Registered at the EFTA Court under N° E-3/24-7 on 3rd day of May 2024

Lögmenn
Laugavegi 3

EFTA Court
1 Rue Fort Thüngen
L-1499 Luxembourg
Luxembourg

Reykjavík, 3rd of May 2024

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 plaintiff, represented by Mr. Elías Karl Guðmundsson of Lögmenn Laugavegi 3, Reykjavík, Iceland, in

Case E-3/24: Margrét Rósa Kristjánsdóttir v the Icelandic State

in which Reykjavík's District Court (Héraðsdómur Reykjavíkur) 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 February 20th, 2024.

The Facts of the Case
As far as the facts of the case are concerned, Margrét Rósa Kristjánsdóttir (hereafter, the plaintiff) refers to the referring Court's request for an advisory opinion, pages 2-3.

In addition to this, the plaintiff emphasises that it is undisputed that prior to the termination of the employment contracts of 14 workers, including the plaintiff, the procedures laid out in Icelandic Legislative Act no. 63/2000 on collective redundancies and Council Directive no. 59/98/EC were not followed. Neither is it disputed that following the termination of her original employment contract, the plaintiff was offered a new position with her employer, for which she received a lower base salary than prior to the termination. The plaintiff's claim before the national court amounts to the pay deficit between the two positions.

The plaintiff also notes that Directive no. 59/98/EC was implemented into Icelandic law without providing for the exception in Article 1(2)(b) of the Directive for employees of an establishment governed by public law. Act no. 63/2000 thus applies equally to public and private-sector workers.

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 plaintiff refers to the referring Court's request for an advisory opinion.

Additionally, the plaintiff would like to point out that Articles 25 and 26 of Icelandic Act no. 70/1996 on the Rights and Obligations of Public Employees are relevant to the first question, as phrased by the referring Court, as is Article 6 of Act no. 112/2008 on General Health Insurance.

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The Questions Referred

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

1) Can board members of a legal entity that operates in the public interest fall within the concept of „worker" within the meaning of Council Directive 98/59/EC, for deciding the number of workers deemed to be employed by such a legal entity, for the purpose of calculating the minimum for collective redundancy (10% or 30 workers), as stated in point (i)(a) of paragraph 1 of Article 1 of the Directive?

2) Does Article 6 of Directive 98/59/EC, regarding that EEA States shall ensure the representatives of workers and/or workers themselves can have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in the Directive are fulfilled, entail other or further requirements than those that EEA States prescribe in general for liability for damages resulting from infringements of the rules inherent in the Directive?

Observations

On behalf of the plaintiff, the following written observations are submitted:

Board Members of the Employer Should Not be Regarded as Workers Within the Meaning of the Directive

Contrary to what the defendant has argued in this case, board members of the employer cannot be considered as falling under the concept of workers in the meaning of Council Directive 98/59/EC, as they are not employed at the state agency in the traditional sense of the term. Thus, they should not be included in the total number of workers normally employed by the employer at the time of the relevant redundancies.

The CJEU has on multiple occasions held that a member of an employer's board of directors can only be considered as falling within the concept of worker, in accordance with point (i) (a) of paragraph 1 of Article 1 of Council Directive 98/59/EC, if three conditions are fulfilled, namely:

- i) The person performs services for the employer.
- ii) The person receives remuneration for those services.
- iii) The person performs the services under the direction of another person within the company.

Here, the plaintiff refers *inter alia* to the judgment of the CJEU from November 11th 2010, C-232/09, *Danosa,* paragraphs 39 and 47, as well as the judgment of the CJEU from July 9th 2015, C-229/14, *Balkaya,* paragraphs 34-38.

Furthermore, it is necessary to consider the circumstances in which the board member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the

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scope of the person's powers and the extent to which he or she was supervised within the legal entity; and the circumstances under which the person could be removed (*Balkaya,* paragraph 38).

Even if the Directive does not give an express definition of the concept ´worker´, 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 45. By harmonizing 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 harmonize the costs which such protective rules entail for Community undertakings. Accordingly, the concept of ´worker´ has meaning in Community law. (*Commision v. Portugal,* paragraph 49).

Regarding the board members relevant to the case at hand, their positions, appointments, and obligations are prescribed in Article 6 of Act no. 112/2008 on General Health Insurance. According to the article, the board members are formally appointed by the Icelandic Minister of Health for a period of five years at a time. The duties of the board members include confirming the institution's organizational structure, yearly budget, and operating agenda, as well as supervising the institution's operations, making sure that the operation does not exceed its budget. For this service, the board members receive remuneration, decided by the Minister of Health, which is then paid from the institution's operating budget. The board members are independent in their work, i.e. they do not carry out their services under the direction or control of any person within the institution, and they cannot be removed from their position at any given time, without restrictions (*Balkaya,* paragraph 39).

According to Article 25 of Act no. 70/1996 on the Rights and Obligations of Government Employees, government officials such as board directors of the Icelandic Health Insurance, are considered as being in office until one of ten conditions are met. These conditions are:

- 1) the official violates their duty in office, in a manner that warrants removal from office,
- 2) the official no longer meets the criteria for performing duties according to Article 6 of the same Act,
- 3) the official is released from their duties at their own request,
- 4) the official is released from their duties due to health reasons,
- 5) the official has reached 70 years of age,
- 6) the official's appointment time has expired,
- 7) the official's installation time has expired,
- 8) the official is transferred to another position within the government,
- 9) the official's position is folded, or
- 10) the official and the government make a bilateral severance agreement.

According to Article 26, paragraph 1 of Act no. 70/1996, only the government entity which has appointed a government official, is capable of removing the official from their office. In the case of the appointed board members of Icelandic Health Insurance, they are appointed by the Icelandic Minister of Health, as per article 6 of Act no. 112/2008. The Minister is therefore the only official capable of removing the board members from their position.

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In accordance with the aforementioned, the plaintiff points out that the board members relevant to the case at hand do not fulfil the conditions of point no. iii) mentioned previously. They can therefore not be considered as falling within the concept ′worker′ within the meaning of Council Directive no. 59/98/EC. According to Article 6 of Act. no. 112/2008 on General Health Insurance, their work for at the state entity is not performed under the direction or supervision of any person within the institution, nor can they be appointed to, nor removed from, their position by anyone within the institution, according to the aforementioned Article 6 of Act no. 112/2008 and Article 26, paragraph 1 of Act no. 70/1996. Furthermore, the board members cannot be removed from their respective positions for whatever reason, at any given time, as stated in Article 25 of Act no. 70/1996. Their removal can only occur if, and when, they meet one of the conditions laid out in the same Article 25.

In light of the aforementioned, the plaintiff submits that the first question should be answered in the affirmative, provided that the board members meet the preconditions set out in C-232/09, *Danosa,* paragraphs 39 and 47, and C-229/14, *Balkaya,* paragraphs 34-38. In the case at hand, the question should be answered in the negative, as the specific board members relevant to the case at hand do not pass the test.

Prescribing Administrative and/or Judicial Procedures in Order to Ensure that Obligations Laid Down in the Directive is a Matter of National Law of the EEA Member States

According to Article 6 of the Directive, Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to the workers' representatives and/or the workers themselves.

The Article does not entail any further requirements as to which procedures must be prescribed. It must therefore be considered that this is a matter determined by the National Law of each Member State. However, it must be noted that these procedures must provide a sufficient implementation of Article 6 of the Directive, i.e. they must be considered practicable and useful remedies or resorts available to workers and/or their representatives when the rules of the Directive are breached.

The plaintiff notes that the EFTA Surveillance Authority, ESA, has found in its decision no. 282/21/COL that the procedures implemented by the Republic of Iceland in Articles 11 and 12 of the Icelandic Act no. 63/2000 on collective redundancies constitute sufficient implementation of Article 6 of the Directive, and therefore provide workers and their representatives with practicable remedies, which should ensure enforcement of obligations under the Directive. The plaintiff tends to agree with ESA's assessment. According to the afore-mentioned Article 11, an employer who deliberately or negligently violates the procedures laid out in the Act (and thus, the Directive), is liable for damages pursuant to general rules. Furthermore, according to Article 12 of the Act, violations of Articles 5-7, which prescribe the employer's procedural obligations prior to enacting collective redundancies, can result in the employer being fined. *Prima facie,* these articles appear to provide useful and practicable remedies for workers and/or their representatives, which should in theory ensure the enforcement of the obligations under the Directive

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and Act no. 63/2000. However, it must also be noted that these remedies have thusfar never been tested, and it therefore remains to be seen whether that truly is the case.

Accordingly, the plaintiff submits that the second question should be answered in the negative.

Conclusion

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

1) Board members of a legal entity that operates in the public interest can only fall within the concept of „worker" within the meaning of Council Directive 98/59/EC, for deciding the number of workers deemed to be employed by such a legal entity, for the purpose of calculating the minimum for collective redundancy (10% or 30 workers), as stated in point (i)(a) of paragraph 1 of Article 1 of the Directive, if the relevant board members provide services, in return for remuneration, for and under the direction of another person within that legal entity. As the board members of Icelandic Health Insurance did not perform their services under the direction or supervision of any person within the institution, they cannot be considered as falling within the concept ´worker´.

2) It is a matter of the national law of each EEA Member State to prescribe administrative and/or judicial procedures to ensure that the obligations laid down in the Directive are fulfilled. Article 6 of the Directive does not entail any further requirements than those that EEA Member States prescribe such procedures, other than that the procedures should be practicable and useful.

On behalf of the plaintiff,
Margrét Rósa Kristjánsdóttir

Elías Karl Guðmundsson hdl.

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