Legal summary of Supreme Court Judgment of 15 May 2024 in Case No. 52/2023:

The Icelandic State (Fanney Rós Þorsteinsdóttir, attorney-at-law)

versus

Eyjólfur Orri Sverrisson (Jón Sigurðsson, attorney-at-law)

Facts of the case

E worked as an aircraft mechanic with the Icelandic Transport Authority (ICETRA), his normal working place being in Reykjavík. E's normal working hours were from 8 a.m. to 4 p.m. on weekdays. He was obliged to undertake inspection visits abroad connected with his work, some of these also involving travelling outside Europe.

For some time there had been disagreement between aircraft mechanics working for ICETRA and the authority over whether the time aircraft mechanics spent travelling in connection with their work abroad was to be regarded as working time. The authority took the view that they worked eight-hour days on the weekdays on which they travelled. When travelling took place at weekends or on public holidays, the authority granted them leave days on full pay. The authority also paid the aircraft mechanics a travelling supplement in accordance with their collective agreement. The aircraft mechanics demanded, in addition, that their travelling time, in its entirety, from the time of departure from their homes until their arrival at their places of lodging abroad, should be counted as working time, and that the same should apply when they travelled back to Iceland. Thus, the dispute concerned travelling time before and after the eight-hour daytime working period on weekdays; the authority did not consider time outside the daytime working period as working hours.

In 2018 E undertook two trips. The first, at the end of February and the beginning of March, was to Tel Aviv, Israel; the second, in November, was to Jedda in Saudi Arabia. When he reported his working time, E stated as working hours the travelling time and the hours spent working abroad outside daytime working hours. ICETRA did not accept this, however, and reduced his recorded working hours accordingly when it made payments to him.

E brought an action before the courts to have part of his travelling time recognised as working time in the sense of Article 52(1) of Act No 46/1980, on Working Environment, Health and Safety in Workplaces. The Icelandic state, on the other hand, took the view that this was not active working time, and should therefore be regarded as rest time in the sense of item 2 of the same article.

Reasoned opinion

An advisory opinion was sought from the EFTA Court during the hearing of this case. The questions submitted to the EFTA Court concerned interpretation of Article 2 of Directive

2003/88/EC when employees travel in the service of, and at the behest of, their employers. More specifically, the EFTA Court was asked whether travelling time was to be regarded as working time if it fell outside daytime working hours and the employee travelled to a workplace that was not his or her regular workplace. It was also asked whether it was of significance that the journey in the service of the employer was made domestically or between countries and whether a work contribution in any form was made during the journey. The EFTA Court delivered its advisory opinion in its judgment of 15 July 2021 in Case E-11/20.

In its conclusion, the EFTA Court noted that it was settled case law that the purpose of the Directive was to lay down minimum health and safety requirements for the organisation of working time. The Directive harmonised national rules concerning, in particular, the duration of working time. Its purpose was to ensure minimum daily and weekly rest periods, breaks and maximum weekly working time. The Directive did not generally apply to the remuneration of workers, save in respect of the special case envisaged by Article 7(1) of the Directive concerning annual paid leave. However, the Directive did not prevent EEA States from applying the definition of "working time" to questions of remuneration. Whether an EEA State chose to do so or not was a matter for national law.

The EFTA Court noted that the term "working time" was defined in Article 2(1) of the Directive as any period during which the worker is working, at the employer's disposal, and carrying out his activity or duties, in accordance with national laws and/or practice. The concept of working time might be placed in opposition to rest periods according to Article 2(2), as the two were necessarily mutually exclusive. As such, the Directive did not provide for any intermediate category between working time and rest periods.

The EFTA court noted that "working time" and "rest periods" were concepts that must be interpreted in an autonomous manner in order to ensure the full effectiveness of the Directive and its uniform application across the EEA. Furthermore, the EEA States might not unilaterally make the right, which is granted directly to workers, to have working periods and corresponding rest periods duly taken into account, subject to any condition or any restriction whatsoever. Any other interpretation would frustrate the effectiveness of the Directive and undermine its objective. The Court examined whether, in a situation such as in the main proceedings, the elements of the concept of "working time" within the meaning of Article 2(1) of the Directive were present.

The first element of the concept of "working time" is that the worker must be carrying out his activity or duties in the context of the worker's employment relationship. As the Court had previously held in Case E-19/16, the journeys of a worker taken in order to perform tasks specified by his employer at a location away from his fixed or habitual place of attendance were requisite and essential for the worker to undertake dutifully those tasks. The Court noted that, as with workers undertaking regular journeys, and workers with a fixed place of work for all assignments, workers in an intermediate position must also be subject to the Directive's protection in situations where they were assigned a place of attendance other than

their fixed or habitual place of attendance. To do otherwise would distort the concept of “working time” and jeopardise the objective of the Directive to protect the safety and health of workers. Moreover, it should be noted that the concept of “working time” covered the entirety of periods of stand-by time, during which the constraints imposed on the worker were such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. Consequently, in situations such as that at issue in the main proceedings, a worker, such as E, who undertook journeys in order to perform tasks specified by his employer at a location away from his fixed or habitual place of attendance in other countries must be considered as carrying out his activity or duties in the context of the worker’s employment relationship.

The second element of the concept of “working time” in Article 2(1) of the Directive was that the worker must be at the disposal of the employer during that time. In order for a worker to be regarded as being at the disposal of his employer, that worker must be placed in a situation in which he is legally obliged to obey the instructions of his employer and carry out activities for that employer. It is settled case law that the intensity of the work performed by the worker and his output were not among the characteristic elements of the concept of “working time” within the meaning of the Directive. However, such travel time was necessary and during that time, the worker remained under the employer’s instructions, with the employer maintaining the right to cancel, change or add assignments. As such, during the necessary travel time, which generally could not be shortened, the worker was unable to use his time freely and pursue his own interests, thus remaining at his employer’s disposal. A worker travelling by air was unable to dispose freely of his time and pursue his own interests in an unrestricted manner, as he was unable to remove himself from the working environment. Moreover, the worker was undertaking a journey under the instructions of his employer. While travelling by air, there might be periods of professional inactivity, and/or periods when the worker could not be contacted. However, such periods were inherent to the form of transport chosen by the employer.

The third element of the concept of “working time” was that the worker must be working during that period of time. An inherent element of requiring a worker to be present at locations other than his fixed or habitual place of attendance was that such an arrangement denied the worker the ability to determine the distance of his commute. Rather, the worker was under a duty to spend his time travelling to a location removed from either his workplace or his home. In this connection, the Court noted that including necessary travelling time in working time was indispensable in order to protect employees’ safety and health. As was mentioned in recital 4 of the Directive, that objective should not be subordinated to purely economic considerations. If a worker such as E were required to undertake certain assignments away from his habitual place of attendance, then travelling to and from that location must be considered an intrinsic aspect of his work. As a consequence, the necessary travel time must be considered as "working time" for the purposes of Article 2(l) of the

Directive and to that end, it was irrelevant whether the hours spent travelling fell within or outside the worker's normal working hours.

In its answer, the EFTA Court stated that collective agreements could not affect the definition or scope of working time as defined by the Directive and that the term included time spent travelling of the type under examination in this case. Furthermore, the Court found that it was immaterial whether the journey was made to a location within the EEA or to or from third countries providing that the employment agreement was governed by the national law of an EEA State.

In accordance with the foregoing, the answers given by the EFTA Court to the questions referred to it by the Reykjavík District Court were as follows:

1. The necessary time spent travelling, outside normal working hours, by a worker, such as the plaintiff in the main proceedings, to a location other than his fixed or habitual place of attendance in order to carry out his activity or duties in that other location, as required by his employer, constitutes "working time" within the meaning of Article 2(1) of 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. It is immaterial whether that journey is made entirely within the EEA or to or from third countries if the employment agreement is established under and governed by the national law of an EEA State.

2. No assessment of the intensity of the work performed while travelling is required.

Legislation and Collective Agreement

According to Article 1 of the Act No 46/1980 on Working Environment, Health and Safety in Workplaces, one of the purposes of that act is to seek to ensure a safe and healthy working environment. Chapter IX of the act addresses rest time, holidays and maximum working hours. Article 52 of the Working Environment, Health and Safety in Workplaces Act, as amended by Act No 68/2003, reads:

1. *Working time*: The time during which a worker is engaged in work, at the disposal of the employer and carrying out his/her activity or duties.

2. *Rest time*: Time that is not counted as working time.

The explanatory notes to Article 52(1) of Act No 46/1980 in the commentary to the bill which became Act No. 68/2003, stated the following:

> The term "working time" as used in item 1 refers to active working time, i.e. the time during which the worker is working, at the employer's disposal and doing his job or discharging his obligations. Rest time, during which no working contribution is required from the worker, refreshment breaks, paid waiting periods, time spent

> travelling to and from the workplace or habitual place of attendance and special holidays do not come under this definition of working time, even though payments are made in respect of them, as the definition refers to active working time, not paid working time. Examples of time that is not counted as active working time are: refreshment and meal breaks, even though they are covered by payments, stand-by shifts covering for other staff, stand-by shifts when one is available for call-outs, "security shifts" and the like, providing that the worker is not actually called out to work. If, on the other hand, the worker is called out, then the time during which he is at work is counted as active working time.

Act No. 68/2003 made the appropriate amendments to Act No. 46/1980 in connection with the transposition of Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time, as amended by Council Directive 2000/34/EC. That directive was replaced by the aforementioned Council Directive 2003/88/EC of 4 November 2003, on the same topic. The latter directive was then incorporated into the EEA Agreement by the Decision of the EEA Joint Committee, No. 45/2004 of 23 April 2004.

The purpose and scope of Directive 2003/88/EC are stated in Article 1. Paragraph 1 of that article states that the Directive lays down minimum safety and health requirements for the organisation of working time. Paragraph 2 then states that the Directive applies to minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time, and to certain aspects of night work, shift work and patterns of work. Article 1 of the older directive, No. 93/104/EC, contained these provisions in identical wording.

Paragraphs 1 and 2 of Article 2 of Directive 2003/88/EC contain the following provisions, which are substantively identical to those of the same article in the older directive, No. 93/104/EC:

> 1. "working time": means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;
>
> 2. "rest time": any period which is not working time.

Under Article 9(1) of the Public Employees' Collective Agreements Act, No. 94/1986, collective agreements are to set out provisions on regular wages, working time, including work sessions (*vinnuvökur*), overtime pay, leave, travelling expenses, meal facilities, meal costs, insurance, vocational training and other matters as agreed by the contracting parties.

When E travelled on behalf of ICETRA in 2018, the employment relationship between him and the authority was governed by the collective agreement between the Union of Icelandic Aircraft Mechanics, on behalf of its members working for ICETRA, and the Minister of Finance and Economic Affairs, on behalf of the Treasury, applying from 1 February 2018 – 29 February 2020. The collective agreement states, in Section 2.3.1: "'Overtime' means the time worked in addition to specified daily work hours or a shift of an employee as well as work carried out in addition to the hours required on a weekly basis, even though they fall within daytime working hours." Section 5.5 of the Collective Agreement, entitled "Travelling time abroad", reads:

> When an employee goes abroad at the initiative of the employer and on the employer's behalf, the payment for such inconvenience shall be as follows:
>
> If the departure of a flight is on a business day before 10:00 and/or arrival after 15:00 the employee shall receive a payment of three hours with a premium of 33.33% pursuant to Section 1.6.1 in each instance.
>
> On general and statutory holidays, the corresponding payment shall amount to six hours with a premium of 55% pursuant to Section 1.6.1 irrespective of the time of day of the flight.
>
> It is permissible to agree on leave instead of payment for travelling time in such a manner that a 33.33% premium corresponds to 20 minutes of leave and a 55% premium corresponds to 33 minutes of leave.

Conclusion

The Supreme Court referred to what is stated in item 1 of Article 52 of Act No. 46/1980, i.e., that working time is time during which a worker is engaged in work, at the disposal of the employer and carrying out his/her activity or duties. This provision gave effect in Icelandic law to a definition of the term parallel to that in Directive 93/104/EC, which was replaced by the currently valid Directive 2003/88/EC.

The Supreme Court noted that under Article 3 of Act No. 2/1993, on the European Economic Area, statutes and regulations are to be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules based thereon. Accordingly, such legal interpretation is to allow for the wording of Icelandic statutes as having, to the extent possible, a meaning compatible with those rules and as closely as possible consistent with the common rules that are supposed to apply in the European Economic Area. When statutes were worded in the same way as the EEA rules, as was the case in the present instance, it was to be assumed that they had the same substance as those rules they were designed to implement. Thus, judgments to which the Icelandic state had referred were not relevant, as discrepancies were present between the legislation on which they were based and the EEA rules, and therefore the law was to be followed as it was correctly interpreted without regard to EEA rules. The Supreme Court had repeatedly endorsed this conclusion, as was stated in further detail in paragraph 39 of its judgment in Case No. 24/2023.

The Supreme Court did not concur with the Icelandic state that, in the light of the interpretative materials, only “active” working time could be regarded as working time in the sense of item 1 of Article 52 of Act No. 46/1980. The Court noted that comments in the preparatory work of the legislation could not result in a statute implementing an identically worded EEA rule being interpreted in manner different from that applying in the European Economic Area, as that would be at variance with Article 3 of Act No. 2/1993, which was intended to promote the prevalence of the same rules throughout the EEA. The Court took the view that if it were the legislator’s intention to make provisions that diverged from what

followed from Iceland's obligations under the EEA Agreement, then this would have to be stated directly in law.

The Supreme Court noted that although advisory opinions from the EFTA Court were non-binding in Icelandic law, they had been taken into account in case law involving the interpretation of EEA rules. This was based on the fundamental principle of the EEA Agreement, and of Act No. 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court, regarding the interpretation of the agreement, that efforts were to be made to promote consistency in its interpretation. The aim of this was to create a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition, as was stated in the recitals to the EEA Agreement.

The Supreme Court could not consider that the Icelandic state had advanced any arguments against the resolution of the case being based on an advisory opinion. On the contrary, the opinion was in conformity both with the EFTA Court's earlier opinion, expressed in its judgment in Case E-19/16, and with the judgment of the European Court in Case C-266/14. In those cases, an employee's travelling time to work outside his normal place of work had been regarded as working time in the sense of Article 2(1) of Directive 2003/88/EC, and these resolutions were considered as being of significance in the interpretation of the EEA rules applying in the present case. Accordingly, and taking the EFTA Court's advisory opinion into account, the Court based its judgment, on the one hand, on the view that time spent travelling outside normal working hours to a place of attendance other than the worker's normal place of attendance was to be regarded as working time in the sense of the Directive and, on the other, that it was irrelevant whether the travelling took place within or outside the EEA, providing that the employment contract was subject to the law of an EEA State.

In accordance with the foregoing, the Court ruled that, in conformity with Article 3 of Act No. 2/1993, the term "working time" in the sense of Article 52(1) of Act No. 46/1980 was to be interpreted in accordance with the identically worded provision of Article 2(1) of Directive 2003/88/EC as this had been interpreted by the EFTA Court. Consequently, E's travelling time in the aforementioned working trips in the service of ICETRA was to be regarded as working time in the sense of this provision.