REQUEST FOR AN ADVISORY OPINION

8 December 2021

Case No E-582/2021:

Anna Bryndís Einarsdóttir
(Hulda Rós Rúriksdóttir, attorney)
versus
the Icelandic Treasury
(Guðrún Sesselja Arnardóttir, attorney)

Judge: Helgi Sigurðsson, District Court Judge

Dómhúsið við Lækjartorg, 101 Reykjavík | Sími: 432-5200
Kt. 661191-3099 | heradsdomur.reykjavikur@domstolar.is | heradsdomstolar.is

Ruling

This case was initiated by the service of a writ of summons on 25 January 2021. The plaintiff is Anna Bryndís Einarsdóttir, and the defendant is the Icelandic State, Arnarhvoll, Reykjavík. The case was accepted for adjudication on 3 November 2021 as to whether an advisory opinion should be sought from the EFTA Court under Article 1 of Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EEA Agreement. That Act provides that judges are able to deliver rulings to the effect that advisory opinions are to be sought from the EFTA Court.

The plaintiff's claims are that the decision by the Maternity/Paternity Leave Fund of 3 March 2020, regarding scheduled payments from the fund to the plaintiff during her maternity leave, be annulled and that ruling No 261/2020 of the Welfare Appeals Committee, which was delivered on 2 September 2020, be annulled. She also claims payment of her legal costs.

The defendant claims to be acquitted of all the plaintiff's claims, and also payment of its legal costs.

In its observations, the defendant also states that the plaintiff's claim regarding the annulment of the decision by the Maternity/Paternity Leave Fund is unnecessary, and that it is sufficient to claim the annulment of the ruling of the committee confirming the fund's decision.

This case was accepted for adjudication after the parties' counsels were given the opportunity, on 3 November 2021, of expressing their position on the question of whether an opinion should be sought. The parties' counsels declared that they were not opposed to the seeking of such an opinion, and submitted the matter for assessment by the court, also leaving it to the court to decide on the wording of the question to be put to the EFTA Court.

I

The plaintiff, who had been pursuing postgraduate studies in medicine in Denmark, and who has been in full-time employment since 1 September 2015, moved to Iceland on 17 September 2019, being pregnant at that time. After arriving in Iceland in September 2019, she began working at Landspítali (the National Hospital); her first working day was 30 September 2019.

The plaintiff notified Landspítali, as her employer, of the proposed structure of her maternity leave on 15 January 2020. She submitted her application for payments from the Maternity/Paternity Leave Fund on 22 January 2020; her baby was born on 26 March 2020.

The plaintiff's application was accompanied by payslips from Landspítali for November and December 2019. Also included was a confirmation from Denmark of her domicile there since 2015 and of her wage payments. The plaintiff's application was approved and she was informed of the payment schedule by a decision dated 3 March 2020, stating that monthly payments to her would amount to ISK 184 119 for 100% maternity leave; this meant that the fund had not agreed to take account of her income in Denmark. The plaintiff appealed against the decision by the Maternity/Paternity Leave Fund to the Welfare Appeals Committee, which upheld the fund's conclusion in its ruling of 2 September 2020.

The plaintiff brought a case to have the decision on her application for payments during her maternity leave quashed; she regards it as being in violation of the rules on the European Economic Area, with which Iceland has undertaken to comply. The point at issue in the case is whether income earned by the plaintiff through her work in Denmark is to be taken into account when payments to her from the fund are calculated.

II

The plaintiff's arguments which are of significance here are that the statutory provisions on which the Maternity/Paternity Leave Fund and the Welfare Appeals Committee base their conclusions are in direct contradiction to the clear aim of the EEA Agreement on the free movement of persons and are, consequently, in violation of the provisions of the EEA Agreement. She argues that the way her application was handled by the Maternity/Paternity Leave Fund and subsequently by the Welfare Appeals Committee was not in conformity with the principle of Article 3 of Act No 2/1993, that statutes and regulations are, to the extent appropriate, to be interpreted in conformity with the EEA Agreement and the rules based thereon. This entails that Icelandic law is, to the fullest extent possible, to be accorded a meaning, which can be accommodated within its wording, that corresponds as closely as possible to the common rules applying in the European Economic Area (*cf.* Supreme Court Judgment No 527/2014). As this rule was not observed, the plaintiff argues that the decision by the Maternity/ Paternity Leave Fund and the ruling of the Welfare Appeals Committee should be annulled.

The plaintiff also refers to Protocol 35 to the EEA Agreement, which addresses the implementation of EEA rules. That protocol states that the Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area, and that this aim will have to be achieved through national procedures. The protocol states that for cases of possible conflicts between implemented EEA rules and other statutory

provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases. Thus, EEA law may be part of Icelandic law and part of the legal basis on which public authorities base their administrative decisions. This is the basis of Article 3 of Act No 2/1993.

The plaintiff argues that the position adopted by the Maternity/Paternity Leave Fund, namely, that there is no legal basis for taking account of income other than that which she earned in Iceland during the reference period, is not well founded. The plaintiff points out that she was in full-time employment as a physician when she lived in Denmark and was paid full wages for her work. When she moved to Iceland on 17 September 2019, she began working at Landspítali within 10 working days of stopping work in Denmark. Thus, the plaintiff argues that she was in receipt of wages during the entire time designated in Article 13 of the Maternity/Paternity and Parental Leave Act No 95/2000. The plaintiff argues that it must be taken into account that she was on the labour market in both Iceland and in Denmark during the reference period, and therefore that her income in both countries should be considered.

The plaintiff points out that had she decided to remain in Denmark and have her baby there, her maternity leave payment would have been based on the wages she had earned there during the reference period. Thus, her decision to move to Iceland placed her in a poorer position. The plaintiff bases her claims on the view that the statutory provisions on which the Maternity/Paternity Leave Fund and the Welfare Appeals Committee base their conclusions are in direct contradiction of the clear aims of the EEA Agreement regarding the free movement of persons, and thus infringe the EEA Agreement.

The plaintiff points out that Article 2 of Act No 2/1993 states that the main text of the EEA Agreement is to have the force of law in Iceland. The same applies to the provisions of Protocol 1 to the Agreement and to point 9 of Annex VIII, and of point 1(g) of Annex XII to the Agreement; these annexes are included as annexes in the Icelandic statute book. Article 4 [EEA] of Appendix I [to Act No 2/1993] states that within the scope of application of the Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. Article 29 [EEA] of the same Appendix states that in order to promote freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular, “(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating

the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Contracting Parties."

The plaintiff bases her case on the fact that the free movement of persons and the free movement of workers within the EEA is one of the fundamental aims of the EEA cooperation (*cf.* Article 28(1) EEA). Coordination of the social security systems in EEA States is an integral part of the principle of freedom of movement of persons. This coordination enables workers and other persons to move between EEA States without loss of entitlement to social security, of which payments during maternity leave constitute a part. This entails, amongst other things, that EEA States must take account of periods that workers have worked in other EEA States when determining their social security entitlements (*cf.* Article 29 EEA). The rule on aggregation of periods, which appears in Article 29 EEA is elaborated further in Article 6 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (*cf.* Annex VI to the EEA Agreement). The regulation replaced Regulation (EEC) No 1408/71 of the Council of 14 June 1971, which was also part of the EEA Agreement. The substantive principles that must be considered here are the same in both these regulations. In both cases, the regulations were intended to facilitate the free movement of workers, which is one of the fundamental aims of the EEA Agreement. Restrictions of the scope of the regulations must therefore be based on clear wording.

The plaintiff points out that Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Regulation (EC) No 988/2009 amending Regulation No 883/2004 and determining the content of its annexes, and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, have taken effect in Iceland (*cf.* Decision of the EEA Joint Committee No 76/20[11] of 1 July 2011 amending Annex VI and Protocol 37 to the EEA Agreement; *cf.* also Article 3 of Act No 2/1993 on the European Economic Area). The provisions of the aforementioned Regulation No 883/2004 cannot be understood other than as meaning that equality is secured between the inhabitants of the states covered by the regulation; thus, they are all in the same position, irrespective of where they are domiciled. The regulation protects insured individuals, and their dependants, who live or reside in another EEA State as regards sickness benefits, benefits covering pregnancy and birth, and equivalent paternity benefits.

Next, the plaintiff refers to the fact that under Articles 4 and 5 of the aforementioned Regulation, No 883/2004, persons to whom the regulation applies are to enjoy the same benefits and be subject to the same obligations as the nationals of any EEA State unless

otherwise provided for by the regulation. As regards social security benefits and other income, the rule is that where, under the legislation of the competent EEA State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another EEA State or to income acquired in another EEA State. The plaintiff argues that these provisions cannot be understood other than as meaning that any individual must be in the same position no matter where he or she is located in the area covered by the regulation. With reference to this, the plaintiff argues that the way her application was processed by the Maternity/Paternity Leave Fund on 3 March 2020, that decision being upheld by the ruling of the Welfare Appeals Committee, did not comply with the rules, which Iceland has undertaken to apply.

The plaintiff argues that, when her application to the Maternity/Paternity Leave Fund was examined, attention should have been paid to all the foregoing provisions and that the instruction of the second paragraph of Article 13 of Act 95/2000, to the effect that only average aggregate wages for the months of the reference period during which parents are on the domestic labour market are to be taken into account, is in direct contradiction with these provisions. The twelfth paragraph of the same Article states that when a parent has worked on the domestic labour market for at least the last month of the entitlement acquisition period defined in the first paragraph, account is to be taken of periods of employment worked by the applicant for payments from the fund, including those spent in another State party to the European Economic Area, the Nordic Agreement on Social Insurance and the Agreement between the Government of Iceland, on the one hand, and the Government of Denmark and the Domestic Administration of the Faroe Islands, on the other, during the entitlement acquisition period, provided that the parent's work conferred on him or her entitlements according to the legislation of the state involved regarding maternity/paternity leave. Later in the same paragraph, it is stated as a condition for this that the parent shall have begun work on the domestic labour market within ten working days of having ceased work on the labour market in another EEA State or in another one of the Nordic countries.

The plaintiff argues that the failure to consider her income in Denmark during the reference period constitutes a violation of the European rules with which Iceland undertook to comply on becoming a party to the EEA Agreement. She argues that the assertion by the Maternity/Paternity Leave Fund that it is not permitted to take account of wages abroad cannot apply to income earned in another EEA State.

The plaintiff refers to Cases C-185/04 and C-257/10 in which the European Court of Justice came to the conclusion that government authorities were obliged to take account of wages earned during periods spent working in other EU Member States when calculating payments related to a person's wages during a specific period.

III

The defendant's pleas

The defendant's pleas that are of relevance here centre on the provision, in the first paragraph of Article 13 of the Act, that parents acquire entitlement to payments from the Maternity/Paternity Leave Fund after being on the domestic labour market for six continuous months prior to the date of birth of a child. It is then stated in the twelfth paragraph of Article 13 of the Act that when the parent has worked on the domestic labour market for at least the last month of the entitlement acquisition period according to the first paragraph, the Directorate of Labour shall, to the extent necessary, take account of periods in which the worker or self-employed person worked in another EEA State, provided that the work done by the parent conferred entitlements on him or her under the legislation of that state regarding maternity/paternity leave.

The defendant also refers to the second paragraph of Article 13 of Act No 95/2000 (*cf.* Article 8 of Act No 74/2008, which amended it), which states that monthly payments from the Maternity/Paternity Leave Fund to an employee on maternity/paternity leave are to amount to 80% of average aggregate wages, this figure is to be based on the continuous twelve-month period ending six months prior to the month in which the child is born. 'Wages' here are to consist, amongst other things, of all types of wage payments and other remuneration under the Social Insurance Tax Act. It is furthermore stated in the eighth sentence of the second paragraph of Article 13 that only average aggregate wages for those months in which the parent has been on the domestic labour market shall be considered (*cf.* also the second paragraph of Article 13 a).

The defendant notes that the third paragraph of Article 4 of the Act provides that the Maternity/Paternity Leave Fund is to be financed by a social security tax (*cf.* the Social Security Tax Act No 113/1990), in addition to interest on the fund's assets. The Social Security Tax Act No 113/1990 makes further provisions on matters including parties' tax obligations, the tax base, wages, etc., payment in kind, exemptions from the tax base and foreign wage-payers. The defendant argues that it is necessary to examine the aforementioned provisions when calculating parents' average aggregate wages on the domestic labour market, as the Maternity/Paternity Leave Fund is financed by a social security tax. The defendant argues that

the wages that the plaintiff earned through her work in Denmark are not regarded as wages and other remunerations under the Social Security Tax Act No 113/1990 and furthermore that no social security tax was paid on those wages that could finance the Maternity/Paternity Leave Fund.

The defendant refers to the fact that the commentary to Article 8 in the preparatory works of the bill that became Act No 74/2008, amending Act No 95/2000, contained an extremely thorough discussion of the twelfth paragraph of Article 13. It was stated clearly what wages and other remuneration were to be included when calculating average aggregate wages, and also that only the months of the reference period "during which the parent has been on the domestic labour market" were to be included, and that "account should not be taken of wages for which the parent worked outside the domestic labour market." It was moreover stated in the commentary in the preparatory works that it was important that the Act was to be interpreted in conformity with the EEA Agreement. [In relation to] Council Regulation No [1408/71], which was included in Annex VI to the Agreement, it is stated [in the preparatory works to Act No 74/2008], that: "amongst other things, account must be taken of parents' working periods on labour markets in other states in the European Economic Area when assessing whether parents are considered as being entitled to payments from the Maternity/Paternity Fund under the first paragraph of Article 13 of the Act while they are on maternity/paternity leave." Following this passage, the interpretation and application of the twelfth paragraph of Article 13 of the Act was explained in further detail and it was stated: "If, however, aggregation of working periods results in a parent's being entitled to payments from the Maternity/Paternity Leave Fund, then account shall be taken only of the parent's average aggregate wages in the reference period during which the parent has been on the domestic labour market (*cf*. the second and fifth paragraphs of Article 13 of the Act.)"

The defendant argues that, when enacting the twelfth paragraph of Article 13 of the Act through the adoption of Act No 74/2008, the legislature saw particular reason to state, in the commentary to this provision, that the Act was to be interpreted in conformity with the EEA Agreement and the legal acts that had been incorporated in Annex VI to that agreement, in addition to stating that if aggregation of working periods resulted in a parent's being entitled to payment from the Maternity/Paternity Leave Fund, then account was only to be taken of the parent's average aggregate wages in the reference period during which the parent had been on the domestic labour market. The defendant points out that a condition stated in the Act was that the parent must have been an active participant in the domestic labour market for at least the last month of the entitlement acquisition period.

The defendant refers to the statement in the commentary to Article 8 of the aforementioned bill explaining that the reason for this is "that the Act provides for the entitlement of parents on the domestic labour market to maternity/paternity leave; a parent must [...] have been an active participant in the domestic labour market when maternity/paternity leave is established under Article 8 of the Act (*cf.* also the first paragraph of Article 1) in order for it to be possible to take his or her working periods in another EEA State into account, [...] when assessing whether the conditions of the Act for payments during maternity/paternity leave are met."

The defendant notes that in cases where the parent was an active participant in the domestic labour market for at least the last month of the entitlement acquisition period, it was possible to add working and insurance periods abroad to domestic working periods. The condition for this was that a maximum of ten working days had elapsed between the insurance periods so that no disruption of the entitlement acquisition period would take place. In general, by contrast, it was not envisaged that any disruption of the entitlement acquisition period could take place in the case of parents who worked for the entire entitlement acquisition period on the domestic labour market.

The defendant points out that Act No 136/2011, amending the Maternity/Paternity and Parental Leave Act, No 95/2000, responded to criticisms from the EFTA Surveillance Authority (ESA) concerning, amongst other things, the requirement set out in the Act that the parent be an active participant in the domestic labour market for at least the last month preceding the date of birth of the child. The condition of at least one month's participation had been introduced in order to ensure that the parent had demonstrably been on the domestic labour market. It was also explained in the commentary to the bill that a consideration in this had been that the Maternity/Paternity Leave Fund was financed by a social security tax, and not directly from the state Treasury. This minimum period had been considered necessary to prevent abuse of the maternity/paternity leave system. ESA had regarded the condition of participation in the labour market for at least the last month preceding the birth of the child as too long a period; in its view, each case had to be assessed separately regarding "the possibility of aggregation of working periods in other states". It was therefore proposed in the bill that the general rule allow for the required period on the domestic labour market to be the last month, but that the Directorate of Labour could take account of working periods in other EEA States when assessing whether a parent was to be regarded as having worked on the domestic labour market for the purposes of the Act. Moreover, in its opinion, ESA also criticised the requirement that the parent's work must have conferred entitlements on him or her according to the legislation

of the state where the parent previously worked regarding maternity/paternity leave. The defendant points out that these conditions regarding ten working days and entitlement to maternity/paternity leave in the state where the parent previously worked are also to be found in the current Maternity/Paternity and Parental Leave Act, No 144/2020, which entered into force on 1 January 2021 (see the second paragraph of Article 21 of that Act).

The defendant points out that ESA, in its opinion, made no criticism concerning the calculation of payments from the Maternity/Paternity Leave Fund, even though it was specifically discussing the provisions of the Act that applied to this entitlement. The defendant considers that, in view of this, it follows *e contrario* that the arrangements regarding calculation of these payments were not considered by ESA as infringing the EEA Agreement.

The defendant points out that it was stated in Article 34 of the Maternity/Paternity and Parental Leave Act No 95/2000 that, in the application of the Act, consideration was to be given to the international agreements in the field of social security and social affairs to which Iceland was a party; this meant, in particular, the EEA Agreement, as was stated in the commentary. It was also stated in the commentary that, when the EEA Agreement took effect in Iceland, the EEC/EU acts in the field of social security and social affairs that were to be made part of the internal legal order of the Contracting Parties under Article 7 EEA had been specified. These included a regulation on the application of social security schemes to employed persons and their families moving between EEA States. The commentary to Article 34 of the Act stated that the article was designed to ensure that the application of the Act would be in conformity with the provisions of the regulations "that have become, or will become, part of the Agreement on the European Economic Area". Article 3 of the European Economic Area Act, No 2/1993, then provided that statutes and regulations were to be interpreted, to the extent appropriate, in conformity with the EEA Agreement and rules based thereon.

The defendant points out that it is stated in Article 29 [EEA] *cf*. the European Economic Area Act, No 2/1993, that, in order to provide freedom of movement for individuals, the Contracting Parties in the field of social security are to secure "aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries." In accordance with Article 34 of the Maternity/Paternity and Parental Leave Act, No 95/2000, and Article 3 of the European Economic Area Act, it is necessary, the defendant argues, to interpret the provisions of Article 29 [EEA] in conformity with Regulation (EC) No 883/2004 of the European Parliament and of the Council. That regulation discusses in further detail the necessity of coordination of national

social security systems within the EEA. Article 6 of that regulation provides that the competent institution of any EEA State must take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other EEA State as though they were periods completed under the legislation which it applies. On the other hand, no provision is made in that Article for taking into account reference wages earned in another EEA State, but only periods of employment.

The defendant notes that Article 21 of Regulation No 883/2004 covers cash benefits. Paragraph 3 of that article states: "The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation." This provision in the regulation applies to payments from the Maternity/Paternity Leave, since cash benefits are paid to those who have acquired entitlements to them on the labour market (*cf.* Article 11 of the Regulation). In the defendant's view, it can be deduced from this that wages earned outside the domestic labour market are not to be taken into account when payments relating to maternity/paternity leave are calculated.

The defendant notes that in the commentary to Article 29 [EEA] in the EEA Act, No 2/1993, it is moreover stated that the provision expresses two of the four main rules of the European Union in the field of social security: that of aggregation, on the one hand, and that of transferability, on the other. The commentary stated: "The aggregation rule ensures that workers [...] will not lose any of their acquired entitlements or entitlements that they are about to acquire, even if they move to, or begin work in, another Contracting Party. [...] This means that insurance periods, working periods and periods of domicile completed under the legislation of another Member State will be taken account of in the same way as if they were completed under the legislation of the country in question."

The defendant argues that the provisions of Article 21 of Regulation (EC) No 883/2004 are intended for the further elucidation of Article 29 EEA and that Article 29 must be interpreted with this in mind. Even though it is clear that working periods completed in EEA States are to be aggregated, it follows directly from Article 21 of the Regulation that the EEA State which makes the payments, and whose legislation then applies, is to base the benefits solely on the income that the person in question has earned in that EEA State. In accordance with this, Iceland's legislation on maternity/paternity leave, which applies in the case of the plaintiff, does not take account of wages on which no social insurance tax has been paid in Iceland when

maternity/paternity leave payments are calculated. Thus, it is not possible to take account of average income earned in Denmark, as it was not acquired in accordance with "the said legislation" referred to in Article 21 of Regulation (EC) No 883/2004. As regards the words "and of calculating the amount of benefit" in point (a) of Article 29 EEA, the defendant argues that these apply to instances when account is to be taken of periods that are needed for the calculation of certain fixed payment sums that are not proportions of average income, for example if a worker has been working in 50% of full-time employment during the last six months preceding the birth of the child. In such instances, the worker is entitled to a minimum payment that is based on his or her job proportion during the period. When a calculation is made to establish whether the worker is entitled to a higher or lower minimum sum, then account is also taken of his or her working periods elsewhere in the EEA during the six-month period.

The defendant points out that Article 13 of the Maternity/Paternity and Parental Leave Act is both detailed and extremely clear and is also backed by thorough interpretative materials which lend further support to the clear meaning of the provision that account is only to be taken of the parent's average aggregate wages for those months during the reference period during which he or she was on the domestic labour market. The defendant argues that this is in accordance with the provisions of Article 29 EEA and Article 21 of Regulation (EC) No 883/2004, as has been discussed above.

Consequently, the defendant entirely rejects the plaintiff's claim that the statutory provisions on which the Maternity/Paternity Leave Fund based its conclusion are at variance with the aim of the EEA Agreement regarding the free movement of persons and therefore constitute an infringement of the EEA Agreement. On the contrary, the defendant argues that when the provisions that were put to the test in the plaintiff's case were enacted in Act No 95/2000, care was taken that they would not be at variance with the EEA Agreement. Furthermore, the defendant considers that the EFTA Surveillance Authority has, in fact, confirmed that this calculation may be based solely on income that has been acquired on the domestic labour market. Here it must be borne in mind that while the regulatory mechanism of the EEA is aimed at the coordination of EEA States' social security rules, the aim is not that their social security systems be harmonised in all respects.

The defendant argues that when Article 29 [EEA, Appendix I to] Act No 2/1993 is interpreted in conformity with Article 21 of Regulation (EC) No 883/2004, it cannot be seen that this provision allows for the interpretation that foreign income is to be taken into account in the

calculation of payments from the Maternity/Paternity Leave Fund. In the defendant's view, Article 3 of Act No 2/1993 and Protocol 35 on the Implementation of EEA Rules do not apply because the situation here is not one in which the provisions of the Maternity/Paternity and Parental Leave Act that are under examination are at variance with Article 29 EEA.

The defendant argues that the plaintiff is unable to support her case by referring to the case-law of the European Court of Justice in cases against Sweden. The maternity/paternity leave systems in Sweden and Iceland differ in many ways, and EEA States determine how they arrange their social security systems. The two cases against Sweden, Case C-185/04 and Case C-257/10, involved cash payments to which parents were entitled who were domiciled in Sweden or moved to Sweden with a child; this entitlement continued until the time when the child attained the age of eight years. In order to be entitled to such payments, the parents had to have completed an insurance period of 240 days prior to the birth of the child. The sum was based on *per diem* sickness benefits that were calculated in accordance with the wages they could have expected for employment on an annualised basis in Sweden if no change took place in their circumstances. In those cases, there were no rules about the calculation of payments to persons who had not been covered by health insurance in Sweden, unlike the case in Iceland, where the rules are clear and detailed and supported by sophisticated interpretative materials in which the will of the legislature is clearly expressed and in full conformity with Article 29 EEA and Article 21 of Regulation (EC) No 883/2004. In both the aforementioned cases brought before the European Court of Justice, the conclusion was that the Swedish state was obliged to take account of the periods during which the persons involved were workers in the European Union during the 240 days preceding the birth of the children. The conclusion was not, on the other hand, that income acquired outside Sweden was to be taken into account when calculating these payments, as has been wrongly alleged by the plaintiff. The defendant considers that this case-law is therefore in full conformity with the decision by the Maternity/Paternity Leave Fund not to take account of income earned in Denmark during the reference period when calculating the plaintiff's maternity leave payments.

IV

Under Article 1 of the Maternity/Paternity and Parental Leave Act No 95/2000, the Act applies to the rights of parents working on the domestic labour market. The previous act included a requirement of Icelandic domicile, but in the bill which became the present Act, it was stated that this domicile requirement had been abandoned and that it was sufficient that the parents to whom it applied had worked on the Icelandic labour market. This amendment was said to have been made with regard to the EEA Agreement. It was stated that this did not constitute a change to the Maternity/Paternity Leave Act No 57/1987 in force at the time. The amendment was

made solely to remove the requirement concerning domicile in Iceland; it was sufficient that the persons concerned had worked on the Icelandic labour market.

Under the first paragraph of Article 13 of the Act, parents acquire entitlement to payments from the Maternity/Paternity Leave Fund after having been on the domestic labour market for six months continuously prior to the date of birth of the child. The twelfth paragraph of Article 13 of the Act states that when the parent has worked on the domestic labour market for at least the last month of the entitlement acquisition period provided for in the first paragraph, the Directorate of Labour shall, to the extent necessary, take account of periods in which the worker or self-employed person worked in another State party to the EEA Agreement, and of other agreements which are named in the provision, provided that the work done by the parent conferred entitlements on him or her under the legislation of that state regarding maternity/paternity leave. A condition for this that the parent shall have begun work on the domestic labour market within ten working days of having ceased work on the labour market in another EEA State.

In this case there is no dispute as to the fact that the plaintiff began working in Iceland on 30 September 2019, which was within 10 working days of her having stopped working in Denmark, that she had worked full-time in Denmark before that and that the work she had done had conferred on her entitlement to maternity leave under Danish law. Furthermore, it is established that the plaintiff received wages throughout the entire period designated as the reference period for wages in Article 13 of the Maternity/Paternity and Parental Leave Act No 95/2000.

Under the second paragraph of Article 13 of Act No 95/2000, monthly payments from the Maternity/Paternity Leave Fund to an employee (*cf*. the second paragraph of Article 7) during maternity/paternity leave amount to 80% of the person's average aggregate wages, based on a continuous twelve-month period ending six months prior to the month in which the child is born. At the end of the provision, it is stated that account is to be taken only of average aggregate wages for those months during the reference period in which the parent has been on the domestic labour market. At no time, however, shall fewer than four months be taken into account when calculating average aggregate wages.

The plaintiff gave birth to a child on 26 March 2020; consequently, monthly payments to her from the Maternity/Paternity Leave Fund during the plaintiff's maternity leave were calculated as 80% of her average aggregate wages during the period from September 2018 to August

2019. Only aggregate wages paid to the plaintiff during this period on the domestic labour market were taken into account; it is not disputed that the plaintiff worked full-time in Denmark during this period.

Under the fourth paragraph of Article 13 of Act No 95/2000, an employee who meets the conditions of the first paragraph but has not worked on the domestic labour market during the reference period specified in the second paragraph acquires entitlement to minimum payments under the seventh paragraph of Article 13 of the Act in accordance with his or her employment ratio. The seventh paragraph then specifies certain minimum payments to parents, which are at no time to be less than ISK 184 119 per month; see also Article 1 of Regulation No 1238/2019 amending Regulation No 1218/2008 on payments from the Maternity/Paternity Leave Fund and the payment of maternity/paternity grants.

The dispute between the plaintiff and the defendant concerns whether the provision of the second paragraph of Article 13 of Act No 95/2000, stating that only average aggregate wages on the domestic labour market shall be taken into account, is at variance with the principles of European law, which Iceland has accepted and introduced into its domestic legal order through its enactment of the European Economic Area Act No 2/1993. This case hinges on the interpretation of a Regulation (currently No 883/2004), which forms part of Annex VI to the EEA Agreement, as regards how periods during which parents have worked on the labour markets of other EEA States are to be taken into account when assessing whether they qualify for payments from the Maternity/Paternity Leave Fund. On the other hand, the provisions of the Act are unambiguous in stating that, for the calculation of a parent's average aggregate wages during the reference period, only the parent's income on the domestic labour market is to be taken into account (see the second and fifth paragraphs of Article 13 of the Act).

In the view of the court, it is therefore sufficiently clear that the interpretation of these EEA rules could be of substantial significance in the case. Furthermore, the court considers that the facts of the case are sufficiently clear as to render it justifiable to request, at this stage, an advisory opinion from the EFTA Court under Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EEA Agreement. It has been established that no judgments by the EFTA Court, the European Court of Justice, the Icelandic Court of Appeal or the Supreme Court of Iceland are available that would remove ambiguity regarding the interpretation of the aforementioned EEA rules in the light of the matters at issue in this case. The court therefore concludes that there is sufficient reason to request, at its own initiative, an advisory opinion from the EFTA Court as provided for under the first paragraph

of Article 1 of Act No 21/1994; thus, the question set out in the operative part of the ruling is to be submitted to the EFTA Court.

Helgi Sigurðsson, District Court Judge, delivered the following ruling.

OPERATIVE PART OF THE RULING:

An advisory opinion is sought from the EFTA Court on the following question:

Does Article 6 of Regulation (EC) No 883/2004, on the coordination of social security systems (*cf.* also Article 21(3) of the Regulation), oblige an EEA State, when calculating payments in connection with maternity/paternity leave, to calculate reference income on the basis of a person's aggregate wages on the labour market across the entire European Economic Area? Does it infringe the aforementioned provision and the principles of the EEA Agreement (see, for example, Article 29 EEA) if only a person's aggregate wages on the domestic labour market are taken into account?

In accordance with the foregoing operative part of the ruling, it is hereby requested that the EFTA Court provide an advisory opinion on the matter.

Helgi Sigurðsson