EUROPEAN COMMISSION

Brussels, 03.08.2022

sj.j(2022)6115935

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: Esther Eva SCHMIDT and Bernd-Roland KILLMANN, Members of its Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles*,

in Case E-9/22

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 Landréttur (hereinafter referred as "Court of Appeal"), in the case:

the Association of Chartered Engineers in Iceland (Verkfræðingafélag Íslands),

the Computer Scientists' Union (Stéttarfélag tölvunarfræðinga), and

the Pharmaceutical Society of Iceland (Lyfjafræðingafélag Íslands)

Appellants

against

the Icelandic State (Íslenska ríkið)

Defendant

requesting an advisory opinion regarding the interpretation of the acts referred to in Point 22 of Annex XVIII to the EEA Agreement, namely Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (hereinafter: "Directive 98/59/EC"), incorporated in the EEA Agreement.

I. INTRODUCTION

1. The request for advisory opinion asks when and in how far unilateral termination of a contract relating to only one working condition for reasons not related to the individual worker to the detriment of the worker affecting her or his employment relationship constitutes a "*redundancy*" within the meaning of point (a) of the first subparagraph of Article 1(1) of Directive 98/59/EC.

II. LAW

II.1. EEA law

2. Directive 98/59/EC became applicable as from 1 July 2010 to Iceland, Liechtenstein and Norway due to point 22 of Annex XVIII, Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women, to the EEA Agreement as replaced by Joint Committee Decision No 41/1999. Articles 1, 2 and 3 of Directive 98/59/EC read as follows:

*"**SECTION I***

Definitions and scope

Article 1

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:

(a) ...;

(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).

SECTION II

Information and consultation

Article 2

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.

…

SECTION III

Procedure for collective redundances

Article 3

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

…"

II.2. National law

3. Iceland implemented Directive 98/59/EC through the Collective Redundancies Act No 63/2000 of 19 May 2000 (*Lög um hópuppsagnir nr. 63/2000*). Its Article 1 reads as follows:

"*Article 1*

1. This Act applies to collective dismissals of workers by an employer for reasons not related to each individual worker …"

III. FACTS AND QUESTIONS ASKED

III.1. Facts

4. In February 2020, as part of its spending cuts, the National and University Hospital of Iceland (*Landspítali*) served notice on 319 workers in technical support departments that their existing contracts in relation to regular overtime would be terminated. They were offered new temporary overtime contracts. The overtime contracts were and are independent contracts additional to the workers' employment contracts.

5. The termination of the overtime contracts by the National and University Hospital of Iceland did not affect the existing employment contracts of the workers

concerned, which continued unchanged. The termination and replacement of the overtime contacts would result in the reduction in salary of up to 3.5%, but those earning monthly below 700 000 Icelandic Krona (approximately 5 000 Euro) would not incur any salary reduction.

6. In total, the number of overtime hours was reduced in the case of 113 workers. The employment contracts themselves of the workers concerned by the replacement of the previous contracts in relation to regular overtime with new overtime contracts were not terminated. Nineteen of these workers were members of unions, namely the Association of Chartered Engineers in Iceland, the Computer Scientists' Union and the Pharmaceutical Society of Iceland.

7. These unions filed a claim against the National and University Hospital of Iceland before the District Court (*Héraðsdómur*). They argued that the termination of the overtime contracts should be regarded as collective redundancies under the Collective Redundancies Act No 63/2000. Therefore, the National and University Hospital of Iceland as employer had failed to follow the procedures laid down in that Act, notably notification to the Directorate of Labor (*Vinnunmálastofnun*) at least 30 days prior to the entry into effect of the terminations.

8. The District Court dismissed the claim with the argument that the Collective Redundancies Act No 63/2000 did not apply because no employment relationship itself was terminated. The unions filed an appeal to the Court of Appeal.

III.2. Questions

9. The questions referred to the EFTA Court by the Court of Appeal are the following:

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. ANALYSIS

IV.1. Admissibility

10. The Commission understands from the order of reference that the Collective Redundancies Act No 63/2000, applies to both, public-sector and private-sector workers.

11. This means that the group of entities subject to the domestic legislation is wider than that to which Directive 98/59/EC applies. Domestic legislation includes the workers concerned by the case in the main proceedings. It is therefore irrelevant to understand whether the National and University Hospital of Iceland falls under the term of "*establishments governed by public law*" in the sense of point (b) of the first subparagraph of Article 1(1) of Directive 98/59/EC[1].

12. Indeed, where domestic legislation, in regulating purely internal situations not governed by EEA law, adopts the same or similar solutions as those adopted in EEA law, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law[2].

13. The Commission therefore submits that the request for an advisory opinion should be admissible.

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1 Judgment of the European Court of Justice of 21 September 2017, *Socha,* C-149/16, paragraphs 19 to 22.

2 Judgment of the EFTA Court of 27 October 2017, *Pascal Nobile*, E-21/16, paragraph 25 and case law cited.

IV.2. First, second and third questions

14. The Commission believes that the three questions could be answered together due to the close connection between them. Indeed, all three questions aim at clarifying whether, under circumstances in which workers are confronted with a worsening of their working conditions, which affects the employment relationship, without their cooperation or agreement, they are as needful of the protection conferred by the information and consultation obligations under Directive 98/59/EC as workers who are made redundant.

15. As regards the concept of "*redundancy*" in point (a) of the first subparagraph of Article 1(1) of Directive 98/59/EC, the European Court of Justice has already held that the Directive must be interpreted as meaning that the fact that an employer, unilaterally and to the detriment of the worker, makes significant changes to essential elements of her or his employment relationship for reasons not related to the individual worker concerned falls within that concept[3].

16. In essence, the European Court of Justice found that the objective of Directive 98/59/EC, which is, *inter alia*, to afford greater protection to workers in the event of collective redundancies, spoke against a narrow definition of the concepts that define the scope of that Directive, including the concept of "*redundancy*" in point (a) of the first subparagraph of Article 1(1). It added that by harmonising the rules applicable to collective redundancies, the Directive intended both to ensure comparable protection for workers' rights in the different EEA States and to harmonise the costs, which such protective rules entail for all undertakings established in the EEA[4].

17. The European Court of Justice then concluded further that, if an employer, unilaterally and to the detriment of the worker, makes a non-significant change to an essential element of the employment relationship for reasons not related to the

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3 See judgments of the European Court of Justice of 11 November 2015, *Pujante Rivera*, C-422/14, paragraph 55; of 21 September 2017, *Socha,* C-149/16, paragraph 25 and of that same date, *Ciupa*, C-429/16, paragraph 27.

4 Judgment of the European Court of Justice of 11 November 2015, *Pujante Rivera*, C-422/14, paragraphs 51 and 53.

individual worker concerned, or makes a significant change to a non-essential element of that relation for reasons not related to the individual worker, that may not be regarded as a "*redundancy*" within the meaning of that Directive[5].

18. On this basis, the Commission submits that it is irrelevant whether the change imposed by the employer unilaterally and to the detriment of the worker results in the end in the full termination of some of the workers' employment contracts or whether the change only affects one of several independent contracts, as in the case at hand, where the contracts covering fixed overtime were additional to the workers' employment contracts. What matters instead is to determine in the light of all the circumstances of the case at hand whether the change imposed by the employer at issue is to be regarded as a significant change to an essential element of the employment relationship.

19. The notice of amendment at issue in the main proceedings provides for changes to the overtime contracts, only, and would result in the reduction in salary. These changes affect remuneration, which is an essential element of the employment relationship of the concerned workers. At the same time, the change is most likely non-significant because its extent is markedly reduced[6].

20. Indeed, without wanting to prejudge the Court of Appeal's assessment of the facts before it, the Commission would tend to consider the impact of the change at issue in the main proceedings limited in two ways: firstly, the change resulted in a relatively modest reduction in salary of merely up to 3.5%; secondly, the change seemed to be respectful of workers with lower income, since those workers earning monthly less than a given threshold were exempted from the salary reduction. Admittedly, switching from permanent overtime contracts to temporary ones leads to more uncertainty for the workers concerned. However, this change is not of such a nature to be, on its own, significant.

21. Still, even if the change at issue in the main proceedings is not covered by the concept of "*redundancy*" due to the lack of a termination of the employment

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5 See judgments of the European Court of Justice of 21 September 2017, *Socha,* C-149/16, paragraph 26 and of that same date, *Ciupa*, C-429/16, paragraph 28.

6 Judgment of the European Court of Justice of 21 September 2017, *Ciupa*, C-429/16, paragraph 29.

relationship, a termination of the contract of employment following the worker's refusal to accept a change such as that proposed in the notice of amendment must be regarded as constituting a termination of an employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned, within the meaning of the second subparagraph of Article 1(1) of Directive 98/59/EC, so that it must be taken into account for calculating the total number of redundancies[7].

22. In light of the above, the Commission is of the opinion that Article 1(1) and Article 2 of 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. 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. In that regard, it is irrelevant that the contracts covering fixed overtime were made independent from and additional to the workers' employment contracts.

V. CONCLUSION

23. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court for an advisory opinion by the Court of Appeal should be answered as follows:

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.

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7 See judgments of the European Court of Justice of 21 September 2017, *Socha,* C-149/16, paragraph 28 and of that same date, *Ciupa*, C-429/16, paragraph 31.

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.

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

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