



JUDGMENT OF THE COURT

28 June 2011

(Failure by a Contracting Party to fulfil its obligations – Freedom to provide services – Directive 96/71/EC – Posting of workers – Minimum rates of pay – Leave with pay in the event of illness or accident – Insurance against accidents)

In Case E-12/10,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, Brussels, Belgium,

applicant,

v

Iceland, represented by Bjarnveig Eiríksdóttir, Attorney at Law, and Dóra Sif Tynes, Attorney at Law, acting as Agents, and Íris Lind Sæmundsdóttir, Legal Officer at the Ministry for Foreign Affairs, acting as Co-Agent,

defendant,

APPLICATION for a declaration that by maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement, i.e. 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, as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Per Christiansen (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of:

- the Republic of Finland, represented by Henriikka Leppo, Legal Counsellor, acting as Agent;
- the Kingdom of Norway, represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Johan Enegren, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the EFTA Surveillance Authority (“ESA”), represented by its agents Xavier Lewis and Ólafur Jóhannes Einarsson; the defendant, represented by its agents Bjarnveig Eiríksdóttir and Dóra Sif Tynes; the Kingdom of Norway, represented by its agents Pål Wennerås and Janne Tysnes Kaasin; and the European Commission, represented by its agent Michel van Beek, at the hearing on 30 March 2011,

gives the following

Judgment

I Introduction

- 1 By application lodged at the Court Registry on 18 August 2010, ESA brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) for a declaration that Iceland has failed to fulfil its obligations under Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement. The Act referred to is 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, as adapted to the EEA Agreement by Protocol 1 thereto (“Directive 96/71”, “the Directive” or “PWD”).
- 2 In essence, the case concerns what requirements the EEA States are permitted to impose as regards the employment conditions of workers posted to their territory and whether the requirements set out in the Icelandic Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers’ terms and conditions of employment (“the Posting Act”) are compatible with Article 36 EEA and Article 3 of the PWD.

- 3 As regards those terms and conditions, the parties particularly disagree as to whether a right to payment for sick leave under the Posting Act qualifies as a constituent element of “minimum rates of pay” as provided for in point (c) of the first subparagraph of Article 3(1) of the Directive. At issue also is whether Iceland is permitted to impose rules on sick pay and an obligation on undertakings to take out accident insurance for posted workers on grounds of public policy.

II Legal background

European law

- 4 Article 36(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

- 5 Article 14 of the European Convention on Human Rights (“ECHR”) – *Prohibition of discrimination* – reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- 6 Article 1 of Protocol 1 to the ECHR – *Protection of property* – reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

...

- 7 Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (“Regulation No 1408/71”), as amended, is referred to in point 1 of Annex VI to the EEA Agreement. Regulation No 1408/71 is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptations contained in Annex VI. Article 4 of Regulation No 1408/71 – *matters covered* – reads:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

...

- 8 Decision 37/98 of 30 April 1998 of the EEA Joint Committee amended Annex XVIII to the EEA Agreement by adding Directive 96/71 at point 30 of that Annex. The preamble to Directive 96/71 reads:

...

(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

...

(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;

(13) Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;

...

(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community lays down the provisions applicable with regard to social security benefits and contributions;

...

- 9 Article 3 of the PWD – *Terms and conditions of employment* – as amended by the adaptation contained at point 30 in Annex XVIII to the EEA Agreement reads:

1. 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;
- (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.

...

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

...

8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

...

10. This Directive shall not preclude the application by Member States, in compliance with the EEA Agreement, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

National law

10 Article 1 of the Posting Act – *Scope* – reads:

This Act applies to undertakings that are established in other Member States of the European Economic Area ... which post their workers temporarily in Iceland in connection with the provision of services ...

11 Article 3 of the Posting Act – *Definitions* – reads:

For the purposes of this Act, the following terms are defined as follows:

1. *Undertaking: Undertaking is an individual, company or other party that runs a business operation and is established in another Member State of the European Economic Area ... and provides services in Iceland under the Agreement on the European Economic Area ...*

...

3. *Worker: A worker who normally works outside Iceland, but is posted temporarily in Iceland on the account of an undertaking (cf. item 1) in connection with the provision of its services.*

12 Article 4 of the Posting Act – *Terms and condition of employment* – reads:

In the event of the posting of workers in Iceland in the sense of this Act, the following legislation, and regulations issued thereunder, shall apply to their conditions of employment, irrespective of the foreign legislation covering other aspects of the employment relationship between the worker and the relevant undertaking:

1. *Article 1 of the Working Terms and Pension Rights Insurance Act, No. 55/1980, with subsequent amendments, regarding minimum wages and other wage-related issues, overtime payments, the right to vacation pay, maximum working hours and minimum rest periods.*
2. *The Act on Working Environment, Health and Safety in the Workplace, No. 46/1980, with subsequent amendments.*
3. *The Holiday Allowance Act, No. 30/1987, with subsequent amendments.*
4. *Article 4 of the Vessel Inspection Act, No. 47/2003.*
5. *Section VI of the Air Traffic Act, 60/1998.*
6. *Articles 11, 29 and 30 of the Maternity, Paternity and Parental Leave Act, No. 95/2000.*
7. *The Act on the Equal Status and Equal Rights of Women and Men, No. 96/2000, and also other legal provisions proscribing discrimination.*

The first paragraph of this Article shall apply without prejudice to more favourable terms and condition of employment for worker according to his employment contract with the relevant undertaking, or a collective agreement or legislation in the state in which he normally works.

Payments that relate specifically to the employment shall be calculated as part of the worker's minimum wages. ...

- 13 Article 5 of the Posting Act – *Entitlement to wages in the event of illness and accidents* – reads:

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.

Worker shall acquire entitlements through his work in Iceland for the same undertaking such that for each month worked during the first twelve months, two days shall be paid at regular wages. If the worker works for more than one year in Iceland, the acquisition of accumulation of entitlement to wages in the event of illness and wage payments shall be in accordance with Article 5 of the Act No. 19/1979, Respecting Workers' Right to Advance Notice of Termination of Employment and to Wage on Account of Absence through Illness or Accidents.

Entitlement to wages in the event of illness is an aggregate entitlement during each twelve-month period, irrespective of the type of illness.

If worker is absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease, he shall retain his daytime wages for three months in addition to their entitlement under the second paragraph of this Article.

...

If worker receives wages during absence resulting from illness or accidents in accordance with his employment contracts, collective agreements or the laws of his home country, he shall be paid the difference in wages if his entitlement under this provision is more to his advantage.

If the undertaking so requests, the worker shall submit to it a medical certificate regarding the illness or accident demonstrating that he has been unfit for work due to the illness or accident. The undertaking shall pay for the medical certificate and the cost of obtaining it, providing that it is notified of the illness the first day of absence due to illness.

The provisions of this Article shall apply without prejudice to more advantageous entitlements that the worker may have according to his employment contract with the relevant undertaking or according to a collective agreement or legislation in the state where he normally works.

- 14 The first, seventh and ninth paragraphs of Article 7 of the Posting Act – *Accident insurance covering death, permanent injury and temporary loss of working capacity* – read:

Worker who works in Iceland for a period of two continuous weeks or longer shall be insured at work against death, permanent injury and the temporary loss of working capacity. The insurance shall cover accidents that occur at work and on a normal route between the worker's workplace and the dwelling place in Iceland, and shall take effect when two weeks' continuous working period in Iceland have been completed.

...

Compensation shall not be paid to worker under this provision if he receives compensation for his injury from legally-prescribed accident insurance If the employer is liable to pay compensation to a worker who is insured against accidents under this provision, then compensation and per diem allowances that may be paid to the worker shall be deductible in full from the compensation that the undertaking may be required to pay. Per diem allowances shall be paid to the undertaking as long as it pays the worker wages in respect of the accident.

...

This provision shall apply without prejudice to more advantageous insurance cover that the worker may have according to his employment contract with the relevant undertaking, a collective agreement or legislation in the state where he normally works.

- 15 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Facts and pre-litigation procedure

- 16 Following a meeting in Reykjavík on 24 and 25 May 2007, ESA informed the Icelandic Government that it intended to examine in light of EEA law the recently enacted Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment ("the Posting Act"). By letter of 5 February 2008, Iceland replied with information on various issues in the Act.
- 17 By letter of 18 April 2008, ESA invited Iceland to provide further information concerning the terms and conditions of employment applicable to posted workers. By letter of 22 May 2008, Iceland provided ESA with the information requested.
- 18 On 11 March 2009, ESA sent a letter of formal notice to Iceland for failure to ensure compliance with Article 36 EEA and Article 3 of Directive 96/71/EC. Iceland neither submitted observations in response to the letter of formal notice within the time limit prescribed nor requested an extension of the period in which to reply.

- 19 The letter of formal notice was discussed at meetings in Reykjavík on 3 and 4 June 2009. In a follow-up letter, Iceland was invited to provide ESA with additional information on the framework applicable to sickness pay provided for in law and in collective agreements. Iceland was also invited to comment on the comparison between the term “pay” mentioned in Article 3(1)(c) of the PWD and the concept used in Article 5 of the Posting Act. Iceland did not reply to the letter.
- 20 On 25 November 2009, ESA delivered a reasoned opinion. By letter of 16 February 2010, Iceland stated that following consultation with the social partners the Government would submit a bill to Parliament amending the Posting Act taking account of the comments made by ESA. The intention was for the bill to be submitted to Parliament in February or March 2010.
- 21 By letter of 16 March 2010, Iceland informed ESA that a bill had been prepared to amend the Posting Act in order to comply with ESA’s conclusion that the obligation imposed on undertakings to register and provide information (Articles 8, 10 and 11 of the Act) was incompatible with EEA law. However, as regards Articles 5 and 7 of the Posting Act, which ESA had also concluded were incompatible with EEA law, Iceland disputed ESA’s conclusions. On 15 June 2010, the Icelandic Parliament adopted Act No 96/2010 amending the Posting Act.
- 22 On 16 June 2010, ESA decided to refer the matter regarding Articles 5 and 7 of the Posting Act to the Court in accordance with Article 31 of the Surveillance and Court Agreement. As for Articles 8, 10 and 11 of the Posting Act, the amending Act was considered sufficient to comply with ESA’s reasoned opinion of 25 November 2009.

IV Arguments of the parties

The applicant

- 23 ESA argues that Articles 5 and 7 of the Posting Act are contrary to Article 36 EEA and Article 3 PWD, and that the restrictions cannot be justified under the exception for public policy.
- 24 In ESA’s view, Article 3(1) of the PWD sets out an exhaustive list of the matters in respect of which the EEA States may give priority to the rules in force in the host EEA State. Accordingly, employment terms and conditions which a host State seeks to impose falling outside the scope of the Article are, in principle, incompatible with the Directive and Article 36 EEA.
- 25 Although ESA acknowledges that the definition of the concept of “minimum rates of pay”, referred to in Article 3(1)(c) of the PWD, is, in principle, a matter for the EEA States, it contends that their competence in that regard is subject nonetheless to compliance with the EEA Agreement and general principles of EEA law. ESA asserts that the margin of discretion left to the EEA States cannot

be interpreted so widely as to permit the EEA States to impose on posting undertakings terms and conditions of employment not listed in Article 3(1) of the PWD.

- 26 ESA considers it inherent in the concept of “minimum rates of pay” that it constitutes remuneration for work actually performed by the posted worker under his employment contract. According to ESA, Article 5 of the Posting Act concerns the right to payment for sick leave, which does not fall within the concept of “minimum rates of pay” mentioned in Article 3(1)(c) of the PWD. In its view, in contrast to remuneration for work carried out, the right to sickness pay arises only on condition that a certain event takes place, namely, that a worker falls sick and is unable to perform his duties under the employment contract. Thus, according to ESA, the entitlement provided for in Article 5 falls within the ambit of Regulation No 1408/71 on the application of social security schemes to employed persons and their families. From ESA’s perspective, it appears illogical if similar rights can be classified both as sickness benefits and minimum rates of pay under EEA law.
- 27 Furthermore, ESA fails to see how the definition of “pay” established in Article 157(2) TFEU and related ECJ case-law is relevant to the interpretation of Article 3(1)(c) of the PWD, as the legal bases and purposes of the two sets of rules are different and there is no further link between them. Moreover, ESA cannot see how it follows from using a monthly rate as a benchmark for the minimum wage that a worker is necessarily entitled to payment for the full month if he has been absent due to illness. Finally, in ESA’s view, it is irrelevant for the purposes of the present case whether wages, as monetary claims, are protected by Article 72 of the Icelandic Constitution on the right to property.
- 28 As regards Article 7 of the Posting Act, ESA considers it evident from the wording of Article 3(1) of the PWD that it does not encompass such requirements as those provided for in Article 7, which consequently fall outside the nucleus of mandatory rules for minimum protection to be observed in the host country by undertakings posting workers there.
- 29 ESA submits that Articles 5 and 7 of the Posting Act cannot be justified under the public policy exception established in Article 3(10) of the PWD. ESA argues that the exception must be interpreted strictly. Public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. ESA fails to see how there can be a genuine and sufficiently serious threat to Icelandic society if workers posted to Iceland are subject to their home state rules in respect of these rights.
- 30 ESA contends further that Articles 5 and 7 of the Posting Act constitute a restriction on the freedom to provide services provided for in Article 36 EEA. In its view, to insist that undertakings established in other EEA States comply with requirements on matters not listed in Article 3(1) of the PWD is liable to make it less attractive or more difficult to carry out work in the host State and, thus, constitutes a restriction on the freedom to provide services. According to ESA,

such a restriction is only justifiable under the exception for public policy provisions established in Article 3(10) of the PWD, which, as noted earlier, in its view, is not applicable in the case at hand.

The defendant

- 31 Iceland contends that Articles 5 and 7 of the Posting Act are neither contrary to Article 36 EEA nor Article 3(1) of the PWD. In the alternative, Iceland argues that the provisions are justified under the exception for public policy established in Article 3(10) of the PWD.
- 32 In relation to Article 5 of the Posting Act, Iceland submits that the entitlement to wages in case of illness or accident is included in the term “minimum rates of pay” in Article 3(1)(c) of the PWD and inherent in the concept of “minimum rates of pay” in Icelandic labour law. Iceland argues that the concept of “minimum rates of pay” or “minimum wage” is not harmonised for the purposes of Directive 96/71 and, subject to compliance with the EEA Agreement and general principles of EEA law, that nothing prevents Iceland from including entitlement to wages in case of illness or accident as part of a minimum wage determined on a monthly basis. Notwithstanding a worker’s inability to render services to his employer during the period of sickness, Iceland argues that what defines this entitlement is the direct contractual relationship between employer and worker. Moreover, Iceland argues that it is inherent in the determination of minimum wages on a monthly rather than an hourly basis that the worker’s right to absence from work due to illness or accident is included in the calculation. In Iceland’s view, entitlement to maintenance of wages in the event of illness or accidents provided for by Icelandic labour law constitutes “pay” and not a “social security benefit”. The right provided for by Article 5 of the Posting Act thus falls outside the scope of Regulation No 1408/71.
- 33 Turning to Article 7 of the Posting Act, Iceland submits that the insurance cover provided for under that Article is a rule of national tort and insurance law, as such falling outside the ambit of Directive 96/71.
- 34 If the Court holds Articles 5 and 7 of the Posting Act to be contrary to Article 3 of the PWD, Iceland argues, in the alternative, that the provisions are justified under the public policy exception established in Article 3(10) of the PWD. It submits that the requirements at issue are established in collective agreements which are legally protected and from which there can be no exemptions. The objective of the legislation is to provide worker protection; a recognised objective under EEA law. Iceland considers the provisions to be imperative requirements. As regards Article 5 of the Posting Act, it asserts that this provision is intended to secure the value of minimum wages and other wages for posted workers, which is considered imperative for the protection of workers and crucial to the social order in Iceland. In its view, the requirements concerned are suitable and necessary in order to secure the objective pursued and are non-discriminatory.

- 35 In relation to Article 36 EEA, Iceland argues that in the event that the Court holds Articles 5 and 7 of the Posting Act to constitute a restriction on the freedom to provide services, the question of justification is not limited to the exemption provided for in Article 3(10) of the PWD. Iceland submits that the Directive does not prevent recourse to overriding requirements in the general interest as grounds of justification. Iceland argues that various objectives in the public interest may constitute a legitimate aim and that these include the objectives referred to in the discussion of Article 3(10) of the PWD. In this connection, too, it submits that the requirements of suitability, necessity and proportionality are fulfilled.

The Republic of Finland

- 36 The Republic of Finland supports Iceland in its contention that Articles 5 and 7 of the Posting Act fall within the concept of “minimum rates of pay” in Article 3(1)(c) PWD. It argues that the concept of “pay” under Article 157 TFEU, on equal treatment of male and female workers as part of EU social policy, is broad and covers the continued payment of wages to an employee in the event of illness. In the view of the Republic of Finland, there is no reason to interpret the concept of “pay” more narrowly in Directive 96/71 than in the context of social policy since a main purpose of the Directive is to strike the balance between the TFEU provisions guaranteeing free movement of services and social policy. In the same vein as Iceland, it argues that where the wage is defined as monthly pay, the rates of pay include all breaks, days off and holidays, that is, justified absences from work. Thus, absence from work does not necessarily constitute a reason for a cessation in the payment of wages.

The Kingdom of Norway

- 37 The Kingdom of Norway agrees with the submissions made by Iceland on the compatibility with EEA law of Articles 5 and 7 of the Posting Act. It claims that benefits and contributions falling within the scope of Regulation No 1408/71 are not only excluded from the scope of Article 3(1) of the PWD but fall outside the scope of the Directive in its entirety. Therefore, it argues, if Article 5 of the Posting Act is deemed to constitute social security legislation for the purposes of Regulation No 1408/71, then ESA’s application must be dismissed in so far as Article 5 is concerned. In any event, it contends that Article 3(1)(c) of the PWD must be assessed with reference to whether the benefits represent consideration which the worker receives in respect of his employment from his employer. In its view, Article 5 of the Posting Act makes the right to wages in the event of illness and the amount thereof entirely conditional on the work carried out by the posted worker. Consequently, the Kingdom of Norway argues that the wages in question are exclusively borne out of and represent consideration for work carried out by the worker.

The Commission

- 38 The Commission supports ESA in contending that Articles 5 and 7 of the Posting Act are incompatible with Article 3(1) of the PWD. It stresses that allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the EEA State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker and the consideration which he receives in return cannot, under the provisions of that Directive, be treated as being elements of that kind. In the Commission's view, the entitlements provided for in Article 5 of the Posting Act do not in all respects appear to relate directly to work performed and thus alter the relationship between the service provided by the worker and the consideration which he receives in return. Consequently, the Commission contends that the entitlements in question do not qualify as constituent elements of the notion of minimum rates of pay.

V Findings of the Court

Preliminary remarks on the PWD

- 39 At the outset, the Court notes that it follows from recital 13 in the preamble to the PWD that the laws of the EEA States must be coordinated in order to lay down a nucleus of rules for minimum protection to be observed in the host country by employers who post workers there, whatever the law applicable to the employment relationship.
- 40 The PWD thus expressly defines – through the matters referred to in points (a) to (g) of the first subparagraph of Article 3(1) – the degree of protection for workers that host EEA States are entitled to require undertakings established in other EEA States to observe when they post workers to their territory. An interpretation permitting EEA States to extend the terms and conditions prescribed by that provision would amount to depriving the Directive of its effectiveness (see, for comparison, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 80). Accordingly, Article 3(1) must be interpreted as setting out an exhaustive list of the matters in respect of which the EEA States may give priority to the rules in force in the host EEA State (see, for comparison, Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, paragraph 26).
- 41 In other words, the level of protection which must be guaranteed to workers posted to the territory of the host EEA State is limited, in principle, to that provided for in points (a) to (g) of the first subparagraph of Article 3(1) of the PWD (see, for comparison, *Laval un Partneri*, cited above, paragraph 81). This applies unless, pursuant to the law or to collective agreements in the EEA State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.
- 42 However, under the first indent of Article 3(10) of the PWD, EEA States have the right to apply, in compliance with the EEA Agreement, in a non-

discriminatory manner, to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1), where public policy provisions are at stake.

Article 5 of the Posting Act

- 43 The parties dispute whether the rights established in Article 5 of the Posting Act fall within the scope of Article 3(1)(c) of the PWD. In the first and second paragraph of Article 5 of the Posting Act, it is stated that in the event of illness, a worker posted to Iceland shall be entitled to two days' paid leave for every month worked during the first twelve months of his posting. In addition, the fourth paragraph of Article 5 of the Posting Act stipulates that a worker shall retain his daytime wages for three months, if he is absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease. After the first twelve months of work in Iceland, Article 5 of the Labourers' Rights Act No 19/1979 is said to apply to posted workers on the same basis as to national workers.
- 44 The "minimum rates of pay, including overtime rates" are, according to Article 3(1)(c) PWD, included in the terms and conditions of employment laid down in the host EEA State which undertakings posting workers to the State must guarantee to their workers.
- 45 The PWD does not harmonise the material content of the mandatory rules for minimum protection. As stated in the second subparagraph of Article 3(1), 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. Accordingly, that content may be freely defined by the EEA States, in compliance with the EEA Agreement and the general principles of EEA law (compare *Laval un Partneri*, cited above, paragraph 60, and the case-law cited).
- 46 The options of the EEA States to define what constitutes "minimum rates of pay" are, however, not unlimited. In the case at hand, the sickness pay provided for in Article 5 of the Posting Act is not set at a minimum rate, i.e. neither as a flat rate of minimum compensation, nor calculated on the basis of a minimum wage, where this applies. On the contrary, the sickness pay to which a worker is entitled corresponds to the regular wage the worker receives under his employment contract.
- 47 Article 3(1)(c) of the PWD does not authorise a host EEA State to impose its system for determining all wages on undertakings which post workers to its territory. As Article 3(1)(c) of the Directive is intended to limit the possibility of the EEA States intervening as regards pay to matters relating to minimum rates of pay, an entitlement to sickness pay which is not set at a minimum rate does not fall within the notion of "the minimum rates of pay" within the meaning of Article 3(1)(c) of the PWD (see, for comparison, *Commission v Luxembourg*, cited above, paragraph 47).

- 48 As regards Iceland’s submission that wages, as monetary claims, are protected by Article 72 of the Icelandic Constitution on the right to property, those considerations cannot be decisive when assessing whether payment in the event of absence due to sickness falls within the scope of “minimum rates of pay” for the purposes of Article 3(1)(c) of the PWD. The same applies with respect to Iceland’s submission regarding the definition of wages in ILO Convention No 95 on the Protection of Wages.
- 49 Against this background, the Court finds that Article 5 of the Posting Act is incompatible with Directive 96/71, unless it can be justified under the exception for public policy laid down in Article 3(10) of the Directive, see paragraph 55 et seq. below.
- 50 For the sake of completeness, the Court adds that for the purposes of this case, it is unnecessary to decide whether Article 5 of the Posting Act constitutes a sickness benefit within the meaning of Regulation No 1408/71. Since it has been established that Article 5 of the Posting Act imposes employment conditions outside the matters exhaustively listed in Article 3(1) of the PWD, it is, in principle, incompatible with the PWD, regardless of whether it falls within the scope of Regulation No 1408/71.

Article 7 of the Posting Act

- 51 Iceland does not contend that Article 7 of the Posting Act falls within the scope of the matters referred to in points (a) to (g) of the first subparagraph of Article 3(1) of the PWD. Rather, Iceland argues that Article 7, which imposes on the employer an obligation to take out accident insurance for posted workers, constitutes a rule of national tort and insurance law and, as such, falls outside the ambit of the PWD.
- 52 The Court cannot accept this reasoning. As noted in paragraph 41 above, points (a) to (g) of the first subparagraph of Article 3(1) of the PWD lay down in an exhaustive list the matters of protection for workers of undertakings established in other EEA States who are posted to the territory of the host EEA State which the latter State is entitled to require those undertakings to observe. It is evident that imposing an obligation on the undertakings posting workers to Iceland to take out accident insurance for their employees concerns the terms and conditions of employment and, consequently, is a matter to which Article 3 of the PWD applies and, hence, covered by the coordination of national mandatory rules. It is of no importance whether under national law the rule is classified as a rule of tort or insurance law.
- 53 Furthermore, it is evident, and not contested by Iceland, that an obligation to take out accident insurance falls outside the matters listed in Article 3(1) of the PWD.
- 54 For these reasons, the Court finds that Article 7 of the Posting Act is incompatible with Directive 96/71, unless it can be justified under the exception for public policy laid down in Article 3(10) of the Directive.

Exception for public policy

- 55 On the issue of whether the provisions in Articles 5 and 7 of the Posting Act may be justified under the exception for public policy, the Court finds that no significant difference exists between these two provisions. Accordingly, they are dealt with jointly.
- 56 The first indent of Article 3(10) of the PWD constitutes a derogation from the principle that the matters with respect to which the host EEA State may apply its legislation to undertakings which post workers to its territory are set out in an exhaustive list in the first subparagraph of Article 3(1) thereof (compare *Commission v Luxembourg*, cited above, paragraph 31). The public policy exception is, more fundamentally, a derogation from the principle of freedom to provide services. While the EEA States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the EEA context, particularly when it is cited as justification for a derogation from a fundamental freedom, must be interpreted strictly, so that its scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions. It follows that a public policy provision may be relied upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, with respect to Article 40 EEA, Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42, and, in relation to Article 33 EEA, Case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 42. See also, in a similar vein, *Commission v Luxembourg*, cited above, paragraph 50, and the case-law cited).
- 57 Moreover, the Court notes that the reasons which may be invoked by an EEA State in order to justify such a derogation must be accompanied by an appropriate analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (see *Commission v Luxembourg*, cited above, paragraph 51).
- 58 Turning to the issue of justification in the present case, first, the Court finds Iceland's submission to the effect that Articles 5 and 7 of the Posting Act constitute public policy because they are provisions of legally protected collective agreements to have no bearing on the case. The assessment under the public policy exception established in Article 3(10) of the PWD must be the same irrespective of whether the contested provisions are set out by law or by universally applicable collective agreements or arbitration awards.
- 59 Second, the Court cannot accept the arguments put forward by Iceland that the requirements established by Articles 5 and 7 of the Posting Act must be considered imperative for the protection of workers and crucial to the social order in Iceland. According to information submitted to the Court, in 2010 only 9 persons were registered as posted workers in Iceland. Although the number of posted workers was higher in 2006 and 2007, the Court cannot see how the requirements stipulated in Articles 5 and 7 of the Posting Act can be regarded as crucial to Iceland's social order.

- 60 Third, it is true that provisions of the EEA Agreement are to be interpreted in the light of fundamental rights, see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23, and the case law cited, and that the provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights. However, the Court is not convinced by Iceland's contention that provisions on the protection of property, Article 14 of the ECHR and Article 1 of Protocol 1 to the ECHR, a right also established in Articles 65 and 72 of the Icelandic Constitution, can justify Articles 5 and 7 of the Posting Act on grounds of public policy. Such a conclusion would, in effect, justify all requirements concerning monetary claims not falling within the scope of Article 3(1) and would manifestly deprive the PWD of its effectiveness.
- 61 Consequently, as Iceland has failed to establish that the requirements of the disputed articles of the Posting Act are necessary to counteract a genuine and sufficiently serious threat to a fundamental interest of society, justification under the exception for public policy may not be relied upon in the case at hand. For the reasons set out above, the Court holds that by maintaining in force Articles 5 and 7 of the Posting Act, Iceland has failed to fulfil its obligations under Article 3 of the PWD.
- 62 As a failure to fulfil obligations on the basis of the PWD has thus been established, it is unnecessary to examine the action in respect of Article 36 EEA (see, for comparison, Case C-341/02 *Commission v Germany* [2005] ECR I-2733, paragraph 42).

VI Costs

- 63 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Iceland be ordered to pay the costs and the latter has been unsuccessful, Iceland must be ordered to pay the costs. The costs incurred by the Republic of Finland, the Kingdom of Norway and the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland**

has failed to fulfil its obligations arising from Article 3 of 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.

2. Orders Iceland to bear the costs of the proceedings.

Carl Baudenbacher

Thorgeir Örlygsson

Per Christiansen

Delivered in open court in Luxembourg on 28 June 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President