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Reykjavík, 30 August 2022

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 90(1) of the Rules of Procedure of

the EFTA Court by

THE GOVERNMENT OF ICELAND

(the Defendant)

Represented by Fanney Rós Þorsteinsdóttir

State Attorney General, Office of the Attorney General (Civil Affairs)

acting as Agent in

CASE E-9/22

Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga

and Lyfjafræðingafélag Íslands

v

the Icelandic State

in which the Court of Appeal (*Landsréttur*) requests the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. The Icelandic Government, on its own behalf, has the honour to submit the following written observations.

I. INTRODUCTION

(1) By an application of 9 June 2022 the Court of Appeal requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") on the following questions:

> *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?*
>
> *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?*
>
> *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?*

II. LEGAL BACKGROUND

1. EEA Law

(2) Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies is referred to in Annex XVIII to the EEA Agreement. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 41/1999 of 26 March 1999.

(3) Article 1 of Section I of the Directive reads:

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:

i) either, over a period of 30 days:

— at least 10 in establishments normally employing more than 20 and less than 100 workers,

— at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,

— at least 30 in establishments normally employing 300 workers or more,

ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

b) 'workers' representatives' means the 'representatives provided for by the laws or practices of the Member States.

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) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;

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); [...].

(4) Article 2 of Section II of the Directive reads:

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.

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).

4. The obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.

(5) Article 3 of Section III of the Directive reads:

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

However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests.

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.

The workers' representatives may send any comments they may have to the competent public authority.

2. National Law

(6) Articles 1-4 of Act No 63/2000 on Collective Redundancies ("the Collective Redundancies Act") read:

Article 1

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.

Article 2

This Act does not apply to collective redundancies effected in accordance with employment contracts made for specific periods or to cover specific projects unless such redundancies occur before these contracts expire or before the projects are completed.

Article 3

The provisions of Article 7 and of the first paragraph of Article 8 shall not apply when the operations of an enterprise are stopped by the ruling of a court of law. Nevertheless, the employer shall send the Directorate of Labour a

notification in accordance with Article 7 if the Directorate of Labour so requests.

Article 4

The provisions of this Act shall apply irrespective of whether the decision on collective redundancies is taken by the employer or by an enterprise that is in a position of control with regard to the employer.

In the event of an allegation of a violation of requirements regarding information, consultation and notification under this Act, the employer may not maintain that he did not receive sufficient information from the enterprise where the decision on the collective redundancies was taken.

(7) Article 19 of the Government Employees Act No 70/1996 ("the Government Employees Act") reads:

> An employee is obligated to accept changes in his job or area of responsibility from the time he began work. An employee may choose to resign his job due to such changes; he must however inform the minister or his superior of it within one month from the time he was informed of the changes. If the changes lead to reduced pay or rights of the employee he shall retain an unchanged level of emoluments and rights during the period remaining of his appointment or to a period equal to the remainder of his contractual notice period, cf. Article 46.

III. FACTS

(8) The appellants are the unions of chartered engineers (*Verkfræðingafélag Íslands)*, computer scientists (*Stéttarfélag tölvunarfræðinga)* and pharmacists (*Lyfjafræðingafélag Íslands)* in Iceland. Members of all these unions are among the employees of the technical support units of Landspítali (the National and University Hospital, hereinafter referred to as "LSH").

(9) LSH is a state-run hospital, cf. Act No 40/2007 on Health Service. Its workers are therefore government employees and fall within the scope of Act No 94/1986 on Collective Agreements for Public Sector Employees. Collective agreements between the state and the unions are negotiated according to that Act.

(10) According to Rules No 351/1996 on the Form of Employment Contracts and the Obligation to Inform Employees about the Terms of Employment, based on Article 8(1) of the Government Employees Act, it is compulsory to enter into an employment contract with each employee where the general terms of employment are outlined. According to Article 1.5.4 in the Collective Agreements between the Unions and the State, it is permissible (but not compulsory) to negotiate separately a fixed fee for overtime. It varies whether it is implemented in the employment contract or a separate contract. LSH used separate contracts for a fixed fee for regular overtime.

(11) Separate contracts covering regular overtime were terminated with three months' notice by a letter from LSH dated 14 February 2020 and employees were offered new, temporary contracts covering regular overtime. On 20 February 2020 employees in the technical support units at LSH were informed of measures that were being planned by LSH which would mean that contracts covering regular overtime would be reviewed and would, from then on, be temporary to ensure the possibility of regular revision. Depending on the individual employee, the number of overtime hours would be reduced, increased, or remain unchanged. This change could result in a reduction of the wages of employees in the technical support departments of as much as 3.5%; nevertheless, this change would be executed in such a manner that employees who received under ISK 700,000 in monthly wages would not incur wage reductions, while the reduction applied to other employees would take into account the wages they received. Instead, employees would be offered alternative contracts in which regular overtime arrangements would be valid for one year. The measures were part of the hospital's spending cuts.

(12) These measures applied to 319 workers, irrespective of the unions to which they belonged. The number of overtime hours was reduced in the case of 113 workers. Of the 319 workers, the measures affected 26 members of the appellant, the Association of Chartered Engineers in Iceland. Overtime hours were reduced for 14 of these 26 workers. The measures affected four members of the appellant, the Union of Computer Scientists. Overtime hours were reduced for three of these four workers. The measures affected two members of the appellant, the Pharmaceutical Society of Iceland. Both had their overtime hours reduced.

(13) On 25 February 2020, the appellants sent an enquiry to LSH requesting information concerning these measures and whether the defendant regarded them as falling under the provisions of the Collective Redundancies Act.

(14) In its reply of 26 February 2020 LSH stated that, in its view, there had been no termination of the employees' employment contracts. Consequently, the Collective Redundancies Act did not apply. The measures proposed were 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 minimum 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 stipulated in the relevant collective agreements, without it constituting a termination of the employment contract. It was also pointed out that under Article 19 of the Government Employees Act state institutions were authorised to make changes to jobs without this being considered a termination of the employment contract.

(15) On 11 March 2020 the appellants sent the Director of LSH and the Ministry of Health a letter outlining their view that the measures involved collective redundancies in the sense of the Act on Collective Redundancies. Consequently, in the appellants' view, the defendant 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 (*Vinnumálastofnun).*

(16) LSH replied on 31 March 2020, reiterating its view. 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.

(17) On 19 May 2020 the appellants brought the present action before the District Court of Reykjavík (*Héraðsdómur Reykjavíkur).* In its judgment, dated 14 December 2020 in case no E-3257/2020, the District Court took the view that the Collective Redundancies Act only applied when the employment relationship between employer and employee had been fully terminated; consequently, the Icelandic State was completely acquitted.

(18) An appeal against the judgment was submitted to the Court of Appeal on 28 December 2020. On 25 March 2022 the appellants' counsel requested that questions, set out in detail below, be submitted to the EFTA Court with a request for an advisory opinion. The Court granted this request on the same date.

IV. LEGAL ARGUMENTS

1. Directive 98/59/EC does not apply

(19) The Icelandic Government submits that Council Directive 98/59/EC is not applicable in the current case, as the Directive does not apply to "workers employed by public administrative bodies or by establishments governed by public law", cf. Article 1 (2)(b) of the Directive. Laws on collective redundancies of "workers employed by public administrative bodies or by establishments governed by public laws" have thus not been harmonised within the European Economic Area.

(20) Directive 98/59/EC was implemented into Icelandic law with the Collective Redundancies Act, cf. Article 7 of the EEA Agreement. According to Article 1 of the Act it "applies to collective dismissals of workers by an employer". There is neither any referral to public administrative bodies or public establishments as "employer" in the Act itself nor in any explanatory notes with the Bill. If the intention was to extend the scope of the Act beyond the requirements of the Directive in order for it to be applicable to public administrative bodies or public establishments, it would have been expressly stated in the Act and/or explained in the explanatory notes. However, it seems to be assumed that "employer" in the meaning of the Act is an employer on the private market. This interpretation of the scope of the Collective Redundancies Act gets support in explanatory notes with Article 1 of Act No 95/1992 on Collective Redundancies[1] that implemented Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, which was the

[1] They can be found on the Alþingi website, see 116. löggjafarþing – 20. mál 1992.

predecessor of Directive 98/59/EC. Explanatory notes with Article 1 of the Collective Redundancies Act point to the same conclusion.[2]

(21) Furthermore, according to Article 3 of Act No 2/1993 on the EEA Agreement and Article 3 of the Agreement itself, the Collective Redundancies Act should be interpreted in conformity with Directive 98/59/EC. Thus, only applying to workers on the private market but not "workers employed by public administrative bodies or by establishments governed by public law", cf. Article 1 (2)(b) of the Directive.

(22) There is no doubt that the employees in this case were employed by an "establishment governed by public law". This means that the Icelandic State is under no obligation under the EEA Agreement to afford these workers the protection afforded by Directive 98/59/EC.

(23) In the Government's view it would not make any difference for the outcome of this case before the EFTA Court, if Iceland had decided to give workers employed by public administrative bodies or by establishments governed by public law protection under the Collective Redundancies Act. Such a decision would have been based on Icelandic "home made laws" and not on an obligation based on the EEA Agreement. The legal status of the employees as presented in this case is therefore solely based on Icelandic laws, including Article 19 of the Government Employees Act.

2. No 'collective redundancies' took place

(24) However, if the EFTA Court does not accept this, it is clear from the facts of the case that no 'collective redundancies' took place. Protection under Directive 98/59/EC was therefore not invoked. The concept of 'redundancy', as mentioned in Article 1(1)(a) of Directive 98/59/EC, may not be defined by any reference to the laws of the Member States, but has instead meaning in Community law.[3] In the Judgement in Case C-55/02 *Commission v Portugal*, the European Court of Justice (the ECJ) stated:

> "The concept has to be interpreted as including any **termination of contract of employment** not sought by the worker, and therefore without his consent. It is not necessary that the underlying reasons should reflect the will of the employer."[4]

(25) Synonyms of the term "termination" includes for examples; expiry, ending, finale, close.[5]

(26) What was proposed by LSH was in no way an ending of employment, but only 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 minimum terms stipulated in their collective agreements. Furthermore, there is no indication that any

[2] They can be found on the Alþingi website, see 125. löggjafarþing 1999-2000, þskj. 748 – 469. mál.
[3] See *Commission v Portugal,* C-55/02, EU:C:2004:605, paragraph 49 and *Pujante Rivera*, C-422/14, EU:C:2015:743, paragraph 48.
[4] See *Commission v Portugal*, paragraph 50.
[5] See https://www.thesaurus.com/.

of the 319 workers affected by LSH's measures stopped working as a result of these measures. There was therefore no "termination of contract of employment". Consequently, the changes to the contracts of the appellants' members do not constitute 'collective redundancies' in the sense of Directive 98/59/EC.

(27) Judgments from the ECJ support this. In Case C-383/92 *Commission v United Kingdom,* the Court found that the concept of 'redundancy', which determined the scope of the Employment Protection Act 1975 (hereinafter referred to as "EPA", the British law implementing Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies) did not cover all the cases of 'collective redundancy' covered by the Directive. In particular, the Commission pointed out, that EPA did not cover cases where workers had been dismissed as a result of a new working arrangement within the undertaking unconnected with its volume of business.[6] Dismissing workers "as a result of new working arrangement" meant "termination of contract of employment" of the workers involved. The same applied in Case C-55/02 where the Court found that "termination of a contract of employment" could not escape the application of the Directive solely because it depended on external circumstances not contingent on the employer's will.[7] The magic word being "termination of a contract of employment". Finally, in Case C-422/14 *Pujante Rivera,* the worker herself requested that her contract be terminated after receiving notification of a change to her working conditions. Furthermore, in that case, change in the working conditions meant 25% reduction of her salary. Such a high reduction might mean "significant changes to essential elements of his employment"[8], whereas in the Government's opinion reduction of as much as 3.5% does not.

3. Principle of effectiveness has no bearing in this case

(28) Finally, the Government submits that reference in the referred question to the *principle of effectiveness*, has no bearing in this case. The *principle of effectiveness* entails that national procedural rules, governing actions for safeguarding rights, which individuals and economic operators derive from EEA law, must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law.[9] The appellants in this case have no rights conferred by EEA law as they do not fall under the scope of Directive 98/59/EC, cf. Article 1(2)(b). Furthermore no 'collective redundancies', cf. Article 1(1)(a) of Directive 98/59/EC, took place. Protection under the Directive was therefore not invoked.

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[6] See *Commission v United Kingdom,* C-383/92, EU:C:1994:234, paragraph 32.

[7] *Commission v Portugal*, paragraph 60.

[8] *Pujante Rivera,* paragraph 55.

[9] *Nye Kystlink AS v. Color Group AS and Color Line AS*, E-10/17, [2018] EFTA Ct. Rep. 292, paragraph 110 and *Fjarskipti hf. v. Síminn hf.,* E-6/17, [2018] EFTA Ct. Rep. 78, paragraph 31 and *Casino Admiral AG v Wolfgang Egger*, E-24/13, [2014] EFTA Ct. Rep. 732, paragraph 69.

V. ANWERS TO THE REFERRED QUESTIONS

(29) In view of the above the Icelandic Government respectfully submits that the EFTA Court answer the question from the national court as follows:

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.

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.

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.

On behalf of the Icelandic State

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