JUDGMENT OF THE COURT
13 December 2019

(Directive 2006/54/EC – employment and working conditions – parental benefits)

In Case E-1/18,

EFTA Surveillance Authority, represented by Carsten Zatschler, Catherine Howdle, Claire Simpson and Erlend Leonhardsen, Members of the Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Kristin Hallsjø Aarvik, Ketil Bøe Moen, advocates, Office of the Attorney General (Civil Affairs), and Ingunn Jansen, Senior Advisor, Ministry of Foreign Affairs, acting as Agents,

defendant,

APPLICATION seeking a declaration that, by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to parental benefits dependent on the mother's situation whereas the mother's entitlement is not dependent on the father's situation, Norway has failed to fulfil its obligations under Article 14(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)),

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann (Judge-Rapporteur), and Siri Teigum (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicant and the defendant, and the written observations by the European Commission ("the Commission"), represented by Anna Szmytkowska and Jonathan Tomkin, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Claire Simpson and Erlend Leonhardsen, and the defendant, represented by Ketil Bøe Moen and Kristin Hallsjø Aarvik at the hearing on 5 February 2019,

gives the following

Judgment

I Introduction

1 By an application lodged at the Court Registry on 13 July 2018, the EFTA Surveillance Authority ("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"), seeking a declaration that by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to parental benefits dependent on the mother's situation whereas the mother's entitlement is not dependent on the father's situation, Norway has failed to fulfil its obligations under Article 14(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).

2 Norway contests the action.

II Legal background

EEA law

3 Article 70 of the Agreement on the European Economic Area ("EEA" or "EEA Agreement") reads:

The Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII.

The Equal Treatment Directive

4 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23 and EEA Supplement 2012 No 35, p. 450) ("the Equal Treatment Directive") was incorporated into the EEA Agreement with certain adaptations at point 21b of Annex XVIII to the Agreement by Decision of the EEA Joint Committee No 33/2008 of 14 March 2008 (OJ 2008 L 182, p. 30, and EEA Supplement 2008 No 42, p. 18) ("Decision No 33/2008"). Constitutional requirements were indicated and the decision entered into force on 1 February 2009.

5 Recitals 12 to 16 of the Equal Treatment Directive read:

(12) Specific measures should be adopted to ensure the implementation of the principle of equal treatment in occupational social security schemes and to define its scope more clearly.

(13) In its judgment of 17 May 1990 in Case C-262/88, the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Cases C-7/93 and C-351/00, that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.

(15) The Court of Justice has confirmed that whilst the contributions of male and female workers to a defined-benefit pension scheme are covered by Article 141 of the Treaty, any inequality in employers' contributions paid under funded defined-benefit schemes which is due to the use of actuarial factors differing according to sex is not to be assessed in the light of that same provision.

(16) By way of example, in the case of funded defined-benefit schemes, certain elements, such as conversion into a capital sum of part of a periodic pension, transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension or a reduced pension where the worker opts to take earlier retirement, may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented.

6 Article 1 of the Equal Treatment Directive reads:

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

7 Article 2(1)(a), (b) and (c) of the Equal Treatment Directive reads:

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

8 Article 3 of the Equal Treatment Directive, with the adaption provided for in Decision No 33/2008, reads:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

9 Article 14(1)(c) of the Equal Treatment Directive reads:

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

The Pregnant Workers Directive

10 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) ("the Pregnant Workers Directive") was incorporated at point 16d of Annex XVIII to the Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994 (OJ 1994 L 160, p. 1, and EEA Supplement 1994 No 17, p. 1.). The decision entered into force on 1 July 1994, and the time limit for implementing the Directive expired on 19 October 1994 pursuant to its Article 14. The Pregnant Workers Directive was amended by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (OJ 2007 L 165, p. 21, and EEA Supplement 2014 No 6, p. 149) and Directive 2014/27/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 65, p. 1). These two directives were added to point 16d of Annex XVIII to the Agreement by Decisions of the EEA Joint Committee No 105/2008 of 26 September 2008 (OJ 2008 L 309, p. 31, and EEA Supplement 2008 No 70, p. 20), and No 239/2014 of 24 October 2014 (OJ 2015 L 230, p. 46, and EEA Supplement 2015 No 52, p. 45) respectively.

11 Article 1(1) of the Pregnant Workers Directive reads:

1. The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.

12 Article 8 of the Pregnant Workers Directive reads:

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

13 Article 11(2)(b) and Article 11(3) of the Pregnant Workers Directive read:

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognized in this Article, it shall be provided that:

…

2. in the case referred to in Article 8, the following must be ensured:

…

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;

The Parental Leave Directive

14 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13, and EEA Supplement 2015 No 58, p. 590) ("the Parental Leave Directive") was incorporated into the EEA Agreement at point 31a of Annex XVIII to the Agreement by Decision of the EEA Joint Committee No 40/2011 of 1 April 2011 (OJ 2011 L 171, p. 41, and EEA Supplement 2011 No 37, p. 48). Constitutional requirements were indicated and the decision entered into force on 1 May 2012.

15 The Annex to the Parental Leave Directive is entitled "Framework Agreement on Parental Leave (revised)".

16 Points 18 to 20 of the General Considerations to the Framework Agreement on Parental Leave read:

18. Whereas Member States should provide for the maintenance of entitlements to benefits in kind under sickness insurance during the minimum period of parental leave;

19. Whereas Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave as well as the role of income among other factors in the take-up of parental leave when implementing this agreement;

20. Whereas experiences in Member States have shown that the level of income during parental leave is one factor that influences the take up by parents, especially fathers;

17 Clause 2 of the Framework Agreement on Parental Leave reads:

1. This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.

2. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.

18 Point 5 second subparagraph of Clause 5 of the Framework Agreement on Parental Leave reads:

All matters regarding income in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law, collective agreements and/or practice, taking into account the role of income – among other factors – in the take-up of parental leave.

National law[1]

The Working Environment Act

19 Pursuant to Section 12-2 of the Act of 17 June 2005 No 62 on Working Environment, Working Hours and Employment Protection (*Lov 17. juni 2005 No. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)*) ("the Working Environment Act"), a woman is entitled to 12 weeks leave during the pregnancy. The first six weeks after the child is born are compulsory maternity leave, pursuant to Section 12-4 of the Working Environment Act.

20 Pursuant to Section 12-5(1) of the Working Environment Act, parents have the right to a total of 12 months parental leave, regardless of whether this is pursuant to Sections 12-2 and 12-4, or pursuant to the National Insurance Act.

The National Insurance Act

21 The Act of 28 February 1997 No 19 on National Insurance (*Lov 28. februar 1997 No. 19 om folketrygd (folketrygdloven)*) ("the National Insurance Act") establishes the entitlement of parents to parental benefits, i.e. benefits from the National Insurance Scheme in connection with pregnancy, birth or adoption of a child. Its most recent amendments took effect after the expiry of the two-month period for compliance with ESA's reasoned opinion of 15 November 2017. The following provisions of the National Insurance Act are reproduced as they read at the material time, i.e. at the end of the two-month period for compliance with ESA's reasoned opinion.

22 Section 14-5 of the National Insurance Act reads:

Parental benefit can be provided to the child's mother and father at birth and by adoption of children under the age of 15.

[1] All translations of national provisions are unofficial.

…

23 Section 14-6 of the National Insurance Act reads:

The right to parental benefits is obtained through employment activities. Both the mother and the father may obtain the right to parental benefits by being employed with pensionable income (Section 3-15) for at least six of the last ten months before that person starts receiving the benefits, see Section 14-10, first and second paragraph, and 14-14 second paragraph.…

Equal to employment activities is a period when subsistence benefits are paid in the form of unemployment benefits during unemployment under Chapter 4, sickness benefits under Chapter 8, benefits during a child's illness etc. under Chapter 9 or work assessment allowance under Chapter 11, or either parental benefits or pregnancy benefits under this chapter.

Equal to employment activities is also a period with

a) salary from the employer during leave in connection with further education,

b) severance pay pursuant to Section 13(6) of the Act of 4 March 1983 No. 3 on the State's civil servants etc.,

c) severance pay pursuant to the third paragraph of Section 24 of the Act of 28 July 1959 No. 26 on the State Pension fund,

d) severance pay from the employer,

e) military service or mandatory civilian defence duty.

24 Section 14-7 of the National Insurance Act reads:

Parental benefits for each of the parents are calculated on the basis of their income according to the same rules as for sickness benefits from the social security, see Chapter 8. Parental benefit for self-employed persons is nevertheless provided with 100 per cent of the calculation basis. The basis for calculation must be at least half of the basic amount. Parental benefit is not granted for the part of the income that exceeds six times the basic amount.

For a member who receives work clarification allowance when the benefit period for parental benefit starts, paid work clarification allowance including child allowance shall be included in the calculation basis.

For a woman who receives unemployment benefit during unemployment or sickness benefit pursuant to Section 8-49 when the benefit period for parental benefit starts, the basis for calculation shall be determined on the basis of the income for the best six of the last ten calendar months before her withdrawal, see Section 14-10 first and second paragraph, if this gives a higher basis than according to the first paragraph.

For a member who serves military service or compulsory civil defence service during the vesting period pursuant to Section 14-6, the basis for calculation shall be at least equivalent to an annual income of three times the basic amount, if the service has been or was intended to last more than 28 days.

…

25 Section 14-9 of the National Insurance Act reads:

In case of birth, the benefit period is 245 benefit days (49 weeks) with full rate or 295 benefit days (59 weeks) with reduced rate. The benefit period after birth is 230 benefit days (46 weeks) with full rate or 280 benefit days (56 weeks) with reduced rate.

In case of adoption, the benefit period is 230 benefit days (46 weeks) with full rate or 280 benefit days (56 weeks) with reduced rate.

Full rate implies that the parental benefit is paid with 100 per cent of the calculation basis. Reduced rate means that the parental benefit is paid with 80 per cent of the calculation basis. The beneficiary chooses between full or reduced rate at the start of the benefit period, and the choice is valid for the whole benefit period. If both parents receive parental benefits, they must choose the same rate.

If the mother gives birth to multiple children at the same time or several children are adopted at the same time, the benefit period is extended with 25 benefit days (5 weeks) for each child that exceeds one if full rate is chosen. If reduced rate is chosen, the benefit period is extended with 35 benefit days (7 weeks). The provisions in Section 14-10 first and sixth paragraph apply accordingly.

The benefit period can be shared between the parents if both parents fulfil the conditions for right to parental benefits in accordance with Section 14-6. Exempted from sharing are the last 15 benefit days (3 weeks) before and the first 30 benefit days (6 weeks) after the birth, which is the part of the benefit period that is reserved for the mother at birth. Exempted from sharing are also 10 weeks that are reserved for the father (father's quota) and 10 weeks that are reserved for the mother (mother's quota), see Section 14-12. The first 6 weeks after birth that are reserved for the mother, are included in the mother's quota. The mother's quota cannot be taken before birth.

…

26 Section 14-12 of the National Insurance Act reads:

If both parents satisfy the conditions for entitlement to parental benefits, 50 benefit days (10 weeks) of the benefit period are reserved for the father (father's quota) and 50 benefit days (10 weeks) of the benefit period are reserved for the mother (mother's quota). The first 30 benefit days (6 weeks) after birth that are reserved for the mother, are part of the mother's quota.

The father can take the father's quota irrespective of whether the conditions in Section 14-13 first paragraph are fulfilled….

…

27 Section 14-13 of the National Insurance Act reads:

The father can receive parental benefits only if the mother after birth or adoption

a) starts working,

b) takes officially approved full-time education,

c) takes officially approved education combined with work that together provides full-time occupation,

d) due to illness or injury is dependent on help to look after the child,

e) is hospitalised,

f) attends a full-time introductory programme pursuant to Chapter 2 of the Introduction Act,

g) attends a full-time qualification programme under the Act of 18 December 2009 No 131 on Social Services in the Welfare Administration.

If the mother works part-time after the birth or adoption, the father's parental benefits are reduced corresponding to the reduction in the mother's working hours. If the mother's work percentage amounts to at least 75 per cent of full working hours, the father's parental benefits are calculated in accordance with his work percentage.

If the mother receives a partial parental benefit, see Section 14-16, the father's parental benefits under letter a) cannot constitute a larger part of the full benefit than that which corresponds to the mother's work percentage.

…

28 Section 14-14 of the National Insurance Act reads:

If only the father has the right to parental benefits, the benefit period is limited to the benefit period after the birth or the taking into care, cf. Section 14-9. Both in case of birth and adoption deduction shall be made for the part of the benefit period reserved for the mother after birth, cf. Section 14-9 fifth paragraph. It is a prerequisite that the conditions in Section 14-13 are fulfilled during the period and within the benefit period after the birth or the taking into care, see Section 14-9 first and second paragraphs. The father's benefit period is reduced continuously when the conditions in Section 14-13 are not fulfilled.

The father can receive parental benefits only when the conditions in Section 14-13 are fulfilled.

Irrespective of the conditions in Section 14-13, the father can receive parental benefits in as many benefit days as the duration of the father's quota, see Section

14-12 first paragraph, if the mother receives a disability pension from the national insurance.

29 Section 14-16 of the National Insurance Act reads:

Graded parental allowance is paid for part-time work. The withdrawal shall correspond to the difference between 100 per cent position and the part-time position of the recipient, see nevertheless Section 14-13.

The part of the benefit period reserved for the mother is exempt from graded withdrawals, see Section 14-9, sixth paragraph.

The parents may collect graded parental allowance at the same time in accordance with the provisions of Section 14-10 sixth paragraph and Section 14-13 third paragraph.

If the withdrawal is less than 100 per cent of the chosen rate, see Section 14-9, third paragraph, the withdrawal is extended accordingly.

It is a condition for graded withdrawal that there is a written agreement with the employer about part-time work. Each parent can only take graded withdrawals based on agreement with one employer at a time. For self-employed persons and freelancers, there is a condition for graded withdrawal that there is a written payment agreement with the Ministry of Labour and Welfare.

III Facts and pre-litigation procedure

30 ESA opened a case, on its own initiative, with a view to assessing whether the Norwegian provisions concerning the right to parental leave comply with the Parental Leave Directive and the Equal Treatment Directive.

31 ESA informed Norway of the opening of the case by a letter dated 28 October 2015 and requested information from Norway. Norway replied by letter on 15 December 2015.

32 On 13 July 2016, ESA sent Norway a letter of formal notice, concluding that by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which renders the fathers' entitlement to paid parental leave dependent upon the mother's situation whilst this is reciprocally not the case, Norway has failed to fulfil its obligations arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Equal Treatment Directive as adapted to the EEA Agreement by Protocol I thereto, and Clauses 2.1 and 2.2 of the Annex to the Parental Leave Directive, as adapted to the EEA Agreement by Protocol I thereto.

33 By letter dated 10 October 2016, Norway submitted to ESA its formal observations on the letter of formal notice, rejecting the view adopted by ESA.

34 On 15 November 2017, ESA delivered its reasoned opinion, in which it did not maintain its position regarding a breach of the Parental Leave Directive. However, ESA concluded that by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the fathers' entitlement to paid parental leave dependent upon the mother's situation whilst this is not the case in reverse circumstances, Norway has failed to fulfil its obligations arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Equal Treatment Directive as adapted to the EEA Agreement by Protocol I thereto. Pursuant to the second paragraph of Article 31 SCA, ESA required Norway to take the measures necessary to comply with the reasoned opinion within two months following its receipt.

35 By letter dated 22 January 2018, Norway responded to the reasoned opinion, maintaining its position and providing some additional comments.

IV Procedure and forms of order sought

36 On 13 July 2018, ESA brought an action under the second paragraph of Article 31 SCA requesting the Court to:

1. *Declare that, by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to parental benefits dependent on the mother's situation whereas the mother's entitlement is not dependent on the father's situation, Norway has failed to fulfil its obligations under Article 14(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).*

2. *Order the Kingdom of Norway to pay the costs of these proceedings.*

37 Both ESA's letter of formal notice and the reasoned opinion refer to Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Equal Treatment Directive. The reference to Article 2(1)(c) was not included in ESA's subsequent application to the Court.

38 On 18 September 2018, Norway submitted a statement of defence, contesting the application and requesting the Court to declare that:

1. *The Application is unfounded.*

2. *The EFTA Surveillance Authority bears the cost of the proceedings.*

39 On 19 October 2018, ESA submitted its reply. On 22 November 2018, Norway submitted its rejoinder.

40 On 16 November 2018, the Commission submitted written observations.

41 The oral hearing was held on 5 February 2019. After the closure of the oral procedure, Judge Per Christiansen was prevented from taking further part in the case. By letter of 16 May 2019, the Court informed the parties that an ad hoc Judge would be appointed in accordance with the fourth paragraph of Article 30 SCA to replace Judge Christiansen and to complete the Court. In the same letter, the parties were given the opportunity to request, by 22 May 2019, a new oral hearing. By an email of 21 May 2019 and a letter of 22 May 2019, respectively, Norway and ESA informed the Court that they would not request a new oral hearing. Accordingly, on 4 July 2019, the Court informed the parties that it had appointed Siri Teigum to act as an ad hoc Judge in the present case and that it had decided to proceed to judgment without a new oral hearing.

42 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

V Pleas and arguments submitted to the Court

ESA

43 ESA considers that the provisions at issue concern "employment and working conditions", within the meaning of Article 14(1)(c) of the Equal Treatment Directive. This follows already from the judgment in *Maïstrellis* (reference is made to the judgment in *Maïstrellis*, C-222/14, EU:C:2015:473). In previous cases too, the ECJ proceeded on the basis that the leave and associated allowance were working conditions that fell *prima facie* within the scope of the old Equal Treatment Directive (reference is made to the judgment in *Hofmann*, 184/83, EU:C:1984:273, paragraphs 22 and 25 to 26).

44 In addition, ESA maintains that social security provisions fall within the scope of the Equal Treatment Directive, provided that their subject-matter is "access to employment, including vocational training and promotion, or working conditions", (reference is made to the judgments in *Jackson and Cresswell*, Joined Cases C-63/91 and C-64/91, EU:C:1992:329, paragraph 28; and in *Meyers*, C-116/94, EU:C:1995:247, paragraphs 12, 13, 17, 20, 21 and 24). According to ESA, two criteria are significant in assessing whether a scheme may be considered to fall under "working and employment conditions" within the meaning of the Equal Treatment Directive: (1) the purpose and function of the benefit; and (2) the conditions for granting the benefit and its links to employment.

45 In this regard, ESA submits that, in general terms, the purpose of the benefits at issue is to secure income for parents in connection with pregnancy, birth and adoption. In addition, according to previous legislative proposals in relation to the National Insurance Act, the rules aim, inter alia, to ensure that mothers and fathers can combine care for the child with employment activities. Moreover, the activity

requirement, as such, may serve the aims of promoting shared parenting and incentivising women to return to work.

46 In addition, ESA considers that also the right to parental benefits in this case is intimately connected to employment. First, the entitlement to these benefits depends, pursuant to Section 14-6 of the National Insurance Act, on whether the parent concerned has been working for a sufficient period prior to the benefit period. Second, the amount of the parental benefit will be calculated by reference to the salary of the parent concerned. Third, the benefit depends, from the father's perspective, on whether the mother does or does not work (or is in a situation deemed equivalent to work) after birth/adoption, and, if so, how much the mother works. Fourth, from the mother's perspective, the relevant provisions require the mother to go back to work (or be in a situation deemed equivalent to work) after birth/adoption; if not, the father will not receive any parental benefits. Again, how much the mother works is relevant.

47 ESA submits that, first, as regards Norway's argument to the effect that the criteria found in the National Insurance Act for granting the benefit at issue are not related to employment, that the wording of the legislation expressly refers to "employment activities". This reference is key in order to determine the purpose of the rules. It is accordingly, irrelevant that certain other activities are considered equal to employment activities. Second, as regards Norway's argument that unemployment does not automatically alter the right to parental benefits, rendering them thereby unrelated to "employment and working conditions," ESA submits that in the present case, just as in *Meyers*, the right to benefits is conferred through employment activities. Accordingly, it is also irrelevant that the right to such benefits, once earned, will not be altered by subsequent unemployment.

48 In addition, ESA submits that Norway's choice to grant paid parental leave through a combination of legislative acts and not through a single act should not, of itself, change the outcome of the case. It is true that without provisions on leave, an employee cannot stop working; however, without provisions on benefits an employee may not be able to afford to take the leave at all. The provisions work hand in hand. For example, recitals 19 and 20 of the Framework Agreement on Parental Leave recognise the role of income on the take-up of parental leave.

49 On the basis of this, ESA submits that the provisions constitute unjustified discrimination in breach of Article 14(1)(c) of the Equal Treatment Directive. Under the relevant provisions, the question of whether a father is entitled (in full, in part, or, at all) to parental benefits, depends on whether the mother is or has been working. In contrast, the mother's rights to such benefits are independent of the father's activities. Since mothers and fathers are in a comparable situation when it comes to bringing up children, the different treatment of mothers and fathers in relation to parental benefits, unlawfully discriminates against fathers on grounds of sex, in breach of Article 14(1)(c) of the Equal Treatment Directive (reference is made to the judgment in *Maïstrellis*, cited above, paragraph 47; and the judgment in *Roca Álvarez*, C-104/09, EU:C:2010:561, paragraph 24). Such discrimination cannot be justified as "positive action" under Article 3 of the Equal Treatment

Directive. Furthermore, Norway failed to meet the necessary standard in relation to the burden of proof required to establish the positive impact of the provisions at issue and their proportionality.

The Kingdom of Norway

50 At the outset, Norway does not agree with ESA's statement that the facts and issues in *Maïstrellis* are similar to those in the present case. *Maïstrellis* concerned the right to parental leave, not the right to a social security benefit, such as parental benefits. It is the right to leave that enables parents to interrupt their professional activities and, as such, has consequences for the exercise of such professional activities (reference is made to the judgment in *Maïstrellis*, cited above, paragraph 45). Consequently, the present case must be distinguished from *Maïstrellis*.

51 According to Norway, the case at issue concerns benefits, which are provided to parents pursuant to a social security scheme. It is established case-law that such a scheme "will fall within the scope of that directive only if the subject-matter is access to employment, including vocational training and promotion, or working conditions" (reference is made to the judgment in *Jackson and Cresswell*, cited above, paragraph 28). The subject-matter of the parental benefits at issue is not access to employment or working conditions. In particular, since in the present case – like the situation in *Jackson and Cresswell* - parental benefits are granted merely to provide parents with an income in connection with the birth or adoption of a child.

52 In this regard, Norway submits that the right to parental benefits is also not "intimately connected with employment". Furthermore, while parents qualify for parental benefits through occupational activities, it is not – unlike the situation in *Meyers* – a condition for receiving parental benefits that the recipient is engaged in remunerative work when he or she receives parental benefits. On the contrary, a parent may also receive parental benefits when he or she is unemployed (voluntarily or involuntarily). However, a parent cannot work and receive benefits at the same time (unless the parent works and claims parental benefits part time pursuant to Section 14-16 of the National Insurance Act).

53 Norway also submits that the fact that the criteria of Section 14-6 of the National Insurance Act may incentivise parents to seek employment prior to starting a family in order to qualify for parental benefits is not sufficient for parental benefits to be linked to "access to employment" and fall within the scope of the Equal Treatment Directive.

54 Moreover, at the hearing, Norway maintained that ESA's statement to the effect that the benefit is calculated on basis of the parents' salary is inaccurate. According to Section 14-7 of the National Insurance Act, the parental benefits are calculated according to the parents' income, not their salary. Income within the meaning of that provision may or may not originate from employment. For example, in relation to parents who are unemployed, the benefits will be calculated on the basis of the social security benefits they receive. Furthermore, Norway emphasised that, a

family will not "lose out financially", because of the application of the activity requirement. Norway simply decided to grant parental benefits only to the mother, in a situation when both parents decide to stay at home at the same time.

55 In addition, according to Norway, the relevant test is not, as submitted by ESA, whether an employee can afford to take leave without receiving social security benefits to determine whether such benefits are "employment and working conditions". Unlike under the Pregnant Workers Directive, Member States are not obliged, under the Parental Leave Directive to provide social security benefits during the minimum period of parental leave provided to workers under the Parental Leave Directive. Under EEA law, the provisions on leave and provisions on benefits do not go hand in hand. An obligation to provide parental benefits to both parents on identical terms can also not be derived from the Equal Treatment Directive.

56 Finally, Norway submits that there exists no unjustified discrimination, within the meaning of Article 14(1)(c) of the Equal Treatment Directive. However, even if the relevant provisions in the present case were considered to create a (direct or indirect) difference in treatment between men and women, such a difference could still be justified on the basis of Article 3 of the Equal Treatment Directive. There can be no doubt that the measure at issue provides a clear advantage to women, both generally and in the long term, and that it has a positive effect on the inequalities between men and women in respect of family obligations and working life. Fathers are more likely to assume a larger share of family obligations if the mother returns to work in the period where the father receives benefits, so that the father has the main responsibility for, and is the primary caretaker of, the child.

The Commission

57 The Commission overall supports ESA's position that the system of parental benefits at issue establishes discriminatory employment and working conditions. In particular, as regards the objective of affording a parent the opportunity to combine giving care to a child with the pursuit of an employed activity, the Commission considers men and women to be in a comparable situation. The unequal treatment detailed in ESA's application cannot be justified as positive action. Furthermore, the national provisions cannot be considered to confer a specific advantage that facilitates the pursuit of a vocational activity or compensates for disadvantages in professional careers. On the contrary, the provisions establish discriminatory criteria as regards the eligibility for the benefits in question.

VI Findings of the Court

58 At the outset, the Court notes that the parties agree that conditions for granting parental leave under the Working Environment Act constitute employment and working conditions within the meaning of Article 14(1)(c) of the Equal Treatment Directive. The provisions of the Norwegian legislation that are challenged by ESA in its application are set out in Section 14 of the National Insurance Act and

concern a benefit granted primarily during periods of parental leave through the Norwegian social security scheme.

59 The present dispute concerns the qualification of the conditions for granting parental benefits under the National Insurance Act. It is necessary to address whether the conditions governing the entitlement to parental benefits granted by the State under a social security scheme, primarily during periods of parental leave, constitute "employment and working conditions" within the meaning of Article 14(1)(c) of the Equal Treatment Directive.

60 Accordingly, the present case concerns the application of the Equal Treatment Directive to matters of a national social security scheme.

61 In this regard, it must be recalled, that while the Equal Treatment Directive was, in principle, not intended to apply to matters related to a national social security scheme, as can be inferred in particular from recitals 12 to 16 of the Equal Treatment Directive, an exclusion of social security matters from its scope must be interpreted strictly, in view of the fundamental importance of the principle of equal treatment (compare, the judgments in *Jackson and Cresswell*, cited above, paragraphs 25 and 26; and *Meyers*, cited above, paragraph 12; and the case-law cited).

62 It follows that a scheme of benefits cannot be excluded from the scope of the Equal Treatment Directive solely because, formally, it is part of a national social security system. Such a scheme may come within the scope of the Equal Treatment Directive if its subject-matter is employment and working conditions, including dismissals and pay. This will be the case if the scheme is necessarily linked to an employment relationship by its aim and function and the conditions for obtaining benefits under the scheme (compare, the judgment in *Meyers*, cited above, paragraph 24). However, the Equal Treatment Directive is not rendered applicable merely because the conditions of entitlement to receive benefits may affect employment and working conditions (compare, the judgments in *Jackson and Cresswell*, cited above, paragraphs 27, 28 and 31; and in *Meyers*, cited above, paragraph 13).

63 As regards the aim and function of the parental benefits at issue, both ESA and Norway have submitted that, according to Section 14-1 of the National Insurance Act, the general purpose of the scheme is to provide parents with income in relation to the birth or adoption of a child. In this respect, parental benefits ensure that parents are able to meet their needs when caring for their child and combine care for the child with employment activities.

64 As maintained by ESA, the granting of parental benefits affects workers' ability to exercise their right to parental leave. This role of income as a factor in parents' take-up of parental leave is also acknowledged in point 19 of the General Considerations to the Framework Agreement on Parental Leave annexed to the Parental Leave Directive.

65 However, as in *Jackson and Cresswell*, cited above, the purpose of the benefits in question is to provide income support, which is in and of itself unrelated to an employment relationship, and does not affect the parents' right to parental leave as such. The parental benefits at issue do not directly affect the employment relationship of parents. By contrast, in *Meyers*, cited above, the purpose of the family credit at issue was to keep low-paid workers in employment.

66 ESA further submitted, that parental benefits concern employment and working conditions, since Section 14-6 of the National Insurance Act provides that "[t]he right to parental benefits is obtained through employment activities". In this regard, however, the Court notes that Section 14-6 lists a number of activities unrelated to a working relationship that qualify for receiving parental benefits, including the receiving of unemployment benefits and periods of military service. By contrast, in *Meyers*, cited above, the existence of an employment relationship was a prerequisite for entitlement to the relevant benefit. The fact that the parental benefits at issue in the present case may be obtained independently of an employment relationship means that they are not necessarily linked to an employment relationship.

67 Neither can it be established that the benefits at issue have as their subject-matter employment and working conditions merely because the amount of benefits is calculated by reference to the income of a parent, under Section 14-7 of the National Insurance Act. Income may, according to Section 14-7 of the National Insurance Act, stem from sources other than income from an employment relationship, such as income of self-employed persons, benefits received from the social security scheme, or remuneration during the military service.

68 As regards ESA's submission that parental benefits are intimately connected to the right to parental leave, thus affecting the qualification of such benefits as employment and working conditions, the Court recalls that the EEA States must afford the right to parental leave to both parents on equal grounds except for a specific period of protection granted to the mother. However, it is optional for EEA States to provide for continued entitlements to relevant social security benefits. Point 5 second subparagraph of Clause 5 of the Framework Agreement on Parental Leave states that all matters regarding income in relation to the Framework Agreement are for the consideration and determination of EEA States and/or the social partners on the basis of national law, collective agreements and/or practice.

69 ESA relies on the ECJ's findings in *Maïstrellis* in order to support its arguments that the conditions for entitlement to parental benefits in Section 14 of the National Insurance Act constitute employment and working conditions. In *Maïstrellis*, the ECJ considered that the granting of parental leave enables new parents to interrupt their professional activities to devote themselves to their family responsibilities, and thus has consequences on the exercise of the professional activities of the civil servant concerned. According to that judgment, the conditions for granting parental leave fall within employment and working conditions within the meaning of Article 14(1)(c) of the Equal Treatment Directive (compare, the judgment in *Maïstrellis*, cited above, paragraph 45). However, even though the proceedings in

Maïstrellis arose from a request for paid parental leave, the fact remains that the ECJ's interpretation of the Equal Treatment Directive and its eventual findings, were limited to the granting of parental leave. It did not cover the issue of parental benefits as such. The judgment can therefore not be of assistance in determining whether the parental benefits at issue are employment and working conditions within the meaning of Article 14(1)(c) of the Equal Treatment Directive.

70 Finally, the Court notes that, insofar as "pay" pursuant to the Equal Treatment Directive is concerned, that concept cannot be extended to encompass social security benefits, such as those at issue, which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned, and which are obligatorily applicable to general categories of employees, as well as to other beneficiaries. Such schemes give employees and other beneficiaries benefits that are determined not by the employment relationship between the employer and the worker, but by considerations of social policy (compare, by analogy, the judgment in *Griesmar*, C-366/99, EU:C:2001:648, paragraph 27 and the case-law cited). For the same reasons, the concept of working conditions, cannot be extended to cover such benefits merely because the conditions for entitlement refer to employment activities.

71 Thus, in the light of the above the Court finds that the parental benefit scheme established by the Norwegian National Insurance Act does not fall under "employment and working conditions", within the meaning of Article 14(1)(c) of the Equal Treatment Directive.

72 Consequently, ESA's application seeking a declaration that Norway has failed to fulfil its obligations under Article 14(1)(c) of the Equal Treatment Directive by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act must be dismissed.

VII Costs

73 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. Norway has been successful, and has requested that ESA be ordered to pay the costs. The Court finds that none of the exceptions in Article 66(3) apply. ESA must therefore be ordered to pay the costs. The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the EFTA Surveillance Authority to bear the costs of the proceedings.**

Páll Hreinsson Bernd Hammermann Siri Teigum

Delivered in open court in Luxembourg on 13 December 2019.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President