

Case No: 84329
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Decision No: 084/23/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 14 June 2023

closing an own initiative case concerning Norway's restrictions on the retention of sickness benefits in cash when going to another EEA State, in breach of Article 21(1) of Regulation 883/2004, Articles 3 and 7 EEA, Articles 28, 31, 36 EEA and Articles 4, 6 and 7(1)(b) of Directive 2004/38.

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

On 28 October 2019, the then Norwegian Minister of Labour and Social Affairs stated during a press conference that Norway had since 2012 wrongfully applied the rights of Norwegian residents under EEA law to retain three types of sickness benefits in cash when going to another EEA State. This statement received significant media attention and came to the attention of the EFTA Surveillance Authority ("the Authority"), prompting it to open an investigation.

Thus, by letter dated 4 November 2019 (Doc No 1094489), the Authority informed the Norwegian Government that it had opened an own initiative case to examine whether the national legislation and ensuing administrative practice regarding the retention of sickness benefits in cash when going to another EEA State complied with EEA law. In its letter, the Authority requested that the Norwegian Government answer a series of questions on the matter.

The three sickness benefits in cash at issue were the sick-pay benefit (*sykepeng*), the work assessment allowance (*arbeidsavklaringspeng*) and the attendance allowance (*pleiepeng*).

The Norwegian Government submitted its reply by way of a letter dated 11 December 2019 (Doc No 1103404). The Authority shared its preliminary assessment with Norway, in the form of a pre-Article 31 letter, on 11 March 2020 (Doc No 1118071). The Norwegian Government was invited to submit its observations, following which the Authority would consider whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

The reply from Norway was received on 11 June 2020 (Doc No 1137756). On 25 November 2020, the Authority issued a letter of formal notice to Norway concluding that the Norwegian legislation in force at the time continued to unlawfully restrict the rights, pursuant to EEA law, of recipients of sickness benefits in cash by requiring such recipients – without due justification – to stay in Norway (Doc No 1138850).

The Norwegian Government provided its reply on 25 February 2021 (Doc No 1184098), informing the Authority *inter alia* that as of November 2019, “stays in another EEA country are equated with stays in Norway for persons that fall within the ambit of EEA law, and there has not been a requirement for prior application approval since then.”

The Authority delivered a reasoned opinion on 9 June 2021 (Doc No 1200885), in which it concluded that, by maintaining in force national legislation such as Sections 8-9, 9-4, and 11-3 of the National Insurance Act (“NIA”), insofar as they restrict the possibility to retain sickness benefits in cash when going to another EEA State, by notably:

- imposing a prior authorisation requirement for stays in another EEA State,
- limiting the total length of stays of benefit recipients in another EEA State, as the case may be, to eight, or respectively four, weeks per year,
- imposing on the benefit recipient the burden of proof that a stay in another EEA State is compatible with eligibility criteria of the benefit in question,
- imposing sanctions of a disproportionate nature for failure to comply with the requirement to stay in Norway, and/or
- creating a state of ambiguity and legal uncertainty which preclude the possibility for concerned individuals to ascertain their rights and obligations,

Norway had failed to fulfil its obligations under EEA law in that measures such as the ones in question:

- are in breach of Article 21(1) of Regulation 883/2004, which provides for a right to export acquired sickness benefits in cash during a stay or residence in another EEA State,
- amount to unjustified restrictions on the free movement of workers, establishment and the freedom to provide services, c.f. Articles 28 EEA, 31 EEA and 36 EEA respectively,
- allow for criminal sanctions for related violations read in conjunction with Article 25-12 NIA which will, depending on the circumstances, constitute an unjustified restriction on the free movement of persons pursuant to Article 28 EEA, and
- are incompatible with the free movement of persons guaranteed under Articles 4, 6 and 7(1)(b) of Directive 2004/38,
- contrary to Articles 3 and 7 EEA create a state of ambiguity and legal uncertainty which preclude the possibility for concerned individuals to rely on the rights provided for by Article 21(1) of Regulation 883/2004 and/or the free movement of workers, establishment and the freedom to provide services under the EEA Agreement and/or the free movement of persons guaranteed under Directive 2004/38.

In its reasoned opinion, the Authority required Norway to take the measures necessary to comply with within three months of its receipt.

Prior to the issuing of the reasoned opinion, the EFTA Court, by its judgment of 5 May 2021 in Case E-8/20 *Criminal proceedings against N*, concluded that conditions such as those referred to above were in breach of both Article 21(1) of Regulation 883/2004 and Article 36 EEA.

The Authority recalls that, as of November 2019, Norway has informed that stays in other EEA States have in practice been equated with stays in Norway with regard to recipients of a sickness benefit in cash and falling within the scope of EEA law. Consequently, since then, recipients of sickness benefits in cash have in practice been allowed to retain the benefit during stays in other EEA States, there being no requirement to seek prior authorisation and no limit on the total length of stays.

However, while the administrative practice was thus seemingly brought in compliance with EEA law as of November 2019, the Authority observed in its reasoned opinion that by maintaining in force unamended the national provisions at issue, a state of ambiguity and legal uncertainty arose in breach of *inter alia* Articles 3 and 7 EEA insofar as concerned individuals were precluded from relying on the rights provided for by EEA law.

In that respect, the Authority notes that the legislative amendments to *inter alia* the NIA were adopted by the Norwegian Parliament on 17 November 2022. The amendments entered into force on 25 November 2022.

The Authority observes that following those amendments, Norwegian legislation now equates stays in other EEA States with a stay in Norway, insofar as Sections 8-9, 9-4 and 11-3 NIA now read that “[i]t is a condition for the right to [the benefit] that the member stays in Norway, another EEA State or (...)”. Consequently, there is no longer any prior authorisation requirement nor any specified time-limit applied to beneficiaries wishing to retain a sickness benefit when going to another EEA State, neither in law, nor, to the Authority’s understanding, in administrative practice.

The Authority further takes note that following the legislative amendments, Section 1-3 NIA now clarifies that the act shall be interpreted and applied in accordance with the fundamental rights to freedom of movement as safeguarded by the main part of the EEA Agreement. Moreover, with the adoption of a new Section 1-3a NIA, Regulation 883/2004 and Regulation 987/2009, as amended, are now incorporated into the national legal order at the level of parliamentary act.

The Authority further observes that the legislative amendments included a set of so called “international law markers” (*folkerettsmarkører*), seeking to draw attention to the fact that the provisions of the NIA must be interpreted and applied, and if necessary set aside, in accordance with relevant EEA law.

Based on the above it appears that the national provisions in question have been amended and that the current legal framework concerning the retention of sickness benefits in cash when going to another EEA State complies with the requirements laid down EEA law.

The Authority recalls that it is also, in a separate but related case (Case No 85884), assessing positive actions taken by Norway to comply with its obligation to remedy the breaches of EEA law that did occur in relation to the ability of individuals to retain sickness benefits in cash during stays in another EEA State. The Authority is also aware that there is ongoing litigation on this issue before Norwegian courts.

The Authority may revert to the matter at issue in this case should any relevant developments occur in EEA/EU law or at national level.

HAS ADOPTED THIS DECISION:

The own initiative case arising from an alleged failure by Norway to comply with Article 21(1) of Regulation 883/2004, Articles 3 and 7 EEA, Articles 28, 31, 36 EEA and Articles 4, 6 and 7(1)(b) of Directive 2004/38, is hereby closed.

For the EFTA Surveillance Authority

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