Case No: 72062
Event No: 692364
Decision No: 53/14/COL

EFTA SURVEILLANCE AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's failure to fulfil its obligations arising from Articles 3 and 4 of the Act referred to at point 24 of Annex XVIII to the EEA Agreement (*Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version)*), as adapted to the EEA Agreement by Protocol 1 thereto

EFTA SURVEILLANCE AUTHORITY

1 Introduction

1. By letter dated 28 June 2012 (Event No 639377), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case against Norway concerning the national rules transposing Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74 (now Directive 2008/94[1]; hereinafter "Directive 2008/94" or "the Directive").

2. The decision to open the case was related to the judgment of the Court of Justice of the European Union ("the Court of Justice") in Case C-435/10 *Ardennen*.[2] In its judgment the Court of Justice declared that the Directive must be interpreted as precluding a national rule which obliged employees to register as job-seekers in the event of the insolvency of their employer, in order to fully assert their right to payment of outstanding wage claims.

3. In the letter of 28 June 2012, the Authority invited the Norwegian Government to explain, whether employees of insolvent companies were required to register as job-seekers in order to assert their right to payment of outstanding wage claims under the national rules transposing the Directive. If that was the case, the Norwegian Government was asked to describe the scope and application of the rules.

4. The Norwegian Government was furthermore invited, if the answer to the first question was in the affirmative, to express its views regarding the compliance of the national rules with the Directive, as interpreted in Case C-435/10 *Ardennen*. The Norwegian Government was invited to submit the above information so that it would reach the Authority by 31 August 2012.

5. The Norwegian Government provided the requested information by letter dated 4 September 2012 (ref. 12/2505, Event No 645595). The matter was further discussed at the package meeting held in Oslo on 25 and 26 October 2012.[3] Additional information was provided by Norway in its reply of 11 January 2013 (ref. 12/2505, Event No 658939) to the follow-up letter to the package meeting.

6. In its letters dated 4 September 2012 and 11 January 2013, the Norwegian Government informed the Authority that administrators of the bankrupt undertakings were under a duty laid down in Section 5-2 of the Regulation on Wage Guarantee of 28 October 1998 No 999[4] ("the Wage Guarantee Regulation") to inform the employees of the requirement to register as job-seekers. The information is usually provided in writing at the same time as the employees receive their notice of dismissal from the administrator.

7. The Norwegian Government furthermore stated that it followed from Section 3-3 second paragraph of the Wage Guarantee Regulation that the Labour and Welfare Administration might cover claims even if the requirement to register as a job-seeker had not been complied with, if that was found to be reasonable due to the employee's personal

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[1] Act referred to at point 24 of Annex XVIII to the EEA Agreement (*Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version)*), as adapted to the EEA Agreement by Protocol 1 thereto.

[2] Case C-435/10 *Ardennen* ECR [2011] I-11705.

[3] See the follow-up letter to the package meeting (Event No 652036 in Case No 72128).

[4] FOR 1998-10-28 nr 999: *Forskrift om statsgaranti for lonnskrav ved konkurs m.v.*

situation. On the basis of this provision, wage claims have, *inter alia*, been covered in cases where the employee has accepted a job offer within the expiration of the 14 day time limit, provided that he/she enters into the new job soon thereafter. Claims have also been covered if the employee has in fact been in search of work during the notice period. Copies of job applications and/or a confirmation that the employee has contacted employers about vacancies have been accepted as sufficient proof of this. Other instances where exceptions have been granted include cases where the employee has established his/her own business within the time-limit to register as a job-seeker, the employee has started to study fulltime, he/she is about to retire, he/she is receiving disability benefits, or is leaving for a maternity leave. Wage claims have also been covered, if the failure to register has been caused by misinformation either from the authorities or the administrator of the bankrupt undertaking. Finally, Norway stated that even though the employee did not register as a job-seeker within the prescribed time limit his/her claims would be covered for the period he/she actually registered.

8. Based on the above, the Norwegian Government holds that a claim similar to the one examined by the Court of Justice in Case C-435/10 *Ardennen* would have been covered by the Norwegian guarantee scheme.

9. The Norwegian Government added that the requirement to register applied only to wage claims earned after the commencement of the bankruptcy proceedings. Wage claims earned prior to the date of the bankruptcy are, therefore, covered under the scheme without this requirement.

10. The Norwegian Government also emphasized that in Norway the duty to register as a job-seeker was considered to be an important measure aimed at promoting a well-functioning labour market. Hence, Norway considers this requirement to be reasonable and in compliance with the Directive.

11. Having examined the information provided for by the Norwegian Government, on 27 February 2013, the Authority issued a letter of formal notice to Norway (Event No 659659), in which it concluded that by maintaining in force Section 3-3 of the Wage Guarantee Regulation whereby employees were required, as a general rule, to register as job-seekers in the event of the insolvency of their employer, in order to fully assert their right to payment of outstanding wage claims, Norway had failed to fulfil its obligations arising from Articles 3 and 4 of Directive 2008/94.

12. The reply to the letter of formal notice was submitted by the Norwegian Government by letter of 6 May 2013 (ref. 12/2505-, Event No 671177). In its reply the Norwegian Government once again emphasized that it found the condition to register as a job-seeker reasonable, as it helped the employees quickly to get a new job and ensured a well-functioning labour market. Nevertheless, the Norwegian Government took note of the Authority's conclusions and committed to take the necessary steps to repeal Section 3-3 of the Wage Guarantee Regulation.

13. The case was discussed at the package meeting in Norway on 21 and 22 November 2013.[5] The representatives of the Norwegian Government informed the Authority's representatives that the necessary amendments of the Wage Guarantee Regulation had not yet been adopted and were expected to enter into force in April or May 2014.

[5] See the follow-up letter to the package meeting (Event No 691859 in Case No 74044).

2 Relevant national law

14. The Act on Wage Guarantee of 14 December 1973 No 61[6] establishes in Section 1 a guarantee for claims which cannot be met by the bankrupt estate in relation to pay and other remuneration earned during a period of up to six months, holiday pay for a period of up to 30 months, pension benefits for a period of up to six months, together with interests and costs linked to the filing the petition for bankruptcy. The amount of the claim is reduced, if the claimant has received income from third parties, including unemployment benefits. The claims are covered under the Act to the extent they are covered by Chapter 9 of the Act relating to Creditors Rights to Satisfaction of Claims of 8 June 1984 No 59.[7]

15. Section 10 of the Act on Wage Guarantee states that regulations may be issued laying down the conditions for the guarantee. This may include, in relation to claims falling due after the opening of the bankruptcy proceedings, that the employee registers with the Labour and Welfare Administration.

16. The Wage Guarantee Regulation provides in Section 3-3 that in order to be entitled to the guarantee for wage claims earned after the commencement of the bankruptcy proceedings, the employee must register within 14 days as a job-seeker with the Labour and Welfare Administration. The 14 day time limit starts to run:

> *"a) when the administrator of the estate informs the employee that the bankrupt estate will not take over the contract of employment, or*
>
> *b) one month after the bankrupt estate has given notice that it will resign from the contract of employment, or*
>
> *c) at the time the employment ceases to exist, and the employee either has been working for another employer or the estate after the commencement of bankruptcy proceedings."*

17. The duty to register applies for the duration of the guarantee period. However, Section 3-3 of the Regulation provides that the Labour and Welfare Administration may provide the guarantee, even if the employee has not complied with the duty to register, if it considers it reasonable based on the personal circumstances of the employee.

3 Relevant EEA law

18. Article 3 of Directive 2008/94 reads:

> "*Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.*
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> *The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.*"

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[6] LOV 1973-12-14 nr 61: *Lov om statsgaranti for lønnskrav ved konkurs m.v. (lønnsgarantiloven).*
[7] LOV 1984-06-08 nr 59: *Lov om fordringshavernes dekningsrett (dekningsloven).*

19. Article 4 of Directive 2008/94 provides:

> *"1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.*
>
> *2. If Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in the second paragraph of Article 3.*
>
> *Member States may include this minimum period of three months in a reference period with duration of not less than six months.*
>
> *Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee shall be used for the calculation of the minimum period.*
>
> *3. Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.*
>
> *If Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling."*

4 The Authority's Assessment

20. The objective of Directive 2008/94 is to guarantee employees a minimum of protection in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period.[8] It is for those reasons that Article 3 of the Directive requires EEA States to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4 of that directive, payment of employees' outstanding claims.

21. As stated by the Court of Justice in Case C-435/10 *Ardennen,* it is purely by way of exception that EEA States have the option, under Article 4 of the Directive, to limit the payment obligation referred to in Article 3 of the Directive. Such a limitation is possible both in respect of the duration of the period giving rise to the payment (see Article 4(2)), and the ceiling of such a payment (see Article 4(3)).[9]

22. The Court of Justice noted that Article 4 of the Directive must be interpreted strictly and in conformity with its social objective. To this effect, the cases in which it is permitted to limit the payment obligation of the guarantee institutions are listed exhaustively and the provisions concerned must be interpreted strictly, having regard to their derogatory character and the social objective of the Directive.[10]

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[8] See Joined Cases C-19/01, C-50/01 and C-84/01 *Barsotti and others* [2004] ECR I-2005, paragraph 35, and Case C-69/08 *Visciano* [2009] ECR I-6741, paragraph 27.

[9] Case C-435/10 *Ardennen*, cited above, paragraph 31.

[10] Case C-435/10 *Ardennen*, cited above, paragraph 34.

23. Based on the above, the Court of Justice concluded that the Directive must be interpreted as precluding a national rule which obliges employees to register as job-seekers in the event of the insolvency of their employer, in order to fully assert their right to payment of outstanding wage claims.[11]

24. Section 1 of the Act on Wage Guarantee establishes a guarantee which covers, *inter alia*, claims for pay and other remuneration earned during a period of up to six months and holiday pay for a period of up to 30 months. However, in order to establish this right the employee making the claim must demonstrate through registration with a public employment office that he has been actively seeking new employment (see Section 3-3 of the Wage Guarantee Regulation).

25. It follows from this procedural requirement that failure to register will, as a general rule, result in the loss of the guarantee provided under the Act on Wage Guarantee. This would be the case even if it is uncontested that the claim by itself is covered by Section 1 of the Act.

26. The Norwegian Government maintains that exceptions can be made on a case by case basis from the requirement to register (see Section 3-3 of the Wage Guarantee Regulation). From the examples provided by Norway concerning the nature of these exceptions (*Section 1 above*) it would appear that for such exceptions to apply the claimant must demonstrate to the Labour and Welfare Administration that he/she had legitimate reasons not to register. However, it follows that the consequence of not being able to establish legitimate reasons in this regard will result in the loss of the guarantee provided under the Act on Wage Guarantee.

27. The Authority takes the view that the Directive does not allow for the discretion of the EEA States to establish a restrictive general rule, such as the mandatory registration as a job-seeker, and then grant exceptions, on a case-by-case basis, *i. e.* the entitlement to receive the payment of outstanding salaries, depending on the personal circumstances of the employee. This would run counter to the social objective of the Directive as well as the principle of legal certainty.

28. As stated above, Article 4 of the Directive lays down in an exhaustive manner the cases in which EEA States are permitted to limit the payment obligation of the guarantee institutions. The provision to this effect must be interpreted strictly.

29. Consequently, and by reference to the Court of Justice's interpretation of the Directive in Case C-435/10 *Ardennen*, the Authority must conclude that by linking the guarantee in Section 1 of the Act on Wage Guarantee to compliance by the employee with a duty to register as a job-seeker, as laid down in Section 3-3 of the Wage Guarantee Regulation, Norway is in breach of its obligations arising from the Directive.

30. The Authority notes that the present case does not address the issue whether it is permissible under the Directive to provide for deduction of the amount payable based on income earned by the claimant during the notice period, either from new employment or by other means such as unemployment benefits.[12]

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[11] Case C-435/10 *Ardennen*, cited above, paragraph 39.

[12] See in this regard Case C-435/10 *Ardennen*, cited above, paragraph 37.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force a rule whereby employees are required, as a general rule, to register as job-seekers in the event of the insolvency of their employer, in order to fully assert their right to payment of outstanding wage claims, such as the rule in Section 3-3 of the Regulation on Wage Guarantee of 28 October 1998 No 999, Norway has failed to fulfil its obligations arising from Articles 3 and 4 of the Act referred to at point 24 of Annex XVIII to the EEA Agreement (*Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer*), as adapted to the EEA Agreement by Protocol 1 thereto.

Pursuant to 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, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* following notification thereof.

Done at Brussels, 12 February 2014

For the EFTA Surveillance Authority

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College Member

Xavier Lewis
Director