Lögmenn
Laugavegi 3

EFTA court
1 rue Fort Thüngen
L-1499 Luxembourg

MEMORANDUM FROM

Anna Bryndís Einarsdóttir

In case nr. 5/2021

The defendant is:

The Icelandic Treasury

Plaintiff's Agent:

Hulda Rós Rúriksdóttir supreme court attorney from the lawfirm Lögmenn Laugavegur 3 in Reykjavík is representative for the plaintiff.

Court claims:

- That the decision by the Maternity/Paterniry Leave Fund of March 3, 2020 regarding scheduled payments from the fund to the plaintiff during her maternity leave will be annulled.

- That Ruling no 261/2020 of the Welfare Appeals Committee, which was delivered on September 2, 2020 will be annulled.

The plaintiff also claims that the defendant pays her legal cost.

Litigation:

The plaintiff, a medical doctor, had been pursuing postgraduate studies in medicine in Denmark and had been there in full-time employment since September 1, 2015. She and her family decided to move to Iceland in the year of 2019 when she was pregnant. She moved back to Iceland on September 17. She began working at Landspitali, the National Hospital, within 10 working days, on September 30, 2019.

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The plaintiff notified Landspítali on Janury 15, 2020 that she was expecting her child in March. She submitted her application for payments from the Maternity/Paternity Leave on January 22, 2020. The plaintiff's child was born March 26, 2020.

The plaintiff´s application to the Fund for Maternity/Paternity Leave was accompanied by payslips from Landspítali for November and December 2019, confirmation from Denmark of her domicile there since 2015 and of her wage payments in Denmark. The plaintiff was informed on March 3, 2020 that the Fund´s decision was that her monthly payments during her maternity leave would be ISK 184.119. This decision meant that the Fund did not agre to take into account the plaintiff's income in Denmark. Consequently the decision meant that the plaintiff was only to receive the basic minimum payments during her maternity leave. The plaintiff appealed the Fund's decision to the Welfare Appeals Committee, which upheld the Fund´s decision in its ruling of September 2, 2020.

Plaintiff´s arguments:

The plaintiff claims that the decisions taken in her case regarding her payments during her maternity leave are in direct contradiction to the clear purpose of the EEA Agreement on the free movement of persons. She further claims that they are in direct violation of the provisions of the EEA Agreement, which Iceland has undertaken to comply to. As both the purpose of the EEA Agreement and its provisions were not observed in the handling of the plaintiff's application for maternity leave payments she claims that the decision taken by the Maternity leave Fund and the ruling of the Welfare Appeals Committee should both be annulled:

1) The principle of Article 3 of Act no 2/1993:

Iceland has legislated the EEA Agreement with Act no 2/1993. In Article 3 of this Act it is confirmed that statutes and reglulation shall be interpreted in comformity with the EEA Agreement and the rules based thereon, to the extent appropriate. This entails that Icelandic law provisions are to be interpreted in a way that corresponds as closely as possible to the common rules applicable in the EEA.

In Protocol 35 to the EEA Agreement which addresses the implementation of EEA rules it states that the Agreement aims at achieving a homogeneous European Economic Area, based on common rules without requiring any Contracting Party to transfer legislative powers to any institution of the EEA, and that this aim will have to be achieved through national procedures.

As pointed out in the request for an advisory opinion from the District Court in Reykjavik it is important that Article 29 in Appendix I to Act No 2/1993 states that in order to promote freedom of movement for workers and self-employed persons, the Contracting Parties shall secure

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aggregation, for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries.

Free movement of persons and the free movement of workers within the EEA is one of the fundamental purposes of the EEA cooperation according to Article 28 in the EEA Agreement. Coordination of the social security systems in the EEA states is an integral part of that principle. This coordination enables workers and other persons to move between EEA States without loss of entitlement to social security. Payments during maternity leave is a part of that system.

This rule on aggregation of periods, which appears in Article 29 of the EEA Agreemet is elaborated further in Article 6 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. The provisions of this regulation cannot be interpreted in any other way than as meaning that equality is secured between the inhabitants of the states covered by the regulation; thus, they are all in the same position, irrespective of where they are domiciled. The regulation protects insured individuals who live or reside in another EEA State as regards sickness benefits, benefits covering pregnancy and birth, and equivalent paternity benefits.

In Articles 4 and 5 of the aforementioned Regulation No 883/2004 it is stated that persons to whom the regulation applies are to enjoy the same benefits and be subject to the same obligations as the nationals of any EEA State unless otherwise provided for by the regulation. According to these articles the rule is that social security benefits and other income under the legislation of the competent EEA State the receipt of social security benefits and other income has certain legal effects; the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another EEA State or to income acquired in another EEA State. These provisions cannot be interpreted in any other way than as meaning that each individual must be in the same position no matter where he or she is located in the area covered by the regulation. The dicision of Maternity/Paternity Leave Fund from March 3, 2020 and ruling of September 2, 2020 did not comply with these rules, which Iceland has undertaken to respect and apply.

2) Article 13 and 34 of Act 95/2000:

When the plaintiff´s application to the Maternity/Paternity Leave Fund was examined, attention should have been paid to all the aformentioned provision. The instructions found in the second paragraph of Article 13 of Act 95/2000 stating that account shall only be taken of average aggregate wages for the months of the reference period during which the parents are participating in the Icelandic domestic labour market, are in direct contradiction and violation with the aforementiond EEA provisions.

In the decision of the Welfare Appeals Committee it states that since the plaintiff's child was born on March 26, 2020, the monthly payment is to be 80% of the plaintiff´s average wages during

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the entitlement acquition period which ends six months before the birthgiving month. Accordingly, for the plaintiff this period ended on September 1, 2019. The plaintiff´s wages in the domestic labor marken (Iceland) was none during that period. Furthermore, it is undisputed that all the plaintiff's wages during that period were obtained in Denmark. Consequently, the decision is that she is only to receive the minimun maternity payments from the fund during her maternity leave.

The 12th paragraph of Article 13 states that when a parent has worked on the domestic labour market for at least the last month of the entitlement acquisition period as defined in the first paragraph (continuous for 6 months in a domestic labor marked before the date of birth), account should be taken of periods of employment worked by the applicant for payments from the fund, including those spent in another State party to the EEA, the Nordic Agreement on Social Insurance and the Agreement between the Government of Iceland, on the one hand, and the Government of Denmark and the Domestic Administration of the Faroe Island, on the other, during the entitlement acquisition period, provided that the parent´s work conferred on him on her entitlements according to the legislation of the state involved regarding Maternity/Paternity leave. In this paragraph it is stated as a condition for this that the parent shall have begun work on the domestic labour market within ten working days of having ceased work on the labour market in another EEA State or in another one of the Nordic countries.

Article 34 states that international agreements in the field of social security and social affairs to which Iceland is a party, should be taken into account. The EEA Agreement is of such nature. The wording of the Act on the Domestic Labor Market, cf. the second paragraph of Article 13 is considered by the plaintiff to be a restriction that is contrary to the aforementioned principles that apply in European law on free movement of persons.

The plaintiff refers to Cases C-185/04 and C-257/10 in which the European Court of Justice came to the conlusion that government authorities were obliged to take account of wages earned during periods spent working in other EU Member States when calculating payments related to a person´s wages during a specific period.

In the Case C-185/04 it is described that Mr. Öberg (from Sweden) worked at the Court of Justice of the European Communities from 1995 to 2000. His child was born in September of 1999. The Stockholm Social Insurance Office refused, in decisions taken August 28 and November 16, 2001 to pay Mr. Öberg parental benefit in relation to daily sickness allowance for the first 180 days of his parental leave, on the ground that during the period prior to the birth of his child he was employed by the Court of Justice and was thus not insured by the National Sickness Insurance Scheme for sickness benefits above the guaranteed amount for at least 240 consecutive days immediately before the date of birth or due date of birth.

The case and the question for the court was about whether it should take into account the man´s payments outside of Sweden. In the premise of the conclusion in the case says: *„It follows that*

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there is no justification for the barrier to the freedom of movement of workers which results from the refusal to take into account, for the calculation of the amount of parental benefit, periods worked by migrant workers undir the Joint Sickness Insurance Scheme of the European Communities." Then it says: *„In those circumstances, the answer to the questions referred for preliminary ruling must be that Article 39 EC is to be interpreted as meaning that, where national legislation such as that at issue in the main proceedings applies, the period during which a worker was affiliated to the Joint Sickness Insurance Scheme of the European Communitites must be taken into account."*

In the aforementioned case C-257/10 the same issue is for review by the Court. The Court's conclusion was the same as in Case C-185/04.

The principle of free movement for workers is very important for all people living and working in countries that are part of the EEA. That principle does not work if countries can decide that only domestic payments shall be taken into account when decisions are made as regards payments in maternity/paternity leave.

The defendant notes that the third paragraph of Article 4 of the Act no 95/2000 provides that the Maternity/Paternity Leave Fund is financed by a social security tax and argues that the wages that the plaintiff earned through her work in Denmark are not regarded as wages and other remunerations under the Social Security Tax Act no 113/1990. Furthermore that of the plaintiff's wages in Denmark no social security tax was paid to finance the Materniry/Paternity Leave Fund.

Because of that assertion from the defendant, the plaintiff refers again to the aforementioned cases (C-185/04 and C-257/10). In both of those cases the Sweedish Government put forward similar rationale. In the premise of the conclusion in the case C-185/04 says: *„In that regard, consideration of a purely economic nature do not justify infringements of individual rights deriving from provisions of the Treaty enshrining the freedom of movement of workers."*

The plaintiff notes that the same arguments are in her case. The fact that the Maternity/Paternity Leave Fund is to be financed by a social security tax does not justify infringements of her individual rights deriving from provisions of the Treaty enshrining the freedom of movements of workers.

Reykjavik March 2 2022,

On behalf of Anna Bryndís Einarsdóttir

Hulda R. Rúriksd hrl

Hulda Rós Rúriksdóttir supreme court attorney

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