EUROPEAN COMMISSION

Brussels, 28th February 2022
Sj.j (2022) 1485313

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the European Commission, represented by Denis Martin, its Legal Adviser, and Nicola Yerrell, its Senior Expert, with a postal address for service in Brussels at the Legal Service, *Greffe Contentieux*, BERL 1/169, 200 Rue de la Loi B-1049 Brussels.

In Case **E-5/21,**

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Reykjavik District Court, in the case of:

Anna Bryndis Einarsdottir

Plaintiff

against

The Icelandic Treasury

Defendant

requesting an advisory opinion regarding the interpretation of Article 6 of the act referred to in Point 1 of Annex VI to the EEA Agreement, namely Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security schemes.

The Commission has the honour to submit the following written observations:

I. FACTS AND PROCEDURE

1. The present request for an advisory opinion arises out of a decision made by the Maternity/Paternity Leave Fund (represented by the defendant) on 3rd March 2020 regarding the plaintiff's entitlement to payment from that fund during her maternity leave.

2. The plaintiff undertook postgraduate studies in medicine in Denmark, and was in full-time employment there from 1st September 2015. She moved from Denmark to Iceland on 17th September 2019 while pregnant and began working at the National Hospital (Landspitali) on 30th September 2019 (in other words, within 10 working days of leaving her employment in Denmark). It is undisputed that her period of employment in Denmark from 1st September 2015 until 16th September 2019 conferred entitlement to maternity leave under Danish law, and that she received wages throughout this period.

3. On 15th January 2020 she informed her employer of the proposed structure and timing of her maternity leave, and on 22nd January 2020 she submitted an application for payments from the Maternity/Paternity Leave Fund ("the Fund"). This was accompanied by payslips from her employment at the Landspitali for November and December 2019, as well as confirmation from the Danish authorities of her domicile in Denmark from 2015 as well as her wage payments during that period. Her baby was born on 26th March 2020.

4. The plaintiff's application for a maternity payment was approved and she was informed of the payment schedule by a decision made by the Fund on 3rd March 2020, to the effect that she would receive a monthly payment of ISK 184 119 (the minimum set by the Icelandic Act on Maternity/Paternity Leave) during her maternity leave. In accordance with Icelandic legislation, the calculation of her maternity payment was based on 80% of average aggregate wages earned **on the**

domestic labour market during the period from September 2018 to August 2019, and accordingly did not take into account the income earned by the plaintiff in Denmark during that period. Instead, she was entitled only to a fixed minimum monthly payment. The plaintiff appealed to the Welfare Appeals Committee, but in its ruling No 261/2020 delivered on 2nd September 2020, the Committee upheld the Fund's decision.

5. By a writ dated 25th January 2021, the plaintiff lodged proceedings before the Reykjavik District Court, requesting that the decision on her application for payments from the Fund be quashed on the grounds that it was incompatible with EEA law. The detailed grounds for her appeal are set out at pages 3-7 of the request for an advisory opinion, to which the Commission would refer. In short, she argues that the failure to take into account her income in Denmark for the purposes of calculating her maternity payment infringes the rules set out in Regulation (EC) No 883/2004 (especially its Article 6 on aggregation) and the principle of the free movement of workers.

6. By way of contrast, the defendant maintains that the decision of the Fund fully reflects the requirements of EEA law, with specific reference to the provisions of Article 21 of Regulation (EC) No 883/2004 (see pages 7-13 of the request for an advisory opinion).

7. In light of these arguments, the Reykjavik District Court decided that it was necessary to refer the matter to the EFTA Court for an advisory opinion on the proper interpretation of EEA law.

II. THE QUESTION

8. The question referred to the EFTA Court by the Reykjavik District Court is the following:

> *"1. 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?"*

III. THE APPLICABLE LAW

Icelandic Law

9. The rules governing the right to maternity/paternity leave as well as payments from the Maternity/Paternity Leave Fund are set out in Act No. 95/2000 on Maternity/Paternity Leave and Parental Leave, as amended[1] ("Act 95/2000"). The basic rule is contained in Article 4, which states that the Fund shall make payments to parents "*who hold entitlements to payments during maternity/paternity leave under Article 13*".

According to the first paragraph of Article 13, a parent acquires the right to payments from the Fund after "*she/he has been active on the domestic labour market for six consecutive months prior to a birth of a child*". Paragraph 12 of this article further clarifies that provided a parent has worked on the domestic labour market for at least the last month of this "rights acquisition period" under paragraph 1, the Directorate of Labour, "*shall, to the extent necessary, take account of his/her*

[1] The Commission is basing itself on the English translation available at www.government.is.

working periods as an employee or self-employed individual" in another State party *inter alia* to the EEA Agreement, providing that "*the parent's work conferred rights on him/her under the legislation of the state in question regarding maternity/paternity leave"*. It also states that a "*condition for this shall be that the parent began work on the domestic labour market within 10 working days of stopping work on the labour market of the other state within the EEA*….".

As regards the level of maternity payment, the second paragraph of Article 13 states that the monthly payment shall amount to 80% of the parent's average total wages, these being "*based on a continuous twelve-month period ending six months prior to the birth month*". (In other words, as the Commission understands the position, the twelve month reference period used to calculate the maternity payment does not coincide with, but rather **precedes,** the six month period required for the acquisition of entitlement under paragraph 1). For this purpose, "*only average total wages for those months during the reference period in which the parent was on the domestic labour market shall be taken into account*" and in no case are fewer than four months to be taken as a reference base when average total wages are calculated.

The fourth paragraph of Article 13 goes on to provide that an employee who meets the condition of entitlement set out in the first paragraph but has not worked on the domestic labour market during the twelve month reference period defined in the second paragraph shall acquire the right to minimum payments under the seventh paragraph in accordance with her/his employment ratio. The seventh paragraph of Article 13 in turn fixes the levels of this minimum monthly payment (according to page 15 of the request for an advisory opinion, this was ISK 184 119 per month at the relevant time).

Finally, the Commission notes that the final paragraph of Article 13 empowers the Minister to issue regulations containing further provisions on payments from the Maternity/Paternity Leave Fund covering for example *"the entitlements of those who have worked in other member states of the Agreement on the European*

Economic Area". As far as the Commission is aware, no additional regulations have been made to this effect.

EEA and Union Law

10. Article 28 of the EEA Agreement lays down the general principle that freedom of movement for workers shall be secured among EU Member States and EFTA States. As regards more specifically the field of social security, Article 29 sets out the principle of the coordination of social security schemes, as follows:

> *"In order to provide 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 purposes 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 the Contracting Parties."*

Annex VI to the EEA Agreement (as amended by Joint Committee Decision No 76/2011 of 1st July 2011[2]) refers in its Point 1 to Regulation (EC) No 883/2004 on the coordination of social security systems ("Regulation 883/2004"), and in Point 2 to Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 ("Regulation 987/2009").

2 OJ L 262, 6.10.2011 at page 33, entry into force 1st June 2012.

Regulation 883/2004

As is explained in its title and first recital, Regulation 883/2004 contains a series of provisions designed to coordinate national social security systems in order to facilitate the free movement of persons. Its personal scope is defined in Article 2, and covers nationals of an EEA State who are or have been subject to the legislation of one or more EEA States. Its material scope is defined in Article 3, and expressly includes legislation concerning maternity and equivalent paternity benefits (Article 3(1)(b)). As for Articles 4-6, these lay down a series of key principles: equality of treatment (Article 4), equal treatment of benefits, income, facts or events (Article 5) and the aggregation of periods (Article 6).

Article 6 states that:

> *"Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:*
>
> - *the acquisition, retention, duration or recovery of the right to benefits,*
> - *the coverage by legislation, or*
> - *the access to or the exemption from compulsory, optional continued or voluntary insurance,*
>
> *conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies."*

Chapter 1 of Title III goes on to set out more detailed rules for sickness, maternity and equivalent paternity benefits. Of particular relevance to the present proceedings, Article 21 is entitled "Cash benefits" and provides that:

> *"1. An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.*
>
> *2. The competent institution of a Member States whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis* ***shall determine such average income*** *or average contribution basis* ***exclusively by reference to the incomes confirmed as having been paid****, or contribution bases applied,* ***during the periods completed under the said legislation.*** (Commission's emphasis).
>
> *3. 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.*
>
> *4. Paragraphs 2 and 3 shall apply mutatis mutandis to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States."*

Regulation 987/2009

As is evidenced by its title, this Regulation was intended to lay down the procedure for implementing Regulation 883/2004. Title I contains a series of general provisions, including Article 12 which lays down further rules on the aggregation of periods, as follows:

> "*1. For the purposes of applying Article 6 of the basic Regulation, the competent institution shall contact the institutions of the Member States to whose legislation the person concerned has also been subject in order to determine all the periods completed under their legislation.*
>
> *2. The respective periods of insurance, employment, self-employment or residence completed under the legislation of a Member State shall be added to those completed under the legislation of any other Member State, insofar as necessary, for the purposes of applying Article 6 of the basic Regulation, provided that those periods do not overlap. ...."*

For the sake of completeness, the Commission would add that Regulation 987/2009 does not contain further detailed rules on how to apply Articles 21(2)-(4) of Regulation 883/2004.

IV. OBSERVATIONS

11. In its request for an advisory opinion, the national court asks how periods during which parents have worked on the labour markets of *other* EEA States should be taken into account when assessing applications for payments from the Icelandic Maternity/Paternity leave Fund, with particular reference to the requirements of Regulation 883/2004.

12. As described in Section III above, Article 6 of Regulation 883/2004 enshrines the key principle of aggregation: when examining entitlement to a benefit, social security institutions are required "*to the extent necessary*" to take into account periods of insurance, employment or self-employment completed under the legislation of other EEA States *as if* they had been completed under the national legislation. This is a fundamental aspect of the coordination of social security schemes and is intended to ensure that the exercise of the right to free movement is not undermined (see for example paragraph 29 of the judgment in Case C-306/03, Alonso[3]).

13. It follows clearly that an EEA State is obliged to take into account periods of employment carried out in another EEA State in order to determine whether the conditions for entitlement to a benefit under its national rules are met.

14. In the present context, entitlement to a maternity payment from the Fund is acquired if a parent has been active on the domestic labour market for six consecutive months prior to the birth. However, paragraph 12 of Article 13 of the Maternity/Paternity Leave Act 95/2000 makes express provision for the aggregation of periods worked in other EEA States: they are to be taken into account in the assessment of entitlement if i) they conferred rights regarding maternity/paternity leave under the legislation of the State in question and ii) the parent started work on the domestic labour market within 10 working days of stopping work in the other State.

15. As is explained by the national court on page 14 of its request for an advisory opinion, it is not disputed that the plaintiff met the conditions for entitlement to a maternity payment under Icelandic law. She started work in Iceland on 30th September 2019 and although her baby was born on 26th March 2020, slightly under six months later, she had worked full-time in Denmark until 16th September 2019 and this had conferred entitlement to maternity leave under Danish law. Further, she began working in Iceland within 10 working days of leaving Denmark. Although not

3 ECLI:EU:C:2005:44.

expressly stated in the request, the Commission accordingly understands that her entitlement to maternity pay in fact derived from the operation of the aggregation principle as set out in paragraph 12 of Article 13 of Act 95/2000.

16. The issue which remains is the *calculation* of the plaintiff's maternity payment. Chapter 1 of Title III of Regulation 883/2004 contains detailed rules applicable to both sickness and maternity benefits and its Article 21 makes specific provision for cash benefits (which include benefits such as a maternity payment which has the purpose of replacing income).

17. According to Article 21(2), if the calculation of a cash benefit is based on average income, the competent institution shall determine this average by taking into account exclusively income paid during periods completed under the national legislation. Article 21(3) applies an identical rule to cases where the calculation of a cash benefit is based on standard income. In both cases, the key point is that the cash benefit is linked to income paid in the national labour market. Article 21(4) further clarifies that these calculation rules apply even if the legislation applied by the competent institution provides for a reference period which includes periods completed in another State (in other words, where the aggregation principle has been applied in order to acquire entitlement to the benefit).

18. In the Commission's view, this simply exemplifies the fact that exercising the right to free movement is not necessarily neutral as regards its consequences for the calculation of a benefit, but that the fundamental principle of non-discrimination must at all times be respected.

19. Article 29 of the EEA Agreement does not provide for the *harmonisation* of national social security systems, but rather their coordination: the substantive and procedural differences between the social security systems of the individual EEA States are as such unaffected. It follows that there is no guarantee that moving to another State to work will be neutral as regards social security (cf. paragraphs 50-52 of the judgment

in Joined Cases C-393/99 and C-394/99, Hervein and Hervillier[4]). In other words, the worker has accepted that the legislation of the host State – the competent State – will be applicable, but in the *application* of that legislation, he/she remains protected by the fundamental principle of non-discrimination, as enshrined in Regulation 883/2004.

20. The judgment in Case C-257/10, Bergstrom[5] further illustrates this principle. Whilst periods of employment completed in another State had to be taken into account in assessing entitlement to a cash family benefit under the relevant Swedish legislation, the Court of Justice reiterated that in accordance with Article 23 of Regulation (EEC) No. 1408/71 (the predecessor to Article 21 of Regulation 883/2004), the relevant income for calculating the *amount* of the benefit was that received under Swedish law (see especially paragraph 49 of the judgment). In the Commission's view, the judgment is particularly illustrative because Ms Bergstrom had not worked a single day in Sweden and had received no income there. Nevertheless, the Court of Justice emphasised that her income received in Switzerland could not be taken into account and the Swedish authorities were instead required to calculate her income *as if* it had been earned in Sweden (on which see further paragraphs 26 and 27 below).

21. The further question which arises is as to the correct interpretation and application of Article 21 of Regulation 883/2004 by the Icelandic authorities.

22. By way of preliminary comment, the Commission notes that the national court refers to Article 21**(3)** of Regulation 883/2004 in its request for an advisory opinion. However, since paragraph 2 of Article 13 of the Icelandic Maternity/Paternity Leave Act 95/2000 fixes the monthly maternity payment at 80% of the parent's **average total wages** over a 12 month reference period (and does not appear to base it on "standard income"), the Commission rather understands Article 21(2) of Regulation 883/2004 to be relevant to the present proceedings. Of course, the final

4 ECLI:EU:C:2002:182.

5 ECLI:EU:C:2011:839.

determination of whether Article 21(2) or Article 21(3) applies is obviously a matter for the national court, and the Commission would merely add that its comments on Article 21(2) should be taken as applying equally to Article 21(3).

23. As mentioned above, Article 6 of Regulation 883/2004 lays down the key principle of aggregation of periods of employment carried out in another EEA State for the purposes of assessing entitlement to a benefit. In the Commission's view, the crucial issue which arises in the present proceedings (although not expressly referred to the EFTA Court by the national judge) is whether the *application* of Article 21(2) by the Icelandic authorities risks emptying this principle of meaningful content, thereby frustrating the objective pursued by Regulation 883/2004 and its Article 6 in particular.

24. More specifically, a feature of the Icelandic legislation is that the 12 month reference period for the **calculation** of the maternity payment (based on employment on the domestic labour market) precedes the six month period immediately prior to the birth upon which the *acquisition* of entitlement is based (paragraph 2 of Article 13 of Act 95/2000). Put simply, the calculation of the level of benefit is thus entirely "separated" from the underlying assessment of entitlement. In cases where (as here) a parent satisfies the entitlement conditions, but was not on the domestic labour market for the preceding 12 month period, only a minimum payment will be made (paragraph 4 of Article 13).

25. At face value, this situation would appear to comply with the requirements of Article 21(2) of Regulation 883/2004 since the calculation is based only on income paid during the periods completed under Icelandic legislation. However, it seems to the Commission that Article 21(2) cannot be viewed as a "self-contained" provision, without limits, but instead must be read in light of the key principles of aggregation and non-discrimination contained in Articles 6 and 4 of Regulation 883/2004.

26. Such an approach is clearly confirmed by the judgment in Case C-257/10, Bergstrom. Ms Bergstrom had applied for a family benefit, but was not employed

nor in receipt of any income in Sweden (the competent State) during the 240 day qualifying period which formed the basis for both entitlement and calculation of the benefit. Once aggregation had taken place, the Court of Justice concluded that Ms Bergstrom's qualifying income should be calculated "*by taking into account the income of a person who is employed, in Sweden, in a situation comparable to her situation and who also has professional experience and qualifications comparable to her professional experience and qualifications"* **in order for the principle of aggregation to be effective, and to satisfy the requirement of equal treatment** (paragraph 52 of the judgment, Commission's emphasis).

27. In other words, although the calculation of the benefit could properly take into account only income from employment completed under Swedish legislation, and not from Ms Bergstrom's employment in another State (cf. Article 21(2)), it was necessary to create a virtual 'national' income based on comparable employment in Sweden in order for the principles of non-discrimination and aggregation to be effective, and to facilitate free movement.

28. A similar logic can be seen underlying the judgment in Case C-652/16, DW[6]. Although this did not on its specific facts involve the application of Regulation 883/2004, the Court of Justice held that it was contrary to the principle of freedom of movement for periods of employment in an EU institution to be equated only to periods of *unemployment* by the competent institution in Latvia for the purposes of calculating a maternity benefit.

29. In the Commission's view, similar reasoning should be applied to the interpretation and application of Article 21(2) of Regulation 883/2004 in the present proceedings. Although this article requires the Icelandic authorities to take into account average income only from employment completed under Icelandic legislation for the purposes of calculating maternity payments, it considers that Articles 4 and 6 of Regulation 883/2004 further require an assessment of the plaintiff's notional

6 ECLI:EU:C:2018:162.

"comparable" income in Iceland during the 12 month reference period based on her employment in Denmark during this period, and for this to be taken into account in the calculation.

V. CONCLUSION

30. For the reasons discussed above, the Commission considers that the question from the Reykjavik District Court should be answered in the following sense:

"1. *Article 6 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 should be interpreted as requiring a competent institution to take into account periods of employment carried out in another EEA State in order to determine whether the conditions for entitlement to a maternity benefit under its national legislation are met.*

As regards the calculation of that benefit, Article 21(2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 should be interpreted as requiring the competent institution to take into account only average income received during periods of employment undertaken under its national legislation during the relevant reference period.

However, when employment during the reference period fixed for the calculation of the maternity benefit was completed under the legislation of another EEA State, the national judge should ensure that the amount of that benefit is calculated by taking into account the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which the benefit is claimed."

Denis MARTIN Nicola YERRELL

Agents of the Commission