1(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.*

4. Article 3 EEA reads:

> *The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement.*

5. Article 7 EEA reads, in extract:

> *Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows :*
>
> *...*
>
> *(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

6. Article 28(1) and (2) EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

7. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16; and Icelandic EEA Supplement 2000 No 46, p. 258) ("the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 41/1999 of 26 March 1999 (OJ 2000 L 266, p. 47; and Icelandic EEA Supplement 2000 No 46, p. 257). The Directive is referred to at point 22 of Annex XVIII (Health and safety at work, labour law and equal treatment for men and women) to the EEA Agreement. Constitutional requirements were indicated by Iceland and fulfilled by 19 May 2000, and the decision entered into force on 1 July 2000.

8. The Directive was amended by Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers (OJ 2015 L 263, p. 1; and Icelandic EEA Supplement 2018 No 85, p. 133), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 258/2018 of 5 December 2018 (OJ 2021 L 337, p. 57; Icelandic EEA Supplement 2021 No 62, p. 53) and is referred to at point 22 of Annex XVIII to the EEA Agreement. Constitutional requirements were indicated by Iceland and Norway. The requirements were fulfilled by 18 June 2019 and the decision entered into force on 1 August 2019.

9. Recitals 2, 3, 4, 11 and 12 of the Directive read:

> *(2) Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community;*
>
> *(3) Whereas, despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers;*
>
> *(4) Whereas these differences can have a direct effect on the functioning of the internal market;*
>
> *(11) Whereas it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer;*
>
> *(12) Whereas Member States should ensure that workers' representatives and/or workers have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in this Directive are fulfilled;*

10. Article 1 of the Directive, in Section I entitled "Definitions and scope", reads:

> *1. For the purposes of this Directive:*
>
> *(a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:*
>
> *(i) either, over a period of 30 days:*
>
> *– at least 10 in establishments normally employing more than 20 and less than 100 workers,*
>
> *– at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,*
>
> *– at least 30 in establishments normally employing 300 workers or more,*
>
> *(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;*
>
> *(b) 'workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States.*
>
> *For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.*
>
> *2. This Directive shall not apply to:*
>
> *(a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;*
>
> *(b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies).*

11. Article 5 of the Directive, in Section IV entitled "Final provisions", reads:

> *This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to*

workers or to promote or to allow the application of collective agreements more favourable to workers.

12. Article 6 of the Directive, in Section IV entitled "Final provisions", reads:

Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers.

National law[1]

13. The Directive has been implemented into Icelandic law through Act No 63/2000 on collective redundancies (*Lög um hópuppsagnir*) ("the Collective Redundancies Act").

14. Article 1 of the Collective Redundancies Act reads:

This Act applies to collective dismissals of workers by an employer for reasons not related to each individual worker where the number of workers dismissed in a 30-day period is:

a. at least 10 workers in enterprises normally employing more than 20 but fewer than 100 workers,

b. at least 10% of workers in enterprises normally employing at least 100 but fewer than 300 workers,

c. at least 30 workers in enterprises normally employing 300 workers or more.

When calculating the number of persons dismissed under the first paragraph, attention shall be given to terminations of the employment contracts of individual workers that are equivalent to collective dismissals provided that there are at least five such terminations.

15. Article 2 of the Collective Redundancies Act reads, in extract:

This Act does not apply to:

a. collective redundancies effected in accordance with employment contracts made for specific periods or to cover specific projects unless such redundancies occur before these contracts expire or before the projects are completed,

b. …

[1] All translations of national law are unofficial.

16. Article 4 of the Collective Redundancies Act reads:

> *The provisions of this Act shall apply irrespective of whether the decision on collective redundancies is taken by the employer or by an enterprise that is in a position of control with regard to the employer.*
>
> *In the event of an allegation of a violation of requirements regarding information, consultation and notification under this Act, the employer may not maintain that he did not receive sufficient information from the enterprise where the decision on collective redundancies was taken.*

17. Article 11 of the Collective Redundancies Act reads:

> *An employer who intentionally or negligently violates this Act is liable for damages according to general rules.*

18. Article 12 of the Collective Redundancies Act reads:

> *Violations of Articles 5 to 7 of this Act may be subject to by fines that shall go to the Treasury.*

19. Article 4 of Act No 112/2008 of 16 September 2008 on Iceland Health Insurance (*Lög um sjúkratryggingar*) ("Health Insurance Act") reads:

> *The Minister is responsible for the central administration of health insurance and contracting for health services and other assistance under this Act, and the administration of the Health Insurance Administration.*

20. Article 6 of the Health Insurance Act reads:

> *The Minister appoints five members to the board of Icelandic Health Insurance, one of whom shall be appointed chairman of the board and another vice chairman. An equal number of alternates shall be appointed. The chair of the board calls board meetings and chairs them, and the director attends board meetings with the right to speak and make proposals. The minister shall issue a letter of appointment to the Board of Directors and determine remuneration to Directors, which shall be paid from the operating budget of the Administration.*
>
> *The board of governors of the Health Insurance Administration shall approve the organisation chart of the Administration, its annual program of operation and budget, and shall establish its long-term strategy. The board shall supervise the work of the Administration and the maintenance of its operations within the framework of the State Budget at any time.*

> *The chairman of the board of the Health Insurance Administration shall report regularly to the Minister on the work of the Administration and notify the Minister if its activities and services are not compliance with the provisions of law and if its operation is not in compliance with the State Budget.*

21. Article 25 of Act No 70/1996 on the Rights and Obligations of Government Employees (*Lög um réttindi og skyldur starfsmanna ríkisins*) ("Government Employees Act") reads:

> *Now a person is appointed or placed in an office, and it should be considered that he should serve until one of the following events occurs:*
>
> 1. *The official violates their duty in office, in a manner that warrants removal from office,*
> 2. *The official no longer meets the criteria for performing duties according to Article 6 of the same Act,*
> 3. *The official is released from their duties at their own request,*
> 4. *The official is released from their duties due to health reasons,*
> 5. *The official has reached 70 years of age,*
> 6. *The official's period of appointment has expired,*
> 7. *The official's ad hoc period of appointment has expired,*
> 8. *The official is transferred to another position within the government,*
> 9. *The official's position is abolished, or*
> 10. *The official and the government make a bilateral severance agreement.*

22. According to Article 26, paragraph 1, of the Government Employees Act, the government entity which has appointed a government official is capable of removing the official from their office.

III FACTS AND PROCEDURE

23. Icelandic Health Insurance is a public administrative organisation, the main role of which is to ensure the rights of health insured persons in Iceland. As the main buyer of health services in Iceland, its role is also to analyse the cost, efficiency, and quality of the health services. Ms Kristjánsdóttir, a pharmacist, worked as a head of department at

Icelandic Health Insurance. She was dismissed from Icelandic Health Insurance on 29 September 2020 along with 13 other managers as part of organisational changes at the institution. Shortly after her dismissal, Ms Kristjánsdóttir entered into a new contract of employment with Icelandic Health Insurance which entered into force on 1 February 2021, subsequent to the completion of the notice period for her dismissal. This new post involved a reduction in salary. Ms Kristjánsdóttir commenced leave without pay on 1 August 2022 and has stopped working at Icelandic Health Insurance.

24. Three co-workers, who were also dismissed on the same grounds as Ms Kristjánsdóttir, submitted a complaint to the Alþingi Ombudsman regarding, among other things, the claim that prior to the dismissal, Icelandic Health Insurance had not complied with the procedural rules laid down in the Collective Redundancies Act, with respect, inter alia, to the workers' rights to information, the obligation relating to consultation and the obligation relating to notification. An opinion from the Ombudsman in Case No 11320/2021, found, inter alia, that the dismissal of the 14 workers in question was to be categorised as a collective redundancy within the meaning of the Collective Redundancies Act and that because the Act's procedural rules governing the dismissal process should have been complied with, which had not been done, Icelandic Health Insurance was directed to make reparations to the workers concerned. At the same time, the Ombudsman noted that it was the remit of the courts to assess the legal consequences. In particular, the Ombudsman found the inclusion by Icelandic Health Insurance of the five board members of Icelandic Health Insurance within the number of workers normally employed not to be justified because they worked under the authority of the Minister, and hence it was incorrect to claim that the 10% threshold had not been reached.

25. Subsequently, Ms Kristjánsdóttir brought an application against Icelandic Health Insurance on 23 November 2022 which was filed with Reykjavík District Court on 1 December 2022. Ms Kristjánsdóttir claims damages in the amount of ISK 2 546 500 plus penalty interest, and claims compensation for non-pecuniary damage in the amount of ISK 2 000 000 plus further detailed interest and penalty interest, as well as legal costs. Icelandic Health Insurance claims that the action should be dismissed and that Ms Kristjánsdóttir should bear the costs, and, in the alternative, that her claims should be reduced and the legal costs for the parties waived.

26. Icelandic Health Insurance rejects the claim and refers, inter alia, to the fact that the Collective Redundancies Act was passed in order to transpose the Directive into Icelandic law, which does not apply to workers employed by the State. Icelandic Health Insurance claims further that it followed guidance from the Directorate of Labour and considers that Ms Kristjánsdóttir has not demonstrated any loss for which Icelandic Health Insurance would be liable.

27. Ms Kristjánsdóttir considers that Icelandic Health Insurance deviated from the conditions of point b of paragraph 1 of Article 1 of the Collective Redundancies Act, which

prescribes that if, at the same time, more than 10% of workers at a workplace with 100-300 workers are dismissed, then the requirements of the Act apply. This provision, she submits, is based on point (a)(i) of Article 1(1) of the Directive. Icelandic Health Insurance deviated from the law by counting five salaried members of its board of directors, appointed by the Minister, as "workers" within the meaning of the Directive. As a consequence of which the total number of workers was 143 instead of 139, as stated, and those who were dismissed were a total of 14. Ms Kristjánsdóttir emphasises that Article 6 of the Directive refers to EEA States having to ensure that workers' representatives and/or workers themselves have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in the Directive are met.

28. Icelandic Health Insurance contends that the Collective Redundancies Act, which is based on the Directive, prescribes in Article 1 that there needs to be dismissal of a specific number and proportion of workers for this measure to be deemed a collective redundancy. It seems clear that the legislation is intended to comply with rules in point (a)(i) of paragraph 1 of Article 1 of the Directive on this issue.

29. The parties to the case agree that the provisions of the Directive with regard to "workers" need clear interpretation on the issue whether Icelandic Health Insurance board members should have been included in the count for the total number of staff. Unlike Ms Kristjánsdóttir, Icelandic Health Insurance considers it tenable to include Icelandic Health Insurance board members as they receive salaries from Icelandic Health Insurance. Icelandic Health Insurance further submits that it is unclear as to whether the legislation covers public employees.

30. In light of the above, Reykjavík District Court decided to request an advisory opinion from the Court. By letter of 19 February 2024, registered at the Court on 20 February 2024, Reykjavík District Court has submitted the following questions to the Court:

1. **Can board members of a legal entity that operates in the public interest fall within the concept of 'worker' within the meaning of Council Directive 98/59/EC, for deciding the number of workers deemed to be employed by such a legal entity, for the purpose of calculating the minimum for collective redundancy (10% or 30 workers), as stated in point (i)(a) of paragraph 1 of Article 1 of the Directive?**

2. **Does Article 6 of Directive 98/59/EC, regarding that EEA States shall ensure that representatives of workers and/or workers themselves can have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in this Directive are fulfilled, entail other or further requirements than those that EEA States**

prescribe in general for liability for damages resulting from infringements of the rules inherent in the Directive?

IV WRITTEN OBSERVATIONS

31. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Margrét Rósa Kristjánsdóttir, represented by Elías Karl Guðmundsson, attorney;
- the Icelandic Government, represented by Fanney Rós Þorsteinsdóttir, State Attorney General, and Jóhanna Katrín Magnúsdóttir, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Kyrre Isaksen, Sigrún Ingibjörg Gísladóttir and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission ("the Commission"), represented by Sandrine Delaude and Freya Van Schaik, acting as Agents.

V PROPOSED ANSWERS SUBMITTED

Ms Kristjánsdóttir

32. Ms Kristjánsdóttir proposes that the questions referred should be answered as follows:

1. Board members of a legal entity that operates in the public interest can only fall within the concept of 'worker' within the meaning of Council Directive 98/59/EC, for deciding the number of workers deemed to be employed by such a legal entity, for the purpose of calculating the minimum for collective redundancy (10% or 30 workers), as stated in point (i)(a) of paragraph 1 of Article 1 of the Directive, if the relevant board members provide services, in return for remuneration, for and under the direction of another person within that legal entity. As the board members of Icelandic Health Insurance did not perform their services under the direction or supervision of any person within the institution, they cannot be considered as falling within the concept 'worker'.

2. It is a matter of the national law of each EEA Member State to prescribe administrative and/or judicial procedures to ensure that the obligations laid down in the Directive are fulfilled. Article 6 of the Directive does not entail any further requirements than those that EEA Member States prescribe such procedures, other than that the procedures should be practicable and useful.

The Icelandic Government

33. The Icelandic Government proposes that the questions referred be answered as follows:

> *1. Council Directive 98/59/EC, and in essence point (i) (a) of paragraph 1 of Article 1 of the Directive, must be interpreted as meaning that it precludes a national law or practice that does not take into account, in the calculation provided for by that provision of the number of workers employed, the members of the board of directors of a legal entity, such as the members of the board of directors in the referred case, that are an integral part of it, that perform their duties under the direction and subject to the supervision of another body that is a part of that legal entity and receive remuneration in return for the performance of their duties.*
>
> *2. In circumstances such as those in the present case, the EEA Agreement and Directive 98/59/EC must be interpreted as not precluding a national rule which provides workers and/or their representatives with the right to claim compensation for infringements of the Directive's obligation after an infringement has been incurred, provided, that the right to compensations for loss granted cannot be off-set in full or in part against any amounts otherwise payable by an employer to a worker.*

ESA

34. ESA proposes that the questions referred be answered as follows:

> *1. A board member of a legal entity that operates in the public interest is to be considered a worker and included for the purpose of calculating the thresholds set out in Article 1(1)(a) of the Directive, if he or she receives remuneration and is in a relationship of subordination. This must be assessed based on the circumstances of the recruitment; the nature of the duties entrusted; the context in which those duties were performed; the scope of the person's powers and the extent of supervision; and the circumstances under which the person could be removed. A board member could be in a relationship of subordination even if he or she enjoys a degree of latitude in the performance of duties that exceeds that of other workers, and even if he or she may be directed by the employer as to the specific tasks that must be completed and the manner in which they must be carried out.*
>
> *2. Article 6 requires the EEA States to introduce procedures to ensure compliance with the obligations laid down in the Directive. It is for the EEA*

States to lay down detailed arrangements or specific measures for those procedure, which must ensure real and effective judicial protection.

The Commission

35. The Commission proposes that the questions referred be answered as follows:

1. Article 1(1), point a, of Council Directive 98/59/EC must be interpreted as meaning that board members must be taken into account in the number of workers if they perform duties under the direction of another body of the entity and receive remuneration in return for the performance of duties, which is for the national court to determine. In doing so, the national court must determine the existence of a relationship of subordination on the basis of all the factors and circumstances characterizing the relationship between the parties, such as the circumstances in which the board members were recruited; the nature of the duties entrusted to them; the context in which those duties are performed; the scope of their powers and the extent to which they were supervised within the entity; and the circumstances under which they could be removed as well as the fact of receiving remuneration in return for services provided.

2. Article 6 of Council Directive 98/59/EC does not preclude a national provision such as Article 11 of the Act on collective redundancies that applies general national rules on liability for damages when an employer does not comply with the consultation and information obligations applicable in case of collective redundancies, provided that those are effective, dissuasive and proportionate, which is for the national court to determine.

Bernd Hammermann

Judge-Rapporteur