ESA | EFTA Surveillance Authority

Brussels, 7 December 2022
Case No: 83751
Document No: 1311270
Decision No: 223/22/COL

Ministry of Social Affairs and Labour
Síðumúla 24
108 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning breach of the Working Time Directive

1 Introduction

On 6 June 2019, the EFTA Surveillance Authority ("the Authority") received a complaint against Iceland regarding alleged breach of Iceland's obligations under Directive 2003/88/EC *concerning certain aspects of the organisation of working time*[1] ("the Working Time Directive" or "the Directive").[2] By letter dated 13 June 2019, the Authority informed the Icelandic Government that it had received the complaint.[3] The complaint alleges that Iceland's implementation of the Working Time Directive is insufficient, *inter alia* due to the fact that Act No 46/1980 *on working environment, health and safety in workplaces*[4] does not contain any provision obliging employers to provide for a formal, effective and accessible system in order to measure and monitor workers' working time.

After having examined the case, the Authority has reached the conclusion that Iceland has failed to fulfil its obligations under Articles 3, 5 and 6(b) of the Working Time Directive and Article 7 of the EEA Agreement.

2 Correspondence

On 23 August 2019, the Authority sent a request for information to Iceland.[5] The Authority, *inter alia*, referred to the judgment of the Court of Justice of the European Union ("the CJEU") in Case C-55/18 *CCOO*[6] and asked whether Icelandic legislation or collective agreements ensure that employers are required to set up an objective, reliable and accessible system enabling the recording of working time. The Icelandic Government replied by letter dated 28 October 2019,[7] mentioning Article 58 of Act No 46/1980 as the implementing provision for Article 11 of the Working Time Directive concerning notification of regular use of night workers.

[1] Act referred to at point 32h of Annex XVIII to the EEA Agreement (*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*), as adapted to the EEA Agreement by way of Protocol 1 thereto.
[2] Doc No 1073704.
[3] Doc No 1074642.
[4] Lög nr. 46/1980 um aðbúnað, hollustuhætti og öryggi á vinnustöðum.
[5] Doc No 1079683.
[6] Judgment of 14 May 2019 in Case C-55/18 *CCOO*, EU:C:2019:402.
[7] Doc No 1094079 / your ref. FRN19060132/02.30.04.

By letter of 20 March 2020,[8] the Authority sent a supplementary request for information to Iceland, asking, *inter alia*, whether it was the view of the Icelandic Government that Icelandic legislation meets the requirements for the recording of working time laid down in the *CCOO* judgment. Iceland replied by letter dated 20 May 2020,[9] stating that a working group had been appointed which was drafting a legislative bill in connection with social dumping where this issue was being addressed.

The case was discussed at the virtual package meeting with Iceland on 27 May 2020. During the meeting, the representatives of the Icelandic Government informed the Authority that a legislative bill had been drafted suggesting to add a new provision to Chapter IX of Act No 46/1980 (a new Article 57a) entailing an obligation on employers to record working time.[10] The Icelandic Government replied to the Authority's follow-up letter on 6 August 2020,[11] providing the Authority with a draft legislative text and stating that the draft legislative bill was on the Parliament's agenda for that winter session 2020-2021.

The case was discussed during the virtual package meeting on 1 June 2021, where the representatives of the Icelandic Government noted that it was still uncertain whether the draft legislative bill would be adopted as law during that parliamentary session.[12] In the Authority's follow-up letter to the package meeting,[13] Iceland was invited to provide an update on whether the draft legislative bill had been adopted as law and, if not, to provide a time line on the way forward. The Icelandic Government replied by letter dated 5 August 2021,[14] stating that the draft legislative bill had not been adopted as law during that parliamentary session and that due to upcoming elections in Iceland there were some uncertainties about whether and when the draft bill would be adopted as law.

The Authority sent another supplementary request for information to Iceland on 4 February 2022,[15] asking for an update on the foreseen legislative amendments. The Icelandic Government replied by letter dated 12 April 2022,[16] stating that the draft legislative bill had been put before the Parliament again but was still in the early stages of the parliamentary procedure.

The case was discussed at the package meeting in Iceland on 8 June 2022.[17] At the meeting, the representatives of the Icelandic Government explained that the legislative bill, to which a new Article 57a of Act No 46/1980 formed part, had been submitted before the Parliament during the 2021-2022 parliamentary session, unchanged from previous bill. However, given that the current parliamentary session was coming to an end, it was uncertain whether this bill would be adopted as law before the summer break. The representatives of the Authority noted that it had now been two years since the Icelandic Government stated that it would adopt a new legislative provision on the recording of working time in order to comply with the judgment of the CJEU in *CCOO*.

In the Authority's follow-up letter to the package meeting,[18] Iceland was requested to provide a new update and a time line in relation to the adoption of Article 57a of Act No 46/1980. The Icelandic Government replied by letter dated 30 September 2022,[19] stating that the draft legislative bill had not been adopted as law during the last parliamentary

[8] Doc No 1117966.
[9] Doc No 1133999 / your ref. FRN19060132/02.30.04.
[10] See the Authority's follow-up letter to the 2020 package meeting, Doc No 1133598.
[11] Doc No 1147448 / your ref. FRN19060132/02.30.04.
[12] See the Authority's follow-up letter to the 2021 package meeting, Doc No 1204495.
[13] Doc No 1204495.
[14] Doc No 1220101 / your ref. FRN19060132/02.30.04.
[15] Doc No 1267410.
[16] Doc No 1282425 / your ref. FRN19060132/02.30.04.
[17] See the Authority's follow-up letter to the 2022 package meeting, Doc No 1294470.
[18] Doc No 1294470.
[19] Doc No 1316557.

session and that the aim was to put a bill forward adding a new Article 57a to Act No 46/1980 during the current parliamentary session.

3 Relevant national law

Article 53(1) of Act No 46/1980 provides:

> *"Working time shall be arranged so that during every 24 hours, counting from the beginning of the working day, workers shall receive at least 11 hours' continuous rest."*

Article 54(1) of the Act reads:

> *"In each seven-day period, the worker shall receive at least one weekly holiday in direct conjunction with his daily rest time according to Article 53."*

Article 55(1) of Act No 46/1980 stipulates:

> *"Workers' maximum working hours per week, including overtime, may not exceed 48 hours, on average during each four-month period."*

Article 58 of Act No 46/1980 states:

> *"Employers shall be obliged to provide the Administration of Occupational Safety and Health with the information necessary for monitoring the application of this Act regarding working time, including information on the number of night workers and their working time."*

4 Relevant EEA law

Article 7 of the EEA Agreement provides that EEA States are to make acts incorporated into the EEA Agreement part of their internal legal order. With regard to directives, the choice of form and method of implementation shall be left to the authorities of the EEA States.

Article 1(1) of the Working Time Directive concerning the purpose of the Directive states:

> *"This Directive lays down minimum safety and health requirements for the organisation of working time."*

Article 3 of the Working Time Directive on daily rest provides:

> *"[EEA] States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period."*

Article 5 of the Directive concerning weekly rest period reads:

> *"[EEA] States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.*
>
> *If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied."*

Article 6 of the Directive on weekly working time provides:

> *"[EEA] States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:*
>
> *(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;*
>
> *(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours."*

Article 11 of the Directive titled "Notification of regular use of night workers" stipulates:

> *"[EEA] States shall take the measures necessary to ensure that an employer who regularly uses night workers brings this information to the attention of the competent authorities if they so request."*

5 The Authority's assessment

The Authority observes that the Working Time Directive[20] was implemented into the Icelandic legal order by Act No 46/1980 *on working environment, health and safety in workplaces*, as amended by Act No 52/1997, Act No 68/2003 and Act No 138/2005, and by three agreements between the social partners, signed in 1996 and 1997.[21]

The provisions of the Directive on daily and weekly rest periods (Articles 3 and 5) and maximum weekly working time (Article 6(b)) are implemented in Articles 53(1), 54(1) and 55(1) of Act No 46/1980. Moreover, Article 11 of the Directive concerning notification of regular use of night workers is implemented in Article 58 of Act No 46/1980.

The Authority however recalls that, on 14 May 2019, the CJEU delivered its judgment in *CCOO*, where it concluded that Articles 3, 5 and 6(b) of the Working Time Directive must be interpreted as precluding a law of a Member State that does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.[22]

In the judgment, the CJEU highlighted that the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods constitutes a rule of EU social law of particular importance, which is expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the EU. The provisions of the Working Time Directive, in particular Articles 3, 5 and 6(b), give specific form to that fundamental right and must, therefore, be interpreted in the light of the latter.[23]

The Court further held:

> *"While Member States thus enjoy a discretion for that purpose, it remains the case that, having regard to the essential objective pursued by Directive 2003/88, which is to ensure the effective protection of the living and working conditions of workers and better protection of their safety and health, they are required to ensure that the effectiveness of those rights is guaranteed in full, by ensuring that workers actually benefit from the minimum daily and weekly rest periods and the limitation on the duration of average weekly working time laid down in that directive […]."*[24]

The Court then went on to state that, in the absence of a system enabling the duration of time worked each day by each worker to be measured, it was not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours, as overtime.[25]

The CJEU then held:

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[20] The original Working Time Directive was Directive 93/104/EC, which was amended by Directive 2000/34/EC and then codified as Directive 2003/88/EC.

[21] Agreement between ASÍ and Vinnuveitendasamband Íslands, dated 30 December 1996, Agreement between ASÍ and Vinnumálasambandið, dated 10 April 1997 and Agreement between parties in the public sector, dated 23 January 1997.

[22] Judgment in Case C-55/18 *CCOO*, cited above, paragraph 71.

[23] Ibid, paragraphs 30-31.

[24] Ibid, paragraphs 42.

[25] Ibid, paragraphs 46-47.

> *"[…], a national law which does not provide for an obligation to have recourse to an instrument that enables the objective and reliable determination of the number of hours worked each day and each week is not capable of guaranteeing, in accordance with the case-law recalled in paragraph 42 above, the effectiveness of the rights conferred by Article 31(2) of the Charter and by this directive, since it deprives both employers and workers of the possibility of verifying whether those rights are complied with and is therefore liable to compromise the objective of that directive, which is to ensure better protection of the safety and health of workers."*[26]

Lastly, the Court concluded:

> *"While it is true that the employer's responsibility for observance of the rights conferred by Directive 2003/88 cannot be without limits, it remains the case that the law of a Member State that, according to the interpretation given to it by national case-law, does not require the employer to measure the duration of time worked, is liable to render the rights enshrined in Articles 3, 5 and 6(b) of that directive meaningless by failing to ensure, for workers, actual compliance with the right to a limitation on maximum working time and minimum rest periods, and is therefore incompatible with the objective of that directive, in which those minimum requirements are considered to be essential for the protection of workers' health and safety […].*
>
> *Consequently, in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured."*[27]

It follows from the above that the CJEU has interpreted Articles 3, 5 and 6(b) of the Working Time Directive as entailing an obligation on EEA States to require employers to set up a system enabling the recording of working time. The Court has held that, without such an obligation, the effective application of the rights conferred by those provisions would not be ensured. In other words, such an obligation is inherent in the above rules of the Working Time Directive.

The Authority observes that, based on the principle of homogeneity and in order to ensure equal treatment of individuals throughout the EEA,[28] Articles 3, 5 and 6(b) of the Working Time Directive must be interpreted in the same manner under the EEA Agreement as in EU law. Consequently, the obligation on employers to record working time also forms part of EEA law.

The Authority further notes that the EFTA Court has held that, pursuant to Article 7 of the EEA Agreement, provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty and that EEA States must ensure full application of directives not only in fact but also in law.[29]

On this basis, the Authority takes the view that a correct implementation of Articles 3, 5 and 6(b) of the Working Time Directive necessarily entails that EEA States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. Without such an obligation on

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[26] Ibid, paragraph 50.

[27] Ibid, paragraphs 59-60.

[28] See e.g. Articles 1 and 6 of the EEA Agreement and Article 3 of the Surveillance and Court Agreement. See also Judgment of 16 December 1994 in Case E-1/94 *Restamark*, [1994-1995] EFTA Ct. Rep. 15, paragraphs 32-35 and 80.

[29] See Judgment of 22 July 2013 in Case E-15/12 *Jan Anfinn Wahl v. Iceland*, [2013] EFTA Ct. Rep. 534, paragraphs 50-51 and 56. See also Judgment of 11 February 2014 in Case E-12/13 *EFTA Surveillance Authority v Iceland*, [2014] EFTA Ct. Rep. 58, paragraph 70.

employers to record working time, Icelandic legislation thus remains incompatible with Articles 3, 5 and 6(b) of the Working Time Directive and Article 7 of the EEA Agreement.

With regard to the fact that the CJEU in *CCOO* referred to Article 31(2) of the Charter of Fundamental Rights, which does not form part of EEA law, the Authority observes that, already before the adoption of the Charter, the Court had delivered judgments making the same statements about the provisions concerning minimum rest periods and maximum working time constituting rules of Community social law of particular importance.[30] It thus appears clear that those rules were just as important and fundamental without a specific provision in the Charter of Fundamental Rights on fair and just working conditions. The provisions in the Working Time Directive on minimum rest periods and maximum weekly working time should thus have the same importance and meaning in EEA law as in EU law. Moreover, the Court's interpretation of Articles 3, 5 and 6(b) of the Working Time Directive stands independently, regardless of the Court's reference to the Charter of Fundamental Rights. The lack of incorporation of the Charter of Fundamental Rights into the EEA Agreement does therefore not alter the Authority's conclusion in this case.

It is undisputed that Icelandic legislation does not contain an obligation on employers to set up a system for the recording of working time. The Icelandic Government did state in May 2020 that it intended to adopt a new legislative provision introducing such an obligation on employers. However, more than two years have now passed without such a provision having been adopted and it remains uncertain whether and when that will happen. According to the information available to the Authority, the Icelandic Government has not yet submitted such a bill to the Parliament.

The Authority must therefore conclude that Iceland has failed to fulfil its obligations under Articles 3, 5 and 6(b) of the Working Time Directive and Article 7 of the EEA Agreement.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by failing to implement a specific rule on the recording of working time, obliging employers to set up a system enabling the duration of time worked each day by each worker to be measured, Iceland has failed to fulfil its obligation under Articles 3, 5 and 6(b) of the Working Time Directive and Article 7 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Arne Røksund	Stefan Barriga	Árni Páll Árnason
President	Responsible College Member	College Member

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[30] Judgment of 1 December 2005 in Case C-14/04 *Dellas and Others*, EU:C:2005:728, paragraph 49, and the case law cited therein.

Melpo-Menie Joséphidès
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This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.