REPORT FOR THE HEARING

in Case E-9/22

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 the Icelandic Court of Appeal (*Landsréttur*), in the case between

the Association of Chartered Engineers in Iceland (*Verkfræðingafélag Íslands*),
the Computer Scientists' Union (*Stéttarfélag tölvunarfræðinga*), and
the Pharmaceutical Society of Iceland (*Lyfjafræðingafélag Íslands*)

and

the Icelandic State,

concerning the interpretation of the 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 9 June 2022, registered at the Court on the same day, the Icelandic Court of Appeal (*Landsréttur*) made a request for an advisory opinion in the case pending before it between the Association of Chartered Engineers in Iceland (*Verkfræðingafélag Íslands*), the Computer Scientists' Union (*Stéttarfélag tölvunarfræðinga*) and the Pharmaceutical Society of Iceland (*Lyfjafræðingafélag Íslands*) (the "Unions") as appellants and the Icelandic State as defendant.

2. The case referred concerns the termination of the fixed-wage contracts, in relation to regular overtime, of some of the Unions' members by the National and University Hospital (*Landspítali*) ("LSH") in February 2020. It is disputed whether this termination constituted a collective redundancy in the sense of the Icelandic Collective Redundancies Act No 63/2000 of 19 May 2000 (*Lög um hópuppsagnir nr. 63/2000*) ("the Collective Redundancies Act"). In the previous instance, Reykjavík District Court did not apply the Collective Redundancies Act to the termination or amendment of part of the workers' employment terms without the employment relationship itself being fully terminated.

3. The Court of Appeal requests an advisory opinion regarding the scope of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member

States relating to collective redundancies ("Directive 98/59/EC"), and specifically whether its rules cover situations in which an employer terminates the fixed overtime contracts of a group of workers.

II Legal background

EEA law

4. Directive 98/59/EC (OJ 1998 L 225 p. 16 and Icelandic EEA Supplement 2000 No 46, p. 258) was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 41/1999 of 26 March 1999 (OJ 2000 L 266, p. 47) and 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. The requirements were fulfilled by 19 May 2000 and the decision entered into force on 1 July 2000.

5. Directive 98/59/EC 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 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) 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.

6. Article 1 of Directive 98/59/EC, entitled "Definitions and scope", reads, in extract:

> *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:*
>
> *…*
>
> *(b)…*
>
> *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:*
>
> ...
>
> *(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).*

7. Article 2 of Directive 98/59/EC, entitled "Information and consultation", reads, in extract:

> *1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.*
>
> *2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed,* inter alia*, at aid for redeploying or retraining workers made redundant.*
>
> *Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.*
>
> *…*

8. Article 3 of Directive 98/59/EC, entitled "Procedure for collective redundances", reads, in extract:

> *1. Employers shall notify the competent public authority in writing of any projected collective redundancies*
>
> ...

National law

9. The substance of the predecessor to Directive 98/59/EC (Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies) was given effect in Icelandic law by the Collective Redundancies Act No 95/1992 of 2 December 1992. Iceland implemented Directive 98/59/EC also through the Collective Redundancies Act.

10. Article 1 of the Collective Redundancies Act reads: [1]

[1] All translations of national law are unofficial.

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.

…

III Facts and procedure

11. By letter of 14 February 2020, LSH terminated, with three months' notice, the regular overtime contracts of its workers in its technical support units. The workers were offered new temporary contracts covering regular overtime instead.

12. On 20 February 2020, the workers in LSH's technical support units were informed of the measures planned by LSH which would mean that contracts covering regular overtime would be reviewed and would, from then on, be temporary. This change would result in a reduction in the technical support departments' workers' wages by as much as 3.5%. However, this change would be executed in such a manner that workers who received under ISK 700,000 in monthly wages would not incur wage reductions, while the reduction applied to other workers would take into account the amount of wages they received. It was stated in the announcement, that all fixed-wage contracts would be terminated. Instead, workers would be offered alternative employment contracts in which regular overtime arrangements would be valid for one year.

13. LSH planned measures, which were part of the hospital's spending cuts, applied to 319 workers, and the number of overtime hours was reduced for 113 workers. Among the workers concerned are members of the Association of Chartered Engineers in Iceland, the Computer Scientists' Union and the Pharmaceutical Society of Iceland.

14. On 25 February 2020, the Unions sent an enquiry to LSH requesting information concerning the terminations, and whether LSH regarded them as falling under the provisions of the Collective Redundancies Act. In its reply of 26 February 2020, LSH stated that, in its view, there was no termination of the workers' employment contracts.

Consequently, the Collective Redundancies Act did not apply. What was proposed was a moderate reduction of regular overtime hours in the case of specific workers who had enjoyed terms of employment which were over and above the terms stipulated in their collective agreements. The reply furthermore stated that in practice, state institutions were allowed to terminate contracts covering payments going beyond the terms set out in the relevant collective agreements without this constituting a termination of the employment contract. It was also pointed out that under Article 19 of Act No 70/1996 on the Rights and Obligations of Public Employees, state institutions were authorised to make changes to jobs without this being considered to be termination of the employment contracts. Finally, LSH stated that other institutions had previously been obliged to take similar measures without complaints having been voiced that the provisions of the Collective Redundancies Act being infringed.

15. On 11 March 2020, the Unions sent a letter to the Director of LSH and the Ministry of Health outlining their view that the measures involved collective redundancies in the sense of the Collective Redundancies Act. In their view, the LSH was obliged to follow the procedural rules laid down in the Act, including those of Section III regarding notifications to be submitted to the Directorate of Labour. According to the request, as stated in the first paragraph of Article 8 of the Collective Redundancies Act, collective redundancies shall only take effect 30 days after the receipt of such a notification by the Directorate of Labour. The Unions acknowledged that LSH was free to make reductions in its personnel if it considered this necessary, but they pointed out that the way in which terminations were effected could not violate the legally-prescribed rules of procedure.

16. In a reply of 31 March 2020, LSH reiterated its views. It argued that contracts covering regular overtime did not constitute part of workers' employment contracts as such. Therefore, termination of regular overtime did not constitute termination of the employment contracts themselves. Reference was made to the fact that these measures were nothing new. It was stated that workers had generally shown understanding regarding such measures and had therefore not voiced complaints. Moreover, so few workers' contracts covering regular overtime had been terminated that the Collective Redundancies Act did not apply. According to the request, there is no indication that any of the 319 workers affected by LSH's measures stopped working as a result of these measures.

17. In the previous instance, Reykjavík District Court took the view that the Collective Redundancies Act was applicable only when the employment relationship between employer and worker had been fully terminated.

18. An appeal against the judgment of the District Court of 14 December 2020 was lodged by the Unions to the Court of Appeal on 28 December 2020. In the notice of appeal, the appellants state their view that the District Court's judgment represented a departure from what is considered to constitute redundancy in Icelandic employment law. The Unions argue that the legislator did not intend to restrict the scope of the Act to situations in which the employment relationship was fully terminated, since the Act used the term redundancies (*uppsagnir*) and not terminations of employment

(*ráðningarslit*). Furthermore, the Unions submit, the case law of the Court of Justice of the European Union ("ECJ") indicates that Directive 98/59/EC on which the Collective Redundancies Act was based covers situations in which terms of employment were reduced by means of terminations of contracts, even though the employment relationship was not fully terminated. According to the referring court, the Collective Redundancies Act applies to both public-sector and private-sector employees.

19. The Court of Appeal decided to stay the proceedings and by letter of 9 June 2022, registered at the Court on the same day, submitted the following questions to the Court:

> **1. Does it follow from Article 1(1) and Article 2 of Council Directive 98/59/EC, and also from the principle of effectiveness, that an employer who intends to terminate contracts with a group of workers covering fixed overtime is required to observe the procedural rules laid down in the Directive, including as regards consultation with workers' representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive?**
>
> **2. If the answer to the first question is in the affirmative, does the employer's obligation cease to apply if termination of contracts covering fixed overtime does not subsequently result in the full termination of the workers' employment contracts?**
>
> **3. Is it of significance for the answer to the first two questions whether the contracts covering fixed overtime which the employer terminates were specifically made in independent contracts that were additional to the workers' employment contracts?**

IV Written observations

20. 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:

- the Association of Chartered Engineers in Iceland, the Computer Scientists' Union and the Pharmaceutical Society of Iceland, represented by Halldór Kr. Þorsteinsson, advocate;

- the Icelandic Government, represented by Fanney Rós Þorsteinsdóttir, acting as Agent;

- the EFTA Surveillance Authority ("ESA"), represented by Erlend Møinichen Leonhardsen, Ingibjörg Ólöf Vilhjálmsdóttir, Kyrre Isaksen and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Esther Eva Schmidt and Bernd-Roland Killmann, acting as Agents.

V Proposed answers submitted

The Association of Chartered Engineers in Iceland, the Computer Scientists' Union and the Pharmaceutical Society of Iceland

21. The Unions submit that the questions referred should be answered as follows:

Question 1:

It follows from Article 1 (1) and Article 2 of Council Directive 98/59/EC, and also from the principle of effectiveness, that an employer who intends to terminate contracts with a group of workers covering fixed overtime should be required to observe the procedural rules laid down in the Directive, including as regards consultation with workers' representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive, as such terminations affect essential elements of the employment contracts, or can lead to the full termination of the employment relationships if refused by the workers.

Question 2:

The employer's obligation to observe the procedural rules laid down in the Directive cannot cease to apply, even though the termination of fixed overtime contracts does not subsequently result in the full termination of the workers' employment contracts, as this would render the employer's legal obligations stemming from the Directive dependent on the aftermath of the action of the employer.

Question 3:

It should be of no significance to the answers to the previous two questions, whether the fixed overtime contracts, terminated by the employer, were prepared separately to the workers' initial employment contracts. Otherwise, employers could greatly limit the importance of the Directive by preparing independent part-contracts for each aspect of any single employment contractual relationship and terminate each independent part-contract at will without regards to the Directive.

The Icelandic Government

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

Question 1:

The answer to the first question is negative as the group of workers in this case do not fall under the scope of Directive 98/59/EC, cf. Article 1(2)(b), which clearly states that the Directive shall not apply to "workers employed by public administrative bodies or by establishments governed by public law". Furthermore, the changes to the contracts of the appellants' members do not constitute "collective redundancies" in the sense of Directive 98/59/EC and thus do not invoke the protection provided in the Directive, including consultation with workers representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive.

Question 2:

Regarding the second referred question it goes without saying that as there was no termination of the workers' employment contracts, the protection afforded under Directive 98/59/EC cannot apply. This is supported by the above-mentioned case law of the ECJ.

Question 3:

The fact that provisions on fixed overtime were specifically made in independent contracts that were additional to the employees' employment contracts is not significant for the answer to the first two questions. What is significant is the fact that employees in this case do not fall under the scope of Directive 98/59/EC, cf. Article 1(2)(b). However, the fact that the contracts covering fixed overtime were made independently and were additional to the employees' employment contracts further supports the fact that there was no termination of employment. All employees affected by this measure continued their employment on the grounds of their employment contracts with LSH.

ESA

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

Question 1:

Article 1(1) and Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, read in light of the principle of effectiveness, should be interpreted as requiring an employer who, for reasons not related to the individual employee, intends to terminate unilaterally contracts with a group of workers covering fixed overtime with the effect of reducing remuneration and changing the status of the contracts from permanent to temporary, to observe the procedural rules laid down in the Directive, including as regards consultation with workers' representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive, provided that the changes in question are significant changes to essential elements of the employment contract, which is for the national court to determine in light of all circumstances.

Question 2:

The fact that the employment relationship is not fully terminated subsequently is immaterial with regard to the determination of the employer's procedural obligation.

Question 3:

It is not of significance for the answer to the first two questions whether the contracts covering fixed overtime which the employer terminates were specifically made in independent contracts that were additional to the worker's employment contracts.

The Commission

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

Question 1:

Article 1(1) and Article 2 of Council Directive 98/59/EC must be interpreted as meaning that an employer is required to engage in the consultations provided for in Article 2 and in the procedure for collective redundancies provided for in Article 3 when it intends, to the detriment of the workers, to make a significant change to an essential element of the employment relationship for reasons not related to the individual worker concerned.

Question 2:

It is for the referring court to determine, in the light of all the circumstances of the case before it, whether a change in contracts covering fixed overtime which the employer terminates in order to modify them unilaterally and to the detriment of the worker amounts to a significant change to an essential element or not.

Question 3:

In that regard, it is irrelevant that the contracts covering fixed overtime were made independent from and additional to the workers' employment contracts.

Bernd Hammermann
Judge-Rapporteur