EFTA-Court **19 February 2024**

1, Rue du Fort Thüngen

L-1499 Luxembourg

Request for an advisory opinion by Reykjavík District Court in Case No E-5586/2022 pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, cf. Act No 21/1994

The questions at issue concern Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, which was incorporated into Annex XVIII to the EEA Agreement by Decision No 41/1999 of 26 March 1999 of the EEA Joint Committee and published in the EEA Supplement in an Icelandic version.

At a hearing of the Reykjavík District Court today in the case in question E-5586/2022 which is pending before the Reykjavík District Court, a ruling was delivered to the effect that it was necessary to request an advisory opinion from the EFTA Court on the following questions:

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?

Parties, claims to the court, facts and main pleas of significance

The court case in question was initiated with the plaintiff's application on 23 November 2022, and was filed with the Reykjavík District Court on 1 December of the same year. The plaintiff is Margrét Rósa Kristjánsdóttir, [XXX], and the defendant is the Icelandic State for Icelandic Health Insurance (*Sjúkratryggingar Íslands* ("SÍ"))[XXX].

In this case the plaintiff submits a claim to the court for damages to the amount of ISK 2 546 500 plus penalty interest, as further detailed in the plaintiff's application, and furthermore submits a claim to the court for compensation for non-pecuniary damage in the amount of ISK 2 000 000 plus

further detailed interest and penalty interest. In addition, the plaintiff submits a claim for legal costs from the defendant. The defendant primarily claims acquittal and legal costs from the plaintiff, and in the alternative, a reduction of the plaintiff's claims to the court and that legal costs for the parties be waived.

This case is brought before the District Court by the plaintiff, a pharmacist who had worked as head of department at SÍ, who was dismissed from SÍ on 29 September 2020 along with 13 other managers at SÍ in announced organisational changes at the institution. Shortly after the dismissal, the plaintiff made a new contract of employment with SÍ which entered into force on 1 February 2021, subsequent to the completion of a notice of dismissal, where the new post of the plaintiff involved a reduction in salary from her prior terms of employment with SÍ. The plaintiff commenced leave without pay on 1 August 2022 and has now stopped working there. Three coworkers who were also dismissed on the same grounds as the plaintiff at SÍ submitted a complaint to Alþingi's Ombudsman regarding, among other things, that prior to the dismissal, SÍ had not complied with the procedural rules laid down in Act No 63/2000 on Collective Redundancies, with respect to inter alia the workers' rights to information, the obligation relating to consultation and the obligation relating to notification. In an opinion from Alþingi's Ombudsman in Case No 11320/2021, the conclusion was inter alia reached that the dismissal of the 14 workers in question at SÍ was to be categorised as collective redundancy within the meaning of Act No 63/2000 and for that reason that the procedure of that act in the dismissal process should have been complied with, which had not been done, and SÍ was therefore directed to make reparations to the workers concerned, while noting that it was the remit of the courts to assess the legal consequences. Subsequently, the plaintiff has sought damages from the defendant in the amount of the difference in salary between that which she had received in her prior post at SÍ and that which she received from SÍ subsequent to the dismissal, with the addition of compensation for non-pecuniary damages. The defendant has rejected the plaintiff's claim and has inter alia referred to the fact that Act No 63/2000 on Collective Redundancies had been passed in order to transpose into Icelandic law Directive 98/59/EC, which does not apply to workers employed by the State. The defendant has furthermore followed guidance from the Directorate of Labour and considers that the plaintiff has not demonstrated any loss for which the defendant would be liable.

With respect to the pleas from the parties which are considered most relevant in connection with a request for an advisory opinion, the plaintiff bases her claims on Act No 63/2000 on Collective Redundancies, which she considers to apply in this case. The plaintiff refers, inter alia, to the fact that she is a worker and that the defendant is an employer within the meaning of Act No 63/2000 as well as that, in other respects, her dismissal at SÍ comes within the scope of the Act. The Act applies regardless of the fact that Directive 98/59/EC appears however to exempt public employees.

The plaintiff also considers that the defendant SÍ has with the dismissal in question, deviated from the conditions of point b of paragraph 1 of Article 1 of Act no. 63/2000, 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 Act No 63/2000 apply. It is established, according to the plaintiff, that the above specified provisions of Icelandic law are based on point (a)(i) of Article 1(1) of Directive 98/59/EC. The defendant deviated from the law by counting 5 salaried board members in SÍ, appointed by a Minister, as 'workers' within the meaning of Directive 98/59/EC, which means that the total number of workers was 143 instead of 139, as stated, and those who were dismissed were a total of 14. Alþingi's Ombudsman had, in his aforementioned Opinion No 11320/2021, accepted this

understanding of the plaintiff that the SÍ board members in question could in this instance not be included in the concept of 'worker', where the word 'worker' has an autonomous and consistent meaning in Directive 98/59/EC.

Finally, the plaintiff emphasises in connection with her claims for damages, cf. Article 11 of Act No 63/2000, which provides that an employer who deliberately or through negligence infringes this Act, is liable for damages pursuant to general rules, also that Article 6 of Directive 98/59/EC refers to EEA States having to ensure that workers' representatives 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 met. The plaintiff then refers to provisions of the Directive appearing to indicate that damages must at least be adequate to ensure compliance with the regulatory framework. Rules appear to differ by EEA State, and the Icelandic provisions for damages have not been at issue in previous case law, but in an opinion from the EFTA Surveillance Authority (ESA) in Case No 84844 from 15 December 2021, it was concluded that these provisions did however satisfy the requirements of Article 6 of the Directive on the basis that they provide an effective remedy. The plaintiff's claim for damages is based on the difference between the salary she received prior to dismissal and that she received subsequent to being re-appointed and up until the point in time when she took unpaid leave. The plaintiff therefore appears for example to consider that a level of compensation lower than this, such as at the discretion of the Reykjavík District Court, does not constitute the redress that must be provided as a minimum.

On the part of the defendant, it is contended that although one might deem it unclear whether Act No 63/2000 on Collective Redundancies covers workers of public institutions or not, cf. reference in that act to employers and companies, it is however clear that materially, Directive 98/59/EC, which the Act was particularly intended to transpose into Icelandic law, does not apply to public employees or workers, cf. wording in Article [1(2)(b)] of the Directive. And for this reason, the Directorate of Labour has interpreted the Act such that it does not cover the public sector, cf. the rule of interpretation in Article 3 of Act No 2/1993. It is established that Case No 3/2024, which has now been brought before the Supreme Court, relates inter alia to whether the provisions of Act No 63/2000 apply to public institutions, where an advisory opinion is awaited from the EFTA Court on related issues. In the light of legal uncertainty, the Ministry of Finance has directed state institutions to observe these special procedural rules where applicable.

The defendant furthermore contends that the Act on Collective Redundancies No 63/2000, which is based on Directive 98/59/EC, prescribes in Article 1 that there needs to be dismissal of a specific number and proportion of workers for this to be deemed collective redundancy. It seems clear that the legislation is intended to comply with rules in point (a)(i) of paragraph 1 of Article 1 in the Directive on this issue. The parties to the case agree that the provisions of the Directive with regards to 'workers' need clear interpretation with regards to whether SÍ board members should have been included in the count for the total number of staff. Unlike the plaintiff, the defendant considers it tenable to include SÍ board members as they receive salaries from SÍ. The defendant then has the general reservation that it is unclear as to whether the legislation covers public employees.

The defendant finally refers to a potential right to compensation being contingent on adherence to general rules which have normally led to significantly lower damages than the criteria relied on by the plaintiff in this instance. The defendant also considers that the plaintiff has not demonstrated

that the conditions for compensation with respect to pecuniary and non-pecuniary damages, have been fulfilled. It is however not deemed necessary to further recount the defendant's pleas in this connection.

The court finally wishes to reiterate that the request for an advisory opinion is based on the above specified pleas of the parties to the case, which relate to the interpretation of specified provisions in Act No 63/2000 on Collective Redundancies, which in turn appear to be based more or less on provisions in Directive 98/59/EC, which do not seem to have been interpreted in the context here in question. The court therefore deems that it could have a decisive impact for the case to receive the requested opinion of the EFTA Court. Further documents in the case file that the EFTA Court may call for, such as for example the plaintiff's application and observations will be gladly provided, and the request for an advisory opinion is here submitted in full consultation with both parties to the case.

Pétur Dam Leifsson, Judge at Reykjavík District Court – [XXX]

____

Agents for the parties to the case are:

Attorney for the plaintiff: Elías Karl Guðmundsson - [XXX]

Attorney for the defendant: Jóhanna Katrín Magnúsdóttir - [XXX]