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Lögmenn
Laugavegi 3

EFTA Court
1 Rue Fort Thüngen
L-1499 Luxembourg
Luxembourg

Reykjavík, 22nd of August 2022

Written Observations
submitted in accordance with Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court, on behalf of the appellants, represented by Mr. Halldór Kr. Þorsteinsson of Lögmenn Laugavegi 3, Reykjavík, Iceland, in

Case E-9/22: The Association of Chartered Engineers in Iceland, the Computer Scientists´ Union and the Pharmaceutical Society of Iceland v the Icelandic State

in which Iceland´s Court of Appeal (Landsréttur) requests an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by an application lodged at the EFTA Court on June 9th, 2022.

The Facts of the Case
As far as the facts of the case are concerned, the Association of Chartered Engineers in Iceland, the Computer Scientists´ Union and the Pharmaceutical Society of Iceland (here after, the appellants) refer to the Court´s request for an advisory opinion, paragraphs 8-12.

In addition to this, the appellants emphasise that the workers in question have received regular overtime payments since they were initially hired by the employer. Thus, since day one at the Hospital, each worker has had their regular overtime covered, as a part of their personal employment contract. Special contracts regarding the regular overtime were not made on a temporary basis, but were to be terminated automatically if the position of the worker was terminated or changed drastically.

As stated in the request for an advisory opinion, paragraph 9, the wages of the workers were reduced by up to 3.5% when the fixed-wage contracts were terminated in February 2020. The contracts were terminated with a formal termination letter, which granted each recipient a three-month notice period from the end of February 2020.

In email correspondence with the attorney of the appellants on February 26th 2020, the chief human resources officer of the employer alluded to Art. 19 of Icelandic Legislative Act No 70/1996 on the rights and obligations of public employees. The Article in question grants state institutions the right to make certain alterations to jobs and positions without terminating any employment contracts. The formal termination letters sent to the workers in February 2020 did not mention this Article, nor was the action based on this ground anywhere else. In a further email, sent on March 9th 2020, the same chief HR officer certified that the action in question was not viewed as an alteration in accordance

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with Art. 19 of Act No 70/1996, and that the Article had only been mentioned in a previous email as an example of the different rules regarding public employees and workers in the general labour market.

In her email from February 26th 2020, the chief HR officer of the employer alluded to a practice, by which, she claimed, state institutions were allowed to terminate contracts covering payments beyond the minimum terms of the corresponding collective agreements, without any effects on the employment contracts themselves. The reference was not supported by any case law in the email, nor has such a practice been referenced at any other point in the proceedings.

Furthermore, the email from February 26th stated that other state institutions have previously had to take similar action, and even on a larger scale, without any complaints voiced by the workers in those instances. This statement, which the appellants contest, has not been supported by any example. On the contrary, the Icelandic Parliamentary Ombudsman, *Umboðsmaður Alþingis*, has recently voiced the opinion that a rescheduling of a state institution in Iceland, which led to a group of workers being offered different roles within the institution, constituted a collective redundancy in accordance with Act No 63/2000 on collective redundancies (Decision in Case No 11320/2021 from June 24th 2022). Act No 63/2000 is the legal act through which Council Directive 98/59/EC has been implemented in Icelandic law. In any case, any possible examples of mass redundancies by state institutions in Iceland cannot grant the employer in question the right to bypass their legal obligations according to Council Directive 98/59/EC.

The Relevant Provisions of National and EEA Law

As far as the relevant provisions of the law of the Republic of Iceland and EEA law are concerned, the appellants refer to the Court´s request for an advisory opinion.

Additionally, the appellants would like to emphasise that Art. 19 of Act No 70/1996 on the rights and obligations of public employees is not relevant for the case at hand, as the terminations in question were not based on the Article, as mentioned previously.

The Questions Referred

The referring Court has requested the EFTA Court to provide an advisory opinion on the following questions:

> 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?

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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?

Observations

On behalf of the appellants, the following written observations are submitted.

The Employer's Action in Question Entails the Termination of Workers' Employment Contracts

Contrary to what the employer has argued in this case, an action which terminates the fixed overtime of workers, reducing their wages by up to 3.5%, does entail the termination of the workers' employment contracts, even if the workers in question continue to be employed in the same workplace following the receipt of the termination letters. The change in question is not merely a moderate reduction of regular overtime hours, but a reduction of the workers' pay, decided unilaterally by the employer. Such a wage reduction cannot take place unless the contracts in question are, practically, terminated. In the instance where such a redundancy does not lead to a full termination of the employment relationship, the terminated employment contract must in practice be seen as being replaced by a new, less-valuable, employment contract.

Furthermore, the employer terminated each employment contract via a formal termination letter. The termination letters show clearly that the employer meant to alter the existing employment relationships by terminating the existing contracts and offering new contracts instead.

In its judgment from 11 November 2015, *Pujante Rivera,* the CJEU concluded that Council Directive 98/59/EC must be interpreted as meaning "that the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of 'redundancy' for the purpose of the first subparagraph of Article 1(1)(a) of the directive" (paragraph 55). Previously, the scope of Directive 75/129, on the same matter as Directive 98/59, had been interpreted as not being limited in scope to cases of redundancy defined as resulting from a cessation or reduction of the business of an undertaking or a decline in demand for work of a particular type, as per the judgment of the Court of 8 June 1994, *Commission v the United Kingdom*, C-383/92, paragraphs 31-32.

Even if the Directive does not give an express definition of 'redundancy,' the concept must be given a uniform interpretation for the purposes of the Directive, as per the judgment of the CJEU of 12 October 2004, *Commission v Portugal*, C-55/02, paragraph 44. By harmonising the rules applicable to collective redundancies, the Community legislature intended both to ensure comparable protection for workers' rights in the different member states and to harmonise the costs which such protective rules entail for Community undertakings. Accordingly, the concept of 'redundancy' as mentioned in Article 1(1) of the Directive has meaning in Community law (*Commission v Portugal*, paragraphs 48-49 and *Linster*, C-287/98, paragraph 43).

Since the employer's action in this case did entail the termination of the workers' employment contracts, Council Directive 98/59/EC should be considered. According to Article 1(1) of the

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Directive, "collective redundancies" are dismissals effected by an employer for one or more reasons not related to the individual workers concerned. It is clear that the employer´s action in this case falls under the scope of "redundancy" according to the judgment in *Pujante Rivera*, as the action was taken unilaterally by the employer and to the detriment of the workers. There is no argument on behalf of the employer that the redundancies in this case were in any way related to each individual worker concerned.

The Article furthermore lists the required numbers of redundancies for an action to be considered "collective redundancies." The number of redundancies in the case at hand far surpasses the limit set in Article 1(1), since 319 workers were affected by the action, including 113 workers who suffered a reduction in overtime hours.

The concept of "redundancy" in the context of Article 1(1) of the Directive is not dependent on the aim of the contract terminations, as long as reasons do not relate to the individual workers themselves. In other words, the Community law meaning of "redundancy" is irrespective of the aim of the employer (as per *Commission v Portugal*, paragraphs 48-49). Article 1(1) contains no express exception, to grant employers the right to terminate employment contracts *en masse* as long as the aim of the collective redundancies is to reset the general structure of employment contracts at the workplace. The employer´s action in this case constitutes a collective redundancy under the guise of general restructuring of the workplace.

Since all requirements laid out in Article 1(1) have been met in this case, the appellants submit that the first question should be answered in the affirmative.

The Procedural Rules Laid Down in Council Directive 98/59/EC Apply Even if a Full Termination Does Not Follow the Termination of Contracts Covering Fixed Overtime

Even if the action at hand were not considered to constitute a termination of the workers´ employment contracts, the procedural rules of Directive 98/59/EC should nonetheless apply in the case, including the employer´s obligation to notify and consult the relevant parties.

As stated previously, the CJEU has concluded that the Directive should apply in instances where an employer makes significant changes to essential elements of employment contracts, even where a full termination of the employment contract does not necessarily follow the redundancy, as per *Pujante Rivera,* paragraph 55. Therefore, there is no need for a cessation of the employment relationship to follow the action of the employer, for the Directive to apply. A wage reduction of up to 3.5% must constitute a significant change to an essential element of the employment contract of the worker affected. Thus, following the reasoning in *Pujante Rivera*, the Directive should apply in this case.

Even if the wage reductions were, for some reason, not deemed to constitute a significant change to an essential element of the employment contracts, the Directive should nonetheless apply. In the judgment of the CJEU from 21 September 2017, *Socha and Others*, C-149/16, the Court concluded that regardless of whether the changes are deemed to affect "essential elements" of the employment contract, the employer must engage in consultations in accordance with the Directive when it intends

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to make unilateral amendments to the terms of remuneration which, if refused by the employees, will result in termination of the employment relationship (paragraphs 26-35).

It is clear that the recipients of the termination letters in February of 2020 were within their rights to respond to the letters by refusing the reduced wages on offer, terminating their contracts, and thus ending their employment relationship once the notice period was up. In accordance with decision in *Socha and Others*, the employer should thus have engaged in consultations in accordance with the Directive prior to making the decision unilaterally. It follows from the same decision that the employer should have notified the competent public authority beforehand, in accordance with Article 3 of the Directive.

In *Pujante Rivera*, the CJEU specifically pondered whether an instance, where a worker sought the termination of her employment contract – as a response to changes made unilaterally to her employment contract by her employer – fell under the definition of "redundancy" in this context. It was clear that the remuneration of the worker in question had been reduced unilaterally by the employer for economic and production reasons and, as the person concerned did not accept the reduction, she terminated the employment contract. The CJEU concluded that this should fall under the definition of "redundancy." The same can be read from the decision in *Commission v Portugal*, C-55/02, paragraph 56.

Paragraph 10 of the request for an advisory opinion in this case mentions that no workers affected by the employer´s measures did in fact resign from their work. The appellants´ lawyer has no further information on any resignations due to the introduction of the measures.

The number of workers who did in fact resign following the receipt of termination letters, however, is irrelevant. The employer´s obligation to notify the Directorate of Labour and workers´ representatives of upcoming collective dismissals arises before a decision is made. The obligation to notify serves the purpose of minimising the damage to workers by cooperation and communication. This point is rendered useless if the employer´s obligation is dependent on how the recipients of the termination letters respond to the letters. Here, the appellants refer to the judgment of the CJEU from 21 September 2017, *Socha and Others,* paragraphs 25-35.

The CJEU has held that the obligations of consultation and notification, provided for in Article 2 of Directive 98/59, arise prior to any decision by the employer to terminate contracts of employment (*Junk*, C-188/03, paragraph 37, and *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, paragraph 38). If the obligation to consult and notify is left subsequent to the employer´s decision, this jeopardieses the objective of the directive, which is to avoid terminations of contracts of employment or reducing the number of such terminations (*Junk*, paragraph 38, and *Akavan Erityisalojen Keskusliitto AEK and Others*, paragraph 46).

An employer who is faced with the possibility, that the recipient of a termination letter resigns her position following the receipt of the letter, should follow the procedural rules before such a termination

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letter is sent. Once the termination letters were sent, the matter was out of the employer´s hands. Once a decision is made, the time limit set for the obligation by the CJEU in *Junk,* paragraph 37 and *Akavan Erityisalojen Keskusliitto AEK and Others*, paragraph 38, has passed.

Each recipient of a termination letter was within her rights to respond to the action by resigning, and the employer would have been powerless to stop a mass exodus from the workplace. The fact, that no workers did in fact leave their posts following the receipt of the termination letters, was no thanks to the employer.

Since the power to terminate the contract in full rests with the recipient of the termination letter, any other interpretation would make the legal obligations of the employer dependent on the worker´s response, which cannot be known until after the employer has acted. If the legality of the employer´s actions is measured solely by the subsequent response of the workers, the aim of the Directive is jeopardised.

In accordance with the beforementioned, the appellants submit that the second question referred to the EFTA Court should be answered thus, that the employer has an obligation to observe the procedural rules laid down in the Directive, regardless of whether the termination of contracts covering fixed overtime subsequently leads to the full termination of the workers' employment relationships with the employer.

The Employer Cannot Avoid the Obligation to Observe the Procedural Rules by Splitting Up the Employment Contract
The nature of the workplace in question – which is a large hospital – is such, that each worker is expected to work overtime and most workers count on overtime as an essential element in their employment contracts. The employer in question has for many years prepared specific contracts to workers, stipulating the arrangement of fixed overtime. Examples of such contracts were presented in the court case in Iceland. The fixed overtime contracts link directly to the employment contracts of each worker. For instance, the fixed overtime contracts state that they will automatically terminate if the employment contracts of the corresponding employees are terminated or changed significantly.

From the beforementioned, it is clear that the fixed overtime contracts regulate an essential part of the workers´ employment relationships. As such, they form an important part of each worker´s contract with the employer. Any termination of a fixed overtime contract or a major change in such a contract signifies a change in the employment contract of the worker affected as a whole.

The employer should not be able to bypass her obligations according to the Directive, simply by splitting up each employment contract into smaller part-contracts, and argue that each individual part-contract can independently be terminated without further consequence for the employment relationship as a whole.

At the very least, the Court should in such instances evaluate whether each independent part-contract stipulates such an important part of the employment relationship, or whether the unilateral termination of such a part-contract on behalf of the employer can lead to the worker resigning (as per *Socha and*

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Others, paragraphs 26-35). If the answer to either question is in the affirmative, the termination of the part-contract cannot go through unless the employer follows the procedural rules of Council Directive 98/59/EC.

Any other answer would lead to a scenario, whereby an employer can single-handedly decide to split up the employment contract into smaller contracts and bypass the obligations set out in the Directive. This would greatly endanger the realisation of the goals of the Directive.

Accordingly, the appellants submit that the third question should be answered in the negative.

Conclusion

In accordance with the reasons listed above, the appellants submit that the questions referred to the EFTA Court should be answered as follows:

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.

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.

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.

On behalf of the appellants,
Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga
and Lyfjafræðingafélag Íslands

Halldór Kr. Þorsteinsson lrl.

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