MINISTRY FOR FOREIGN AFFAIRS OF FINLAND

ORIGINAL

HEL7877-41

30.12.2010

Registered at the EFTA Court under N° E-12/10-18
4 day of January 2011

EFTA Court
Registry
1, rue du Fort Thüngen
L-1499 Luxembourg

WRITTEN OBSERVATIONS OF THE FINNISH GOVERNMENT IN CASE E-12/10 EFTA SURVEILLANCE AUTHORITY V REPUBLIC OF ICELAND

The Ministry for Foreign Affairs hereby sends to the EFTA Court the enclosed written observations of the Finnish Government in case

E-12/10

EFTA Surveillance Authority

against

Republic of Iceland

On behalf of the Finnish Government,

Legal Counsellor Henriikka Leppo

Annexes: Written observations of 30th of December, 2010
Letter of credentials
7 certified copies of the written observations and of the letter of credentials

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To the EFTA Court

WRITTEN OBSERVATIONS OF THE FINNISH GOVERNMENT IN CASE E-12/10 EFTA SURVEILLANCE AUTHORITY V REPUBLIC OF ICELAND

WRITTEN OBSERVATIONS

submitted by the **FINNISH GOVERNMENT** in accordance with Article 20 of the Statute of the EFTA Court

in case **E-12/10**

EFTA Surveillance Authority

against

Republic of Iceland

In accordance with Article 33 paragraph 2 of the Rules of Procedure of the EFTA Court Finland agrees that service is to be effected on it by fax to number +358 9 1605 6540.

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INTRODUCTION

1. The EFTA Surveillance Authority (hereinafter "ESA") has filed an Application against the Republic of Iceland in order to seek a declaration that the Republic has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of Directive 96/71/EC[1] (hereinafter "the Directive"). The Application has been registered at the EFTA Court under number E-12/10.

2. The invitation to submit written observations was sent to the Finnish Government on 9 November 2010 and the deadline for submitting the observations is 10 January 2011.

RELEVANT LEGISLATIVE PROVISIONS

3. Article 3 (1) of the Directive reads as follows:

> "*Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:*
>
> *- by law, regulation or administrative provision, and/or*
>
> *- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:*
>
> *(a) maximum work periods and minimum rest periods;*
> *(b) minimum paid annual holidays;*
> *(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*

[1] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted."

4. Article 3 (7) of the Directive provides that

"*Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.*

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging."

5. As regards Icelandic law, reference is made to the Statement of Defence paragraphs 16 - 24. For the purpose of these observations it should be noted that according to Article 5 of the Icelandic Posting Act a worker shall be entitled to receive wages for a certain period of time in the event of illness and accidents while he works in Iceland in connection with the provision of services.

LEGAL ASSESSMENT

Preliminary remarks

6. The Finnish Government treats in these observations the issues covered by Article 5 of the Icelandic Posting Act and, especially, the interpretation of the concept of "minimum rates of pay" under Article 3 (1) (c) of the Directive.

7. The Government submits that the interpretation of the concept "minimum rates of pay" may be broad and account can be taken, in addition to actual working hours, also of wages paid for a certain time when the employee is absent from work because of a justified reason. Therefore, the obligation pursuant to Article 5 of the Icelandic Posting Act to pay wages during the time of illness is in line with the Directive.

8. In the following the Finnish Government will explain the reasons why it considers that the concept of "minimum rates of pay" may include the entitlement to wages in case of illness or accident.

The concept of "minimum rates of pay"

The concept is defined in the national level

9. The second subparagraph of Article 3 (1) of the Directive provides that "*the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.*"

10. The freedom of Member States to define the concept of "minimum rates of pay" has only been limited in paragraph 7 of the said Article, which states that "*Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.*"

11. Thus, it is evident that the content of the concept of "minimum rates of pay" is defined at national level and it may vary from one Member State to another as also recognized by ESA in paragraph 22 of the Application.

The nature of the obligation to continued payment of wages

12. ESA considers in paragraph 24 of its Application that the concept "minimum rates of pay" refers to remuneration for work actually performed by the posted worker under his employment contract. ESA claims that sickness pay is not remuneration for work carried out. According to ESA "*the sickness pay comes as a replacement for loss of wages which the worker would have received if he had been able to comply with the contract*[2]."

13. The Finnish Government does not share this interpretation. The Government submits that the concept "minimum rates of pay" constitutes remuneration for fulfilment of obligations by the employee under the contract of employment. The employee does not fail to comply with the contract by being temporarily absent from work because of a justified reason, e.g. temporary loss of working capacity. Consequently, the employee is entitled to and the employer is obliged to pay the minimum wage even if the former has become temporarily ill.

14. As the Icelandic Government rightly notes in paragraphs 41 - 43 of the Statement of Defence the opposite interpretation would lead to the conclusion that the sole possibility to define minimum rates of pay would be the stipulation of hourly rates. However, it is not uncommon that the wage has been defined as a monthly pay, in which case the rates of pay includes all breaks, days off as well as holidays, i.e. all time when the employee has a justified reason to be absent from work.

15. On the contrary, sickness benefits under a national social security system are not remuneration for performance under the contract of employment and, therefore, the employer is not obliged to pay them. The objective of a social security system is to provide a livelihood for persons that are not capable for work or are unemployed for some other reasons.

16. Since it is not reasonable to expect that the employer should pay wage to a person who has lost working capacity for a long time or even permanently, national legislations typically limit the employer's responsibility for paying wages into a certain period. After this period it is possible to consider that the employee is not

capable of fulfilling his obligations under the contract of employment, i.e. capable of work. Thus, the employer's obligation to pay wage terminates and the employee is entitled to sickness benefits under the national social security system. The length of the time period under which the employer is obliged to pay wage depends on national legislation just like the substance of the other matters listed in Article 3 (1) (a) - (g) of the Directive.

18. It may be concluded that even though the reason for paying wage is the work done by the employee, temporary absence from work is not necessarily a reason for cessation of payment of wages. Thus, the concept of "minimum rates of pay" may include the entitlement to wages in case of illness or accident for the time period provided in the national legislation.

Jurisprudence of the Court of Justice

19. One example of a situation where the employee retains his rights under the contract of employment in spite of incapacity for work is found in case C-350/06[3] *Schultz-Hoff,* where the question was how the employee's sick-leave can affect his right to paid annual leave. This case concerned the interpretation of Directive 2003/88/EC[4] but it clearly states the principle that in calculation of a worker's benefits, sick leave can be equated with actual working hours.

20. The Court of Justice held that "*with regard to workers on sick leave which has been duly granted, the right to paid annual leave conferred by Directive 2003/88 itself on all workers (BECTU[5], paragraphs 52 and 53) cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State.*" Thus, Member States are obliged, under Directive 2003/88, to make sure that also employees who have not actually worked during the leave year are entitled to paid annual leave.

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[2] Application of ESA, paragraph 25.
[3] Joined Cases C-350/06 and C-520/06 Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs [2009] ECR I-179.
[4] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.
[5] Case C- 173/99 BECTU [2001] ECR I- 4881.

21. In other words, an employee who has been on sick leave is entitled to paid annual leave. Accordingly, the Finnish Government submits that it would be illogical if Member States were precluded from requiring that an employee on short-term sick leave is paid the minimum rate of pay.

22. The Court of Justice has dealt with the concept of minimum rates of pay under Article 3 (1) (c) of the Directive in case C-341/02 *Commission v Germany*[6], referred to by ESA in several paragraphs of the Application. In this case the Court was asked to rule on which disbursements by the employer must be taken into account when calculating whether it has fulfilled the obligation to pay the minimum wage.

23. It should be noted that the question of what kind of performance by the employee is required did not arise in that case. Therefore, the judgment is only of limited relevance to the case at hand.

24. In paragraph 29 of the judgment the Court stated as follows:

> "*It is necessary, first, to point out that the parties are in agreement that, in accordance with Article 3(1)(c) and 3(7), second subparagraph, of Directive 96/71, account need not be taken, as component elements of the minimum wage, of payment for overtime, contributions to supplementary occupational retirement pension schemes, the amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate. It is the gross amounts of wages that must be taken into account.*"

25. With reference to the last sentence of paragraph 29 of the judgment quoted above ESA argues that the statement "*It is the gross amounts of wages that must be taken into account*" means that the pay must be reflected in nominal / numerical terms only[7].

26. The Finnish Government does not share this interpretation. In this context the concept of "gross amount" seems to mean that the amount to be taken into account is the wage before taxes (in contrast to the net wage).

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[6] Case C-341/02 Commission v Germany [2005] ECR I-2733, paragraph 30.

27. In addition, since that case concerned the inclusion of allowances and supplements to the minimum wage it is the understanding of the Finnish Government that the Court focused on the interpretation of Article 3 (7) of the Directive, which concerns the inclusion of certain allowances in the scope of minimum wage.

28. Therefore, Member States' freedom to define the concept of "minimum rates of pay" under Article 3 (1) (c) has not been restricted by this judgment.

29. In paragraphs 51 - 53 of the Application ESA quotes the Court's judgment in case C-341/05 *Laval un Partneri*[8]. Based on the judgment ESA argues that the list in Article 3 (1) of the Directive is exhaustive and, consequently, Member States are not entitled to impose standards of minimum protection in areas beyond those which are explicitly listed in the said Article[9].

30. The Finnish Government notes that in the present case the question is not about imposing standards in areas beyond those listed in Article 3 (1). On the contrary, the present case concerns interpretation of one of the matters expressly named in the Article, i.e. minimum rates of pay. Furthermore, in *Laval* the standard of protection required was higher than the minimum standard provided by the national legislation. In the present case it has not been even argued that the Icelandic legislation would impose stricter conditions on companies employing posted workers than on those hiring local employees.

31. Therefore, it cannot be concluded from *Laval* that the Directive would preclude national legislation such as Article 5 of the Icelandic Posting Act.

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[7] Application of ESA, paragraph 27.
[8] Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767.
[9] Application of ESA, paragraph 54.

Relationship with the social policy

Social protection as one of the objectives of the Directive

32. The Finnish Government submits that the broad interpretation of the concept of "minimum rates of pay" is supported by the objectives of the Directive one of which is social protection.

33. According to the fifth preamble of the Directive, *"any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers."*

34. Advocate General Bot noted in his opinion in case C-307/09 *Vicoplus*[10] that one of the objectives of the Directive is the protection of workers. He also noted that the legislator intended to include in the scope of the Directive the greatest number of situations connected to posting of workers in order that as many workers as possible could benefit from the provisions of the Directive.

35. Advocate General Trstenjak stated in his opinion in case C-319/06 *Commission v Luxembourg*[11] that the adoption of the Directive *"is intended to achieve three very different objectives: to avoid distortions of competition, to guarantee the rights of posted workers and to eliminate barriers and ambiguities affecting the freedom to provide services."*

36. It is clear from these statements that the protection of workers is one of the objectives of the Directive.

37. The Government notes that according to settled case-law the concept of pay under Article 157 TFEU is very broad. The said article provides equal treatment of male and female workers as a part of the social policy of the Union. In case 171/88 *Rinner-Kühn*[12] the Court of Justice stated that *"the continued payment of wages to an*

[10] Opinion of Advocate General Yves Bot in joined cases C-307 - 309/09, Vicoplus and Others v Minister van Sociale Zaken en Werkgelegenheid, not yet reported, paragraph 55.
[11] Opinion of Advocate General Trstenjak in case C-319/06, Commission v Luxembourg [2008] ECR I-4323, paragraph 33.
[12] Case 171/88 Ingrid Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH [1989] ECR 2743, paragraph 7.

employee in the event of illness falls within the concept of 'pay' within the meaning of Article 119 of the Treaty [now Article 157 TFEU]."

38. In the Government's view there is no reason to interpret the concept of "pay" more narrowly in the Directive than in the context of social policy since one of the main purposes of the Directive is to set the appropriate balance between the Treaty provisions guaranteeing free movement of services on the one hand and social policy on the other.

39. The reconciliation of the two objectives has been provided in Article 3 (1) of the Directive by setting up an exhaustive list of the matters to be solved in the national legislation. There is nothing in the Directive that refers to the Community legislator's intention to solve eventual conflicts by applying different interpretations of concept of pay in the contexts of free movement of services and social policy. Instead, a harmonious interpretation of the concept of pay is preferable in order to avoid uncertainty and misunderstandings caused by the different meanings of the same concept.

40. As regards the climate of fair competition it is likewise preferable to adopt a broad interpretation of pay. The more equal conditions for employment can be achieved the more level a playing field for competition will be created.

41. Furthermore, the Finnish Government notes that the broad interpretation of pay does not make the provision of services noticeably more difficult than compliance with the other provisions of Article 3 (1). Thus, the obligation in question does not restrict the freedom to provide services in such way that would run counter to the objectives of the Directive. In fact, in case C-341/02 *Commission v Germany* the problem from the point of view of the proper functioning of the internal market was an excessively narrow interpretation of the concept of pay by the German Government because not all considerations had been included in the minimum rates of pay.

42. Consequently, minimum rates of pay may, if so defined in the national legislation, cover in addition to the actual working hours also the time when the employee is not obliged to work.

Regulation No 1408/71[13]

43. ESA claims in paragraph 35 of its Application that the Court of Justice has held that sickness pay constitutes sickness benefits within the meaning of Regulation No 1408/71, and states that "it would appear illogical if similar rights could, under EEA law, be both classified as sickness benefits and minimum rates of pay".

44. The Finnish Government does not agree with this line of argumentation.

45. Firstly, it is irrelevant that the same kind of entitlement to wages can also be classified as a sickness benefit within the meaning of Regulation 1408/71. In case C-45/90 *Paletta*[14] the Court held that although the continued payment of wages to an employee in the event of illness falls within the concept of "pay" within the meaning of Article 119 of the Treaty [now Article 157 TFEU], "*it still does not follow that the benefits provided by the employer in that connection may not at the same time constitute sickness benefits within the meaning of Regulation No 1408/71 [emphasis added].*"

46. As stated above, in *Rinner-Kühn*[15] the Court held already three years earlier that the continued payment of wages to an employee in the event of illness falls within the concept of "pay" within the meaning of Article 157 TFEU.

47. Secondly, the Finnish Government also notes that at the time when the judgment in case C-45/90 *Paletta* was given, the Directive had not yet been adopted. Thus, the Court did not have an opportunity to resolve the relationship between the continued payment of wages as a part of minimum rates of pay under the Directive, and payment thereof as a social security benefit.

48. Finally, it should be observed that the obligation to pay wages in case of temporary loss of working capacity does not mean that posted workers would have compensation both from the employer and the social security system. Article 12 of Regulation 1408/71 states that "*This Regulation can neither confer nor maintain the*

[13]Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 323, 13.12.1996, p. 38. This regulation has been repealed and replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

[14] Case C-45/90 Alberto Paletta and others v Brennet AG [1992] ECR I-3423, paragraph 15.

right to several benefits of the same kind for one and the same period of compulsory insurance."[16]

49. Accordingly, there is no reason to limit the right granted to Member States in Article 3 (1) of the Directive to define the scope of minimum rates of pay in their national law or practice when it comes to the entitlement of a worker to receive wages during temporary illness.

CONCLUSION

50. On these grounds the Finnish Government submits that Article 36 EEA and Directive 96/71/EC do not preclude national rules according to which a posted worker shall be entitled to receive wages in the event of illness and accidents while he works in Iceland in connection with the provision of services.

Respectfully

Agent for the Finnish Government — Henriikka Leppo

[15] Case 171/88 Ingrid Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH [1989] ECR 2743, paragraph 7.
[16] Correspondingly, Article 10 of regulation 883/2004/EC on the coordination of social security systems states that "Unless otherwise specified, this Regulation shall neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance."