THE SUPREME COURT OF NORWAY

On 5 March 2013, the Supreme Court delivered judgment in

Case HR-2013—0496-A, (case no. 2012/1447), civil proceedings, appeal against judgment

STX OSV AS STX Norway Florø AS Kleven Verft AS Myklebust Verft AS Bergen Group Shipbuilding AS Ulstein Verft AS Havyard Ship Technology AS Aibel AS	(Counsel Ingvald Falch)
The Confederation of Norwegian Enterprise, NHO (third-party intervenor)	(Counsel Kurt Weltzien)
The Federation of Norwegian Industries (third-party intervenor)	(Counsel Terjei Thorkildsen)
v.	
The Norwegian State, represented by the Tariff Board	(The Attorney General, represented by Counsel Pål Wennerås) Assistant counsel: (The Attorney General, represented by Counsel Ketil Bøe Moen)
The Norwegian Confederation of Trade Unions, LO (third-party intervenor)	(Counsel Håkon Angel)
The Norwegian United Federation of Trade Unions (third-party intervenor)	(Counsel Einar Stueland)

VOTING:

(1) Judge **Matheson:** This case concerns the validity of provisions provided in the Regulation concerning partial general application of the Engineering Industry Agreement to the Maritime Construction Industry.

(2) On 27 September 2007, the Norwegian Confederation of Trade Unions (LO) lodged a demand for a partial general application of the Engineering Industry

Agreement 2006-2008 between LO and the Norwegian United Federation of Trade Unions on the one side and the Confederation of Norwegian Enterprise (NHO) and the Federation of Norwegian Industries on the other to the maritime construction industry. After having distributed a consultative paper, the Tariff Board resolved on 6 October 2008 to pass the Regulation concerning the General Application of Selected Provisions of the Engineering Industry Agreement 2008-2010 (Regulation of 6 October 2008 no. 1137), which was the agreement in force at the time. The resolution was passed with a dissenting vote from NHO's representative.

(3)

The Regulation includes provisions relating to minimum hourly rates of pay (section 3(1)), out-of-town allowance, (section 3(2)), working hours (section 5), overtime pay (section 6) and compensation for travel, board and lodging expenses for assignments away from home (section 7). With respect to out-of-town allowance and compensation for travel, board and lodging expenses, the provisions mean that the posted employee is entitled to these benefits irrespective of whether he is domiciled in Norway or abroad.

(4)

The resolution was based on a pattern provided by Regulation of 11 October 2004 concerning the General Application of Wage Agreements to certain Onshore Petroleum Installations. It comprises a partial general application of the Engineering Industry Agreement, the Collective Agreement for the Construction Industry and the National Agreement for Electrical Workers as regards certain specific onshore petroleum installations. Resolutions have subsequently also been passed for the general application of nationwide collective agreements to construction sites and to the agricultural, horticultural and cleaning services industries.

(5)

On 24 March 2009, the Appellants – hereafter also referred to as STX and Others – brought legal proceedings against the Norwegian State, represented by the Tariff Board, before the Oslo District Court, submitting a claim for relief that the Regulation concerning the General Application of the Engineering Industry Agreement to the Maritime Construction Industry be found invalid in its entirety, partly because of a failure to document that the statutory conditions for a general application are fulfilled, partly because the Regulation is incompatible with EEA law. A claim for compensation was also put forward. NHO and the Federation of Norwegian Industries joined the case as intervenors for the Appellants, while LO and the Norwegian United Federation of Trade Unions joined the case as intervenors for the Respondents. During the pre-trial review the Oslo District Court decided to split the hearing and adjudication.. The issue of the validity of the Regulation has therefore been heard and adjudicated separately.

(6)

On 29 January 2010, the Oslo District Court gave judgment (TOSLO-2009-50176), concluding as follows :

« 1. The Court finds in favour of the Norwegian State, represented by the Tariff Board.

2. STX Norway Offshore AS, STX Norway Florø AS, Kleven Verft AS, Myklebust Verft AS, Bergen Group Maritime Services AS, Bergen Group Shipbuilding AS, Ulstein Verft AS, Havyard Leirvik AS, Aibel AS, the Confederation of Norwegian Enterprise and the Federation of Norwegian Industries are ordered – jointly and severally – to pay costs to:

- **The Norwegian State, represented by the Tariff Board, in the amount of NOK 550,000 – five hundred and fifty thousand.**
- **The Norwegian Confederation of Trade Unions in the amount of NOK 431,909 – four hundred and thirty one thousand nine hundred and nine.**
- **The Norwegian United Federation of Trade Unions in the amount of NOK 228,000 – two hundred and twenty eight thousand.**

3. Time-limit for performance under point 2 above is 2 - two – weeks from service of judgment.»

(7)

STX and Others appealed the decision to the Borgarting Court of Appeal.

(8)

During the pre-trial review the Court of Appeal decided to request an Advisory Opinion from the EFTA Court concerning the issues relating to EEA law. These questions were answered by the EFTA Court's judgment of 23 January 2012 (E-2/11).

(9)

Before the Court of Appeal, STX and Others limited their claim for the Regulation to be held invalid to section 3(2), section 5, section 6 and section 7. At this point in time, the Regulation of 2008 had been superseded by Regulation of 20 December 2010 no. 1764, following the entering into of the Engineering Industry Agreement for 2010-2012. This Regulation prolongs the former provisions, although the monetary amounts are increased according to the subsequent agreement. A claim for relief was submitted for the same provisions of the Regulation of 2010 to be held invalid as well.

(10)

The Borgarting Court of Appeal delivered judgment on 8 May 2012, concluding (LB-2010-60176-2) as follows:

« 1. The Appeal is quashed.

2. Costs incurred before the District Court and the Court of Appeal are not awarded.»

(11)

STX and Others have appealed the judgment to the Supreme Court.

(12)

The appeal concerns the application of law and the assessment of evidence. The parties have produced statements from a total of 13 witnesses, 5 of whom are new to the Supreme Court. One new piece of documentary evidence has also been produced. One of the Appellants' arguments concerning the validity of section 3(2) of the Regulation relating to out-of-town allowance has been waived. In all other respects, the Case is generally in the same position as before the Court of Appeal.

(13)

The Engineering Industry Agreement for 2010-2012 has been superseded by a new agreement for the period 2012-2014. With reference to the present dispute, the Tariff Board decided on 27 November 2012 to defer their discussion of LO's petition for a general application of the new agreement to replace the Regulation of 2010. The parties agree that in this situation it follows from section 7(2) of the Act relating to the General Application of Wage Agreements etc. (hereafter the General Application Act), that the Regulation of 2010 is still in force pending a new resolution.

(14)

The Appellants – *STX and Others* – have essentially submitted the following arguments:

(15)

According to Article 36 of the EEA Agreement there shall be no restrictions on the freedom to provide services across borders within the EEA. The general application of wage agreements concerning minimum rates of pay of workers who have been posted by employers in other Member States constitutes such restriction under established law. It is clear from the EFTA Court's Advisory Opinion that in order not to constitute a violation of the prohibition it is not sufficient for the condition of the collective agreement to be included in the listing in Article 3(1) (a) — (g) of the Posting of Workers Directive (96/71/EC). An independent examination of whether the condition is compatible with Article 36 is also required.

(16)

The provision allows only restrictions which are objectively deemed to help safeguard overriding considerations for the public good – such as the social protection of workers. It is a requirement that the measure constitutes a real benefit for the workers, and that it does not go beyond what is necessary to achieve this goal.

(17)

The Supreme Court must in its assessment base its decision on the subject matter outlined for evaluation by the EFTA Court. Even if the Advisory Opinion is not binding on a Norwegian court of law, it must according to the Supreme Court's own case law carry considerable weight, cf. Rt. 2000 page1811. Should the Supreme Court find the solution provided by the Advisory Opinion questionable, the remedy would be to submit a further question to the EFTA Court rather than to disregard the opinion. Any such disregard would in

principle be inadvisable based on the system laid down in the treaty, cf. Article 3(2) of the EEA Agreement.

(18)

As regards section 3(2) of the Regulation concerning *out-of-town allowance,* the Appellants accept before the Supreme Court that this constitutes minimum rates of pay in the sense of the Posting of Workers Directive. However, the Tariff Board has not cited social security of workers as grounds for a general application of this provision, but the desire to ensure that foreign workers enjoy pay and working conditions which overall are equal to those achieved by Norwegian workers, cf. section 1 of the General Application Act. This is not the same as providing the necessary level of protection for workers.

(19)

Furthermore, the out-of-town allowance, which amounts to 20 per cent of the hourly rates of pay, cannot in real terms be considered to constitute a benefit which significantly increases the level of social security enjoyed by the posted workers. This allowance has generated a considerable drop in the demand for workers posted from the country in which the employment undertaking operates. They have therefore become either unemployed in their country of residence or they have had to migrate to Norway and seek local employment as this means that there will be no allowance to pay. The result of these structural effects is that in real terms, the out-of-town allowance will be unobtainable for large numbers of workers. Consequently, it cannot constitute a real benefit which increases the level of social security.

(20)

The out-of-town allowance is moreover neither necessary nor proportionate as alternative measures exist which would have less impact on the free movement of services. The Tariff Board could instead have decided to introduce a general increase in the minimum rates of pay and thus given all employees an adequate level of protection.

(21)

Section 5 of the Regulation sets the maximum number of normal *working hours* at 37.5 per week with reference to Article 3(1)(a) of the Posting of Workers Directive (96/71/EC) which provides the right to generally apply provisions relating to « maximum work period ». Pursuant to section 10 - 4 of the Norwegian Working Environment Act, the maximum number of normal working hours is 40 per week. This number of hours has been determined by the legislature based on their opinion of what constitutes a general need for protection. The grounds given by the Tariff Board for introducing section 5 were not the consideration for the social security of workers, but – in the same way as for the out-of-town allowance – the desire to ensure that foreign workers enjoy pay and working conditions which overall are equal to those of Norwegian workers, cf. section 1 of the the General Application Act. Such equality is not an overriding consideration for the public interest under Article 36 of the EEA Agreement.

(22)

Furthermore, the Tariff Board has not considered whether the provision relating to working hours shorter than what follows from the general rule of the Working Environment Act is necessary in view of special needs for protection. There is no indication that a need for such protection exists.

(23)

The provision concerning *overtime rates* in section 6 of the Regulation cannot be interpreted as a rule regarding minimum wage for overtime. Overtime rates are defined as a percentage of the « hourly rates of pay », which must be assumed to refer to the hourly rates obtained by the individual worker rather than the minimum rates of pay which have been declared generally applicable. Consequently, this is not a matter of minimum rates of pay in the sense of the Directive, cf. the Court of Justice of the European Union's decision in e.g., Case C-319/06 *Commission* v *Luxembourg,* paragraph 47.

(24)

Because it is uncertain, at best, which hourly rates of pay should form the basis for calculating the overtime rates, the Regulation under any circumstances fails to meet the requirement for clarity which applies in EU case law, see e.g. Case C-233/00 *Commission v France*, paragraph 76.

(25)

With respect to section 7 of the Regulation concerning the compensation for *travel, board and lodging expenses* payable to posted workers, it follows from paragraph 97 of the EFTA Court's Advisory Opinion (E-2/11) that the payment of expenses does not constitute wages. With reference to what has previously been stated regarding the importance of an Advisory Opinion, the Supreme Court must necessarily take this into consideration.

(26)

Accordingly, the provision is compatible with the Directive (96/71/EC) only in the case of « public policy provisions », cf. Article 3 (10) of the Directive. It follows from paragraph 99 of the EFTA Court's Advisory Opinion (E-2/11) that the concept must be interpreted strictly. In Case C-319/06 *Commission* v *Luxembourg,* paragraph 50, the Court of Justice of the European Union stated that considerations for public policy can only be cited when there is a sufficiently serious threat to the welfare of the community. This is not the situation in the current case. According to the EFTA Court's opinion, and in accordance with the case law of the Court of Justice of the European Union, broad documentation is moreover required to support the argument that a certain measure provides an appropriate and proportionate means of pursuing public policy. The documentation produced in this case does not meet this requirement. It primarily shows that the measure is well suited to protect the industrial peace and the Norwegian labour market model, which involves a regulated and well functioning labour market with a high level of unionisation However, these are economic considerations beyond the scope of « public policy » in the sense of the Directive. The Norwegian labour market model is, regardless, extremely resilient.The failure to compensate posted workers' travel, board and lodging expenses is not a perceivable threat to this. The Appellants further endorse the arguments of their intervenor NHO in this respect.

(27)

Subsequently, for the regard for public policy to be a significant point of consideration, the generally applied measure would need to be made applicable to all, and not merely to one or certain sectors, such as the maritime construction industry.

(28)

The Tariff Board has based its decision on considerations other than those that would have been appropriate under EEA law. Should its decision fulfil the requirements in terms of substantive law that follow from EEA law, it is submitted that the Board's failure to consider these conditions constitutes a procedural error. It cannot be ruled out that this error has had a bearing on the content of the decision. There are therefore alternative grounds for declaring the Regulation invalid. The Appellants support the arguments specifically put forward by their intervenor, the Federation of Norwegian Industries, in this respect.

(29)

The Appellants have submitted the following claim for relief:

« 1**. Section 3(2) and sections 5 – 7 of the Regulation of 6 October 2008 no. 1137 concerning partial general application of the Engineering Industry Agreement to the maritime construction industry to be declared invalid. The same provisions of the Regulation of 20 December 2010 no. 1764 by the same name to be declared invalid**.

2. The Norwegian State, represented by the Tariff Board, the Norwegian Confederation of Trade Unions and the Norwegian United Federation of Trade Unions to be ordered to pay – jointly and severally –costs incurred by STX OSV AS, STX Norway Florø AS, Kleven Verft AS, Myklebust Verft AS, Bergen Group Shipbuilding AS, Ulstein Verft AS, Havyard Ship Technology AS and Aibel AS before the District Court, the Court of Appeal and the Supreme Court. »

(30)

The intervenor – *NHO* – has in all essentials supported the Appellants' submissions, drawing particular attention to the following:

(31)

The Norwegian labour market model involves a coordination of the wage formation process based on a tripartite collaboration between the Norwegian State, LO and NHO. The purpose of this coordination is to ensure a reasonable overall wage growth and to safeguard the distribution effects.

(32)

The exposed sectors constitute the so-called wage leaders which set the norm for the wage growth in other industries. The social partners jointly decide what trades and industries shall constitute the wage leaders. Currently, the Engineering Industry Agreement is a wage leader. To be awarded wage leader status, the industry is required to be representative by employing a

large number of workers and by having a high level of unionisation within the industry.

(33)

The wage leader model is flexible. There is no reason to believe that should the disputed allowances be dropped, a lower level of unionisation will follow, thereby threatening the representative quality of the Norwegian labour market model. The Norwegian model is resilient. It survived the economic crisis in 1986-1993, the weakened competitiveness in 2002 and the financial crisis in 2008. The public policy is not under threat should posted workers no longer have their travel, board and lodging expenses covered by their employer.

(34)

NHO has submitted the following claim for relief:

> **« The Confederation of Norwegian Enterprise (NHO) to be awarded costs incurred before the District Court, the Court of Appeal and the Supreme Court. »**

(35)

The intervenor – *the Federation of Norwegian Industries* – has in all essentials supported the Appellants' submissions, drawing particular attention to the following:

(36)

The Tariff Board has failed to deal with, consider or form an opinion of the criteria that follow from a correct interpretation of the General Application Act from an EEA law perspective.

(37)

Because the Board is in error as regards which terms and conditions are decisive for the passing of a resolution, aspects of relevance for the elucidation of the case have not been examined. Not only is the decision in itself based on inadequate assessments and reasoning, it is also based on irrelevant considerations.

(38)

These deficiencies constitute procedural errors under the Norwegian Public Administration Act. The importance of a procedural error is judged on the basis of section 41 of the Public Administration Act, which is analogously applicable to Regulations, cf. Rt-1980 page 485. This provision stipulates that the resolution shall nevertheless be valid if there is reason to assume that the error cannot have had a determining effect on the content of the resolution. This cannot be assumed in the current case.

(39)

The assessment criteria on which the decision should have been based, clearly involve discretionary and policy-related issues of considerable complexity. The Board's conclusion, based on erroneous premises, cannot give any indication of its conclusion had the premises been correct. There is a

reasonable possibility that the outcome would have been different if the question of general application had been examined and considered based on a correct interpretation of the law. This would not least apply to the manner in which the discretionary assessment of “may” was exercised. It follows from paragraph 50 of Rt-2010 page 376 that a failure to exercise the discretionary assessment of “may” can impact on the outcome of the case. This must apply similarly when such discretionionary assessment is exercised on the basis of erroneous conditions.

(40)

If the courts, based on their full competence, should nevertheless decide to rule on the lawfulness of the decision, this would mean that the courts would be making a decision in the administrative authority’s stead. If so, this would be incompatible with the distribution of roles between the courts and the administrative authority and would in itself suggest that the Tariff Board’s decision must be set aside.

(41)

The Federation of Norwegian Industries has submitted the following claim for relief:

> **« The Federation of Norwegian Industries to be awarded costs incurred before the District Court, the Court of Appeal and the Supreme Court. »**

(42)

The Respondent – *the Norwegian State, represented by the Tariff Board* – has essentially submitted the following arguments:

(43)

Section 3(2) of the Regulation regarding *out-of-town allowance i*s compatible with EEA law. Ascertaining that the allowance represents minimum rates of pay and is therefore included in the matters listed in Article 3(1)(1) of the Directive (96/71/EC). provides sufficient grounds for making the decision. No further evaluation is required to decide whether the allowance is compatible with Article 36.

(44)

The opinion in the Court of Justice of the European Union’s decision in Case C-341/05 *Laval,* paragraph 68, on which the EFTA Court appears to build its view to the contrary, must be interpreted in the light of the fact that the issue in that case concerned the examination of pay and working conditions which failed to fulfil the provisions of Article 3(1). This was the reason why the Court of Justice of the European Union, pointing out that the purpose of the Directive was not to harmonise the terms and conditions of employment in the Member States, established that the countries were free to choose a system which was not listed in the Directive « provided that it does not hinder the provision of services between the Member States ».

(45)

However, if the terms and conditions are included in the listing, these will necessarily – if the purpose of the Directive is to be realised – be considered compatible with Article 36 of the EEA Agreement. It follows clearly from paragraphs 80-81 of the Laval judgment and from later case law, that the list provided in Article 3(1)(1) of the Posting of Workers Directive is exhaustive and accordingly limits the terms and conditions of employment which it can be demanded be made applicable to posted employees through a general application. In this sense, the Directive may be considered equal to a total harmonisation directive, under which only measures that go beyond those conferred by the Directive will need to be examined in relation to the restriction prohibition in Article 36. The EFTA Court's Opinion appears not to have taken these elements into consideration.

(46)

The EFTA Court's Opinion is advisory. This means that the Supreme Court has the authority and the obligation to take an independent position as to whether and to what extent the decision of the relevant issue shall be based on that opinion. In the evaluation the opinion must be attributed considerable importance, cf. Rt-2000-1811, page 1820 (Finanger I). The opinion in the current case is not compatible with established case law of the Court of Justice of the European Union. Consequently, the collaboration arrangement under the EEA Agreement will not be threatened if the Supreme Court were to base its ruling on the Court of Justice of the European Union's interpretation of the relationship between the Posting of Workers Directive (96/71/EC) and Article 56 of the Treaty on the Functioning of the European Union, which corresponds to Article 36 of the EEA Agreement.

(47)

With regard to section 5 of the Regulation concerning *working hours,* a natural interpretation suggests that this refers to the maximum number of normal working hours per week. Similarly, a natural interpretation of section 6 concerning *overtime pay* suggests that this refers to minimum wage in the sense of the Directive for work beyond normal working hours. This is set out in a manner which is clear and easy to understand, and the interpretation therefore fully meets the so-called clarity requirement.

(48)

The EFTA Court's opinion (E-2/11) considers only whether sections 5 and 6 are compatible with the Directive. No directions are given that these provisions should also be considered under Article 36. As already argued in connection with the out-of-town allowance, any such additional requirement would not be compatible with EEA law. Under any circumstances, it is submitted that the provisions concerning maximum normal working hours and overtime rates meet the overriding requirements of public interest, suitability and proportionality.

(49)

Compensation for *travel, board and lodging expenses* must be considered part of the minimum wage in the sense of the Directive. In particular, it is the

Directive's Article 3(1)(2), which stipulates that under the Directive, the concept of minimum rates of pay shall be defined « by the national law and/or practice», which provides cause for the Supreme Court to review the EFTA Court's position on this issue. The view adopted by the EFTA Court represents an erosion of the system of minimum rates of pay. This position is also incompatible with Article 3(7), which is based on the premise that compensation for such expenditure shall be considered part of the minimum rates of pay in the sense of the Directive.

(50)

In any circumstances, compensation for this type of expenditure concerns public policy under Article 3(10) of the Directive (96/71/EC) and is therefore compatible with EEA law. It has been well documented that if the allowance is removed, the consequence will be a two-tier labour market and a lack of stability with respect to the wage formation process. This will pose a threat to the Norwegian labour market model which is firmly anchored in Norwegian politics and Norwegian society.

(51)

It is not a *procedural error* of any consequence for the validity of the decision that the Tariff Board has limited its examination to the law's objective of securing equal pay and working conditions. Reference is in this connection made to the fact that the Supreme Court has full competence to examine whether the Regulation is compatible with EEA law. The argument that the decision is invalid due to a procedural error is conditional upon this question being answered in the affirmative. If so, any procedural errors would be of no consequence for the validity of the Regulation, cf. Rt-1969 page 1053 at page 1060 and Rt-2007 page 1729, paragraph 55.

(52)

In any circumstance, there is no reason to assume that the errors may have had a determining effect on the content of the decision. This follows from the fact that the Tariff Board wanted to promote the law's equality objective. The consideration for equality incorporates the consideration for protection of workers. Consequently, there are no grounds for concluding that the decision is invalid due to procedural errors.

(53)

The Norwegian State, represented by the Tariff Board, has submitted the following statement claim for relief:

« 1. The Appeal to be quashed.

2. The Norwegian State, represented by the Tariff Board, to be awarded costs incurred before all courts. »

(54)

The third-party intervenors – *LO* and *the Norwegian United Federation of Trade Unions* – have essentially supported the Respondents' submissions, drawing particular attention to the following:

(55)

The decision relating to general application of wage agreements etc. concerns only a very few of the provisions in the comprehensive Engineering Industry Agreement These provisions relating to minimum rates of pay, working hours, overtime rates, out-of-town allowance and compensation for travel, board and lodging expenses are of fundamental importance for the protection of posted workers.

(56)

On average, Norwegian workers receive considerably higher wages than what posted workers obtain by virtue of the minimum rates made generally applicable. If the provisions concerning out-of-town allowance and compensation for expenses were to be found invalid, the gap would widen and the posted workers' social situation deteriorate significantly. This is supported by the numerical evidence submitted. Setting aside the Regulation relating to the disputed allowances would jeopardise the Norwegian labour market model.

(57)

Employment undertakings that establish themselves in Norway in order to hire foreign workers locally, do so in order to avoid having to pay the allowances that have been made generally applicable. This is a circumvention of the General Application Regulation. In reality, the workers have not migrated to Norway for employment, but commute between their place of work and their place of residence, like they used to do.

(58)

LO and the Norwegian United Federation of Trade Unions have submitted the following joint claim for relief:

> **« The Appellants and their intervenor to be ordered to pay, jointly and severally, costs incurred before all courts to the Norwegian Confederation of Trade Unions and the Norwegian United Federation of Trade Unions. »**

(59)

My own view on the case

(60)

I have concluded that the appeal must be quashed.

(61)

By way of introduction, I will review some of the legal framework in the case.

(62)

The General Application Act

(63)

In 1975, when the employment of foreign workers first started to gain pace in Norway, LO and the then Norwegian Employers' Confederation (NAF) entered into an agreement which entailed that work permits would be granted only if

the foreign workers were ensured terms and conditions of employment equal to those attained by Norwegian employees, cf. Proposition to the Odelsting no. 26 (1992-1993) page 3.

(64)

This arrangement was discontinued when the EEA Agreement came into force and a free labour market was established, after which EEA citizens no longer required a work permit. The objective of securing terms and conditions of employment for foreign workers equal to those enjoyed by Norwegian workers, was extended by passing the Act of 4 June 1993 No. 58 relating to General Application of Wage Agreements etc. The Purpose of the Act set out in section 1-1 originally read:

> **« The purpose of the Act is to ensure foreign employees terms of wages and employment which are equivalent to those of Norwegian employees. This is to prevent employees from undertaking work on terms which overall can be proved to be poorer than those determined by the current national collective agreements for the relevant trade or industry, or terms that otherwise form the standard for the relevant location and occupation. »**

(65)

On page 22 of the proposition, the Ministry pointed out that « the purpose of the Act is to protect the individual foreign employee against unreasonable pay and employment conditions, and to prevent distortions of competition detrimental to undertakings that employ Norwegian workers ».

(66)

The Amendment of 19 June 2009 No. 42 incorporates the following statement of legislative purpose:

> **« The purpose of the Act is to ensure foreign employees terms of wages and employment which are equivalent to those of Norwegian employees, and to prevent distortion of competition detrimental to the Norwegian labour market. »**

(67)

It is clear from the special note to the proposition on page 67 that the revised text of the law enacts objectives which were previously expressed in the preparatory works, as cited above. The parties agree that in real terms, the amendment to the Act involves no change.

(68)

In its Proposition to the Odelsting No. 88 (2008-2009), on which the Amendment of 2009 is based, the Ministry points out on page 7 that the Government is concerned that all workers in Norway should enjoy good and safe jobs with decent pay and working conditions. It is also stated that the goal is to prevent social dumping:

> **« It is the Government’s opinion that social dumping occurs when**

foreign workers are exposed to violations of health, environment and safety rules, including rules concerning working hours and the standard of lodgings, but also when they are offered wages and other benefits which are unacceptably poor compared with the normal wages of Norwegian employees, or which fail to conform with current general application regulations. »

(69)

The Ministry points out on page 11 of the proposition that protection of the pay and working conditions offered to foreign workers constitutes one of the most important tools for counteracting social dumping.

(70)

General application means that «a nationwide collective agreement shall apply, in full or in part, to all employees who perform work of the kind comprised by the agreement, in an industry or part of an industry », cf. section 5. These decisions are made by the Tariff Board, which is a special committee appointed by the King in Council. It must be documented that foreign workers carry out or may in the future carry out work on terms which overall are inferior to those applicable under nationwide collective agreements for the relevant trade or industry, or which otherwise form the standard for the relevant location and occupation.

(71)

General application can only be extended to those parts of a collective agreement which regulate the wage and working conditions of the individual workers. These conditions will then apply as a mandatory minimum for those covered by the decision, cf. section 6.

(72)

In special cases the Tariff Board is at liberty to determine wage and working conditions which differ from those that follow from the collective agreement, cf. section 6 subsection 1 (2).

(73)

The General Application Act and its compatibility with EEA law

(74)

According to Article 36.1 of the EEA Agreement there must be no restrictions on the freedom to provide services across borders within the EEA. The provision reads:

« Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended. »

(75)

This provision corresponds to Article 56 of the Treaty on the Functioning of the European Union, which is an extension of the former EU Treaty's Article 49.

(76)

The Case involves no dispute as to whether a generally applied collective agreement which ensures better wage and employment conditions for posted workers in the host country than in their home country is a restriction under Article 36, see also the Court of Justice of the European Union's decision in Case C-341/05 *Laval* paragraph 56 with further references. Based on a large number of decisions by the Court of Justice of the European Union, it is established law that such restrictions are in principle compatible with the Treaty only if they are justified by overriding considerations for the public interest, are likely to secure the attainment of the objectives they pursue and do not go beyond what is necessary in order to achieve this, cf. e.g. Case C-165/98 *Mazzoleni* paragraphs 25-26, as well as the EFTA Court's Advisory Opinion, paragraph 80 with further references.

(77)

Directive 96/71/EC concerning the posting of workers in the framework of the provision of services – *the Posting of Workers Directive* – was passed on 16 December 1996. This set of rules embodies the basic principles of the present Article 56 of the Treaty on the Functioning of the European Union, which corresponds to Article 36 of the EEA Agreement, the way these principles have evolved through the case law of the Court of Justice of the European Union The Directive was implemented in Norwegian law by the introduction of a new Chapter XII B, about posted workers in the former Working Environment Act 1977, appended by Act 7 January 2000, cf. Proposition to the Odelsting No. 13 (1999-2000).

(78)

The Directive is based on the internal market's objective of the abolition of obstacles to the free movement of persons and services between Member States, cf. point 1 of the preamble. Point 3 establishes that the completion of the internal market offers a dynamic environment for the transnational provision of services. Point 5 reads:

> **« Any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers. »**

(79)

According to point 13 of the preamble, the Directive will ensure that the Member States coordinate « a nucleus of mandatory rules for minimum protection » to be observed in the host country for posted workers.

(80)

In addition to the above, it should be noted that the description of the Directive's purpose in the preparatory works is « to ease the transnational exchange of services and to safeguard the rights of workers, including the

prevention of 'social dumping' », cf. page 1 of Proposition to the Odelsting No. 13 (1999-2000).

(81)

The introduction of the new Working Environment Act 2005 saw a change in the legislation process compared to the 1977 Act, in that a dedicated Regulation of 16 December 2005 No. 1566 regarding posted workers was introduced under the current section 1-7(4). Section 2 of the Regulation. states that Chapter 10 of the Working Environment Act, concerning working hours, is applicable to such workers. The same applies to the new provision set out in section 14-12(a) of the Working Environment Act regarding the contracting-in of workers from employment undertakings.

(82)

According to Article 3(1) of the Directive, EEA states must ensure that undertakings which provide transnational services, guarantee posted workers the terms and conditions of employment which cover the matters listed in the Article, and which are laid down by law or collective agreements which have been declared generally applicable. According to the provision, these matters include:

> **« a) maximum work periods and minimum rest periods**
>
> **...**
>
> **c) the minimum rates of pay, including overtime rates; ... . »**

(83)

The term « minimum rates of pay » in (c) has not been harmonised, but shall, according to Article 3(1)(2) be defined « by the national law and/or practice of the Member State to whose territory the worker is posted. »

(84)

Paragraph 29 of the EFTA Court's opinion (E-2/11) and its further references to Court of Justice of the European Union case law make it clear that Article 3(1) provides an exhaustive list of matters in respect of which a host EEA State may give priority to its own rules.

(85)

According to Article 3(7), the provisions of paragraphs 1 to 6 – i.e. including maximum work periods and minimum rates of pay – « shall not prevent application of terms and conditions of employment which are more favourable to workers ». This must be read in connection with section 17 of the preamble, which states that the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers. This is likely to have formed the basis for the statement in the preparatory works of the amendments to the Working Environment Act that the Directive « is a minimum Directive and will therefore not prevent the application of terms and conditions of employment which are more favourable to workers », cf.

Proposition to the Odelsting No. 13 (1999-2000) page 1. On page 5, the proposition goes on to say that:

> **« The Directive is a so-called partially harmonising Directive. It provides no minimum rights for the protection of employees, but orders EEA countries to apply current legislation also to workers posted to their territory. The content of these rights therefore depends on national law. Consequently, the Directive does not order Norway to introduce rules on these matters. It provides only a requirement that if we have such rules enshrined in law, regulations or collective agreements declared generally applicable, the rules shall also apply to posted workers. A number of the matters listed in the Directive are covered by Norwegian rules which are applicable to all workers who carry out work in Norway. With respect to other matters, such as holiday entitlements, the rules concerning choice of law may entail that Norwegian rules are not applied. There are no statutory provisions for the payment of wages in Norway. Such provisions are laid down only in collective agreements and individual employment contracts. »**

(86)

Article 3(10) lays down that the Directive shall not preclude the application by Member States of terms and conditions of employment to matters other than those referred to in the first subparagraph of paragraph 1 « in the case of public policy provisions ».

(87)

I will now consider the validity of the disputed regulatory provisions. For the record, please note that my review is based on the wording of the 2008 Regulation. The amendments introduced in the 2010 Regulation are of no consequence to the resolution of the questions of principle raised by the case.

(88)

Out-of-town allowance

(89)

Section 3(1)(2) of the Regulation stipulates that:

> **« Employees who perform production, assembly and installation work in the maritime construction industry, cf. section 2, shall receive a minimum hourly rate of:**
>
> **a) NOK 126.67 in the case of skilled workers.**
>
> **b) NOK 120.90 in the case of unskilled workers.**
>
> **With the exception of employees taken on at the work site, the following allowance shall be paid for work requiring overnight stays away from home:**
>
> **a) NOK 25.32 in the case of skilled workers.**

b) NOK 24.18 in the case of unskilled workers. »

(90)

The Court of Appeal has concluded that section 3(2) concerning out-of-town allowance is a provision relating to minimum rates of pay in the sense of the Posting of Workers Directive. As mentioned, this has not been disputed by the Appellants; however, they refer to the EFTA Court's Advisory Opinion and assert that the out-of-town allowance must also be compatible with Article 36 of the EEA Agreement. They argue that the Court of Appeal was mistaken in its conclusion that this condition has been met. The Norwegian State has disputed the Appellants' arguments on both these points.

(91)

I will first look at what the EFTA Court has stated on this mattert in point 2 of its conclusion:

« Article 3(1), first subparagraph, point (c), of Directive 96/71/EC, as interpreted in light of Article 36 EEA, does, in principle, preclude an EEA State from requiring an undertaking established in another EEA State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State for work assignments requiring overnight stays away from home, unless the rules providing for such additional remuneration pursue a public interest objective and their application is not disproportionate. It is for the national authorities or, as the case may be, the courts of the host EEA State, to determine whether those rules in fact pursue an objective in the public interest and do so by appropriate means. »

(92)

The EFTA Court here expresses the view that the question of whether the additional remuneration payable for assignments requiring overnight stays away from home is compatible with the EEA Agreement cannot be answered simply by ascertaining that the allowance constitutes minimum wage in the sense of the Directive. It will also have to be considered in the light of Article 36 of the EEA Agreement. The Norwegian State has disputed the authority of the EFTA Court's judgment on this point as it is based on a mistaken perception of Court of Justice of the European Union case law with respect to the Posting of Workers Directive.

(93)

On page 1820 of Rt-2000-1811 the Supreme Court has commented as follows on the significance of the EFTA Court's Advisory Opinion:

« The EFTA Court's opinion is of an advisory nature, cf. Article 34 of the Surveillance and Court Agreement between EFTA and the Norwegian State. This means that the Supreme Court has the authority and duty to consider independently whether and to what extent the

Supreme Court's decision should be based on this opinion.

Nevertheless, I find that significant importance must be attributed to the opinion. This follows in my view from the fact that the EFTA States, in accordance with Article 108(2) of the EEA agreement, upon entering into the Surveillance and Court Agreement found reason to establish this court , one of the reasons being the need to reach and maintain uniformity in the interpretation and application of the EEA Agreement. Real reasons also support this assumption. ... »

(94)

Consequently, I find that the Supreme Court shall not accept the EFTA Court's opinion without due examination; it has the authority as well as the duty to consider independently whether and to what extent this is warranted. In this light, I cannot see that the Supreme Court is formally prevented from relying on a different opinion. However, because significant importance must obviously be attributed to the opinion, special reasons would be required for the Supreme Court to diverge.

(95)

My comments are as follows with regard to the EFTA Court's opinion in the case at hand (E-2/11):

(96)

The premise on which the EFTA Court bases its opinion is first and foremost set out in paragraph 70:

« As stated in the second subparagraph of Article 3(1), the concept of minimum rates of pay is a matter to be defined by the national law and/or practice of the EEA State to whose territory the worker is posted. In light of this and given the fact that the Directive does not harmonise the material content of the mandatory rules for minimum protection, that content may be freely defined by the EEA States, provided that it does not hinder the provision of services between the EEA States and is in compliance with the EEA Agreement and general principles of EEA law. This includes, for the purposes of the present case, Article 36 EEA (see paragraphs 34 to 35 of this judgment and, for comparison, *Laval un Partneri*, cited above, paragraph 68). Therefore, Question 1(b) must be examined with regard to the Directive interpreted in the light of Article 36 EEA, and, where appropriate, with regard to the latter provision itself. »

(97)

As borne out by the quote, the conception of justice is based on a combination of the view that the concept of minimum rates of pay has not been harmonised and that the Directive does not harmonise the material content of the mandatory rules on minimum protection. In support of the view that examination under Article 36 is required, reference is made to paragraph 68 of

Case C-341/05 *Laval*, which reads:

> **«It must be noted, in this respect, that since the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States. »**

(98)

It is my opinion that there is reason to question whether this statement provides grounds for determining that in the present case, the out-of-town allowance declared generally applicable will also have to be examined under Article 36, so long as this constitutes «minimum rates of pay » pursuant to Article 3(1)(c) of the Directive. In *Laval* the situation was that it was attempted to bind the employers by a collective agreement, which had not been declared generally applicable, with respect to the payment of wages which did not constitute minimum rates of pay, cf. paragraph 67. The statement made in paragraph 68 concerning the need for examination under the then Article 49 EC, corresponding to Article 36 of the EEA Agreement, must in my view be understood against this background. Furthermore, it is clear from the statement that the provision that free exchange of services shall not be hindered is associated with systems which are not expressly listed in the Directive. It is clear from *Laval* paragraphs 80-81 that this list is exhaustive. The EFTA Court has also relied on this fact in section 29 of its opinion.

(99)

The view that the list provided in Article 3(1) 1 is exhaustive, is repeated in Case C-346/06 *Rüffert,* paragraphs 33-34. In Case C-319/06 *Commission* v *Luxembourg,* paragraph 26 also states that Article 3(1)(1) sets out an exhaustive list « of the matters in respect of which the Member States may give priority to the rules in force in the host Member State ». Paragraph 45 of the same judgment points out that the Commission had not challenged the fact that minimum wages are indexed to the cost of living, a requirement which « is unquestionably covered by point (c) of the first subparagraph of Article 3(1) of Directive 96/71 ». In paragraph 47, the Court confirms that by introducing this provision, the Community legislature intended to limit the possibility of the Member States intervening as regards the payment of wages in matters relating to minimum rates of pay. None of the judgments referred to above mentions the fact that what the host country decides regarding conditions that meet the concept of minimum rates of pay in point (c) of the first subparagraph of Article 3(1), must also be examined for compatibility with Article 36. Such a solution would mean that little was gained by introducing the Directive, which according to its preamble is intended, among other things, to ensure the coordination of a nucleus of mandatory rules for minimum protection.

(100)

In this light, I find it difficult to reconcile the EFTA Court's view that an examination under Article 36 is also required with the case law of the Court of Justice of the European Union and the purpose of the Directive.

(101)

Further support of this position is found in the judgment of the Court of Justice of the European Union in Case C-37/92 *Vanacker* – which admittedly relates to Directive 75/439 and therefore concerns the regulation of a different area of the law – which in paragraph 9 stated that:

> **« … since the question of the collection of waste oil has been regulated in a harmonized manner at Community level by the directive, any national measure relating thereto must be assessed in the light of the provisions of the directive and not of Articles 30 to 36 of the Treaty. »**

(102)

I would like to add that in connection with the request for an Advisory Opinion, obvservations were submitted – in addition to the statements from the parties to the case –from the EU Commission, the EFTA Surveillance Authority and the Governments of Belgium, Poland, Sweden and Iceland. All of these observations – except the one from Iceland, which failed to answer the question directly– argue that Article 3(1) of the Directive is an exhaustive provision where «there is no room for a separate evaluation of the compatibility of those provisions with Article 36 EEA », as expressed by the EU Commission with reference to *Laval,* paragraphs 80-81.

(103)

In this light, there are in my view many indications that any benefits considered to constitute minimum rates of pay in the sense of the Directive, need not also be examined for compatibility with Article 36 of the EEA Agreement. However, I see no reason to form a final opinion on this issue, as I find it evident, in any circumstances, that the out-of-town allowance is indeed compatible with this provision.

(104)

I will now address this issue in closer detail.

(105)

It is clear from point 2 of the EFTA Court's conclusion (E-2/11), that the legality is conditioned by whether « the rules providing for such additional remuneration pursue a public interest objective and their application is not disproportionate». This shall be determined by the national court.

(106)

Under reference to Court of Justice of the European Union case law, paragraphs 80-87 provide a closer look at the various assessment criteria. Paragraph 81 points out that the social protection of workers is considered the pursuance of a public interest objective .However, the national court must make an objective assessment of whether the measure confers a genuine benefit on the workers concerned which significantly adds to their social protection, cf. paragraph 84. Measures whose aims are of an economic nature, such as the protection of domestic businesses, are not recognised, cf. paragraph 83.

(107)

The Appellants' arguments that the Board has based its decision on erroneous grounds in relation to the requirements of the law and inadequate evaluations do not in my view constitute grounds for invalidation. In the case law of the Court of Justice of the European Union the crucial question is whether the measure, in an objective view, benefits the protection of the posted worker, cf. Case C-49/98 and others *Finalarte* paragraphs 40-41. I find it evident that in an objective view the out-of-town allowance fulfils this purpose.

(108)

Primarily I here wish to refer to my earlier account of the legislature's intentions as set out in the preparatory works about the purpose of the General Application Act: to ensure that all workers in Norway enjoy good and safe work places with decent pay and employment conditions. Another goal has been to prevent social dumping. The protection of foreign workers' pay and employment conditions is mentioned by the Ministry as a primary tool for the prevention of such dumping. These statements in the preparatory works show, in my opinion, that the purpose of the General Application Act to ensure « equal » pay and employment conditions must be seen as a manifestation of the objective to secure the social protection of foreign workers. The Board's use of the term must be read in the same light. In this connection the statements of Dølvik and Eldring in their article "The Nordic Labour Market two years after the EU enlargement" published in *TemaNord* 2006:557 are illustrative. Page 43 reads:

> **« The core issue in the debate over the future requirements regarding wage levels and labour conditions for labour migrants from the new EU member states – both those who come as service providers and those who are employed in domestic enterprises – is not whether to protect national employees from competition or to bar foreign workers from finding a better livelihood than they can find at home. The issue mainly concerns the tools to be chosen to achieve inclusion on equal terms, and to prevent the emergence of a new underclass which, without adequate measures, may be defined partly according to ethnic, national dividing lines and as a further consequence partly according to skills, health and capabilities in the domestic labour force. In principle, the issue concerns the kind of working life that is seen as desirable and the conditions for inclusion. It is in view of such reflections and the host countries' legitimate interest in protecting their social standards and labour market regimes against regime competition that the EU's insistence on the host country principle as a norm for defining wage and employment conditions for posted labour must be understood. »**

(109)

Subsequently, I consider there to be little doubt that any compensation paid for the disadvantage of living away from home can be considered, from an objective point of view, as a measure to promote the protection of workers.

(110)

The Appellants have asserted that the allowance provides no real benefit because it allegedly causes the disappearance of the market for posted workers due to the rise in costs. The EFTA Court's comments in paragraph 85 point in the same direction. The view is that the Norwegian rules may impair the employment opportunities of posted workers in that the allowance may contribute to pricing them out of the market, which cannot be seen as beneficial. I fail to see that the Appellants' view is backed by evidence.

(111)

Information submitted in the case indicates that a large number of employees are entitled to the out-of-town allowance – in addition to compensation for travel, board and lodging expenses, which is a point I will return to later. In particular, I refer to the statement made by the representative from STX OSV AS, which is by far the largest group of shipyards amongst the Appellants. It appears from the statement that a total of approximately 340,000 man-days were undertaken at the group's Norwegian shipyard in 2011. Of these, approximately 146,000 man-days were undertaken by the company's own employees, while approximately 118,000 man-days were undertaken by workers on fixed-price contracts and approximately 76,000 man-days by workers who were contracted in at an hourly rate. It was explained that the out-of-town allowance was paid in the case of 53 per cent of the fixed-price contracts. It is somewhat unclear whether this percentage also includes workers contracted in at an hourly rate, but whatever the case, a large proportion of these workers would also be entitled to the allowance.

(112)

The companies' statements point to a development where subcontractors and employment undertakings set up local subsidiaries in order to avoid paying the out-of-town allowance and the compensation for travel, board and lodging. However, the figures I have just referred to, tell us that these allowances still represent a reality for a very large number of workers. Furthermore, no evidence has been produced that employment opportunities for foreign workers have been significantly reduced. The change has been that some of the foreign workers, who were previously posted, are now employed locally in Norway. Consequently, the general application of the out-of-town allowance has not caused the demand for labour as such to diminish.

(113)

Furthermore, this point of view was repudiated in Case C-60/03 *Wollf & Müller*, where the issue was whether the measure constituted a genuine benefit as the protection might lose its financial value if the opportunity to obtain gainful employment was in real terms clearly reduced. The Court of Justice of the European Union concluded in paragraph 40 that it was still a matter of benefit for posted workers, stating that:

> **« On an objective view a rule of that kind is therefore such as to ensure the protection of posted workers. Moreover, the dispute in the**

main proceedings itself appears to confirm this protective intent ... »

(114)
It is my opinion that the situation is the same in the current case.

(115)
Furthermore, there will always be a risk of a weakened labour market in connection with a rise in costs brought about by benefits designed to provide a higher level of social protection, whether it is minimum wage in the form of rates of pay per hour, overtime rates or allowance for out-of-town work. In my view, it is self-evident that such allowances will not cease to represent an objective benefit to workers even if the increased cost results in the risk of a reduced demand for the service. The fact that the Appellants in our case avoid paying the allowance by hiring foreign workers through setting up a company locally, carries no relevance in this connection.

(116)
It is also my view that the out-of-town allowance goes no further than necessary in order to achieve social protection of posted employees. A critical element of this assessment is that it is the minimum rates set out in the collective agreement that are applied. Nor have they been challenged. Even if the allowance entails a higher cost for the employer, it must – based on the presentation of the case to the Supreme Court – be taken for a basis that these are genuine improvements for the posted workers compared to their situation had they not received the allowance.

(117)
However, on this point the Appellants have contended that the Tariff Board, pursuant to section 6(1)(2) of the General Application Act should instead have raised the minimum rate of pay per hour to a level which provides a higher level of protection for all. I wish to point out here that collective agreements are primarily negotiated by the social partners. The power vested in the Tariff Board under section 6(1)(2) of the Act to adjust the content of the agreement, should be exercised only very exceptionally based on a consideration for the overall system. Moreover, by increasing the minimum rates of pay,the objective of the out-of-town allowance, which is to compensate for the disadvantage of living away from home, thereby repairing an imbalance in the wages paid to local workers and posted workers, would not be achieved.

(118)
Working hours

(119)
Section 5 of the Regulations concerning working hours, reads as follows:

« Normal working hours shall not exceed 37.5 hours a week. »

(120)

The issue before the EFTA Court was whether the Posting of Workers Directive allows the general application of provisions for working hours that afford protection beyond the normal maximum work period set out in the Working Environment Act. According to section 10(4) of the Working Environment Act, this is 40 hours a week. The EFTA Court answered the question in the affirmative in point 1 of their conclusion, which reads:

> **« The term "maximum work periods and minimum rest periods" set out in point (a) of the first subparagraph of Article 3(1) of Directive 96/71/EC includes terms and conditions regarding "maximum normal working hours", such as those described in the request for an Advisory Opinion. »**

(121)
I base my decision on this conclusion.

(122)
As the Court of Appeal has pointed out, the EFTA Court's conclusion did not refer to the provision in the Directive that working hours must be interpreted in the light of Article 36 of the EEA Agreement. This in contrast to the Court's statement about the review of the out-of-town allowance. However, it follows from paragraph 54 that the conclusion with respect to working hours involves a condition that «the general principles of EEA law are complied with».

(123)
On this basis, the Appellants have disputed that any such condition has been met. They argue that the general application of the provisions for working hours is not based on an overriding consideration for the public good in the form of a need for protection beyond what follows from the general legislation. Nor can any such need be supported by evidence.

(124)
I disagree.

(125)
Firstly, I point to my previously expressed reservation with regard to the application of Article 36 to provisions that fall directly under the exhaustive listing in Article 3(1) of the Directive.

(126)
Subsequently, I refer to the above comment, that the consideration for equality under section 1 of the General Application Act incorporates the need for protection of foreign workers on equal terms with Norwegian workers. In other words, the fact that posted workers have a need for social protection is inherent in the provisions for equal treatment.

(127)
Furthermore, I point out that this question received special consideration by the Tariff Board. In the rationale for its decision, the following was stated:

« Particularly in view of the collective agreement's high level of coverage, the Board considers that normal working hours in the maritime construction industry must follow from the Engineering Industry Agreement. Different working hours for certain workers within this industry would mean unequal pay and employment conditions for Norwegian and foreign workers. Working hours constitute a significant part of the employment conditions, and the normal working hours moreover determine when overtime is payable. »

(128)
I agree.

(129)
The Appellants have pointed out that the Board also cited «safety and logistics» as grounds for equal working hours within the industry. They have argued that this statement is unreasoned and undocumented. However, the Board's comment on this point appears to be an added note of no significance to the outcome, and I will therefore refrain from any further discussion of this point.

(130)
In this light I find no reason to doubt that the general application of the working hour provisions in the Engineering Industry Agreement is compatible with Article 36 of the EEA Agreement.

(131)
Overtime rates

(132)
I will now address section 6 of the Regulations concerning overtime pay. The provision reads as follows:

« A supplement of 50% of the hourly rate shall be paid for work outside normal working hours. An additional remuneration of 100% of the hourly rate shall be paid for work outside normal working hours between 21.00 hrs. and 6.00 hrs. and on Sundays and public holidays. »

(133)
The Appellants assert that the provision must be interpreted to the effect that overtime rates shall be calculated as a percentage of the hourly rates obtained by the posted worker and not of the minimum rates of pay. They argue that such regulation is incompatible with what is considered minimum overtime

rates under EEA law. In any circumstance, the provision fails to meet the clarity requirement under EEA law.

(134)
The Court of Appeal has the following comments on this issue:

> **« The Court of Appeal finds that section 6 of the Regulation must be considered a provision regarding minimum rates of pay in the sense of the Posting of Workers Directive. The provision imposes an obligation to pay an additional remuneration calculated as a percentage of *the hourly rate*. In the Court's opinion, it follows from the context that this 'hourly rate' refers to the 'hourly pay' determined in the same chapter, section 3(1). The Court also refers to the fact that section 3 is a provision regarding minimum wage, cf. first subsection 'a minimum wage of', and it would in the Court's opinion violate the system and purpose of the regulation if 'the hourly rate' in section 6 were to refer to the actual negotiated hourly pay, whether or not this is higher than the minimum hourly pay set out in section 3(1), as argued by the Appellants.»**

(135)
I support this position, as well as the Court of Appeal's conclusion that the Regulation clearly sets out the basis on which the overtime rates must be calculated. I further agree with the Court of Appeal that the provisions in sections 5 and 6 of the Regulation are necessary, suitable and proportionate for the purpose of attaining the level of protection sought by the general application of the minimum terms and conditions of the Engineering Industry Agreement with regard to working hours and overtime.

(136)
Compensation for travel, board and lodging expenses

(137)
Section 7 of the Regulation reads as follows:

> **« In the case of work requiring overnight stays away from home, the employer shall, according to further agreement, cover necessary travel expenses on commencement and completion of the assignment, and expenses for a reasonable number of home visits.**
>
> **Before the employer posts an employee on assignments away from home, board and lodging arrangements shall be agreed. As a rule, the employer shall cover board and lodging, but a fixed subsistence allowance, payment on the presentation of receipts etc. may be agreed.»**

(138)
The Board's decision states as follows with regard to the compensation arrangement:

« For posted workers who in principle are employed by a foreign undertaking, the place of residence will normally be considered to be at the undertaking's location. The Tariff Board bases its decision on the assumption that the travel provisions involve the reimbursement of actual expenses incurred in travelling to the worker's home, irrespective of whether this is in Norway or abroad, cf. the Tariff Board's statement of 20 October 2005.

With regard to board and lodging in connection with work assignments away from home, the employer and employee are expected to enter into an agreement relating to the coverage of such expenses prior to the assignment. The employer is in principle responsible for providing board and lodging, but compensation may also be agreed by way of reimbursement of documented expenses, fixed compensation rates, etc. ... »

(139)

In point 3 of its conclusion, the EFTA Court has provided the following Advisory Opinion:

« Directive 96/71/EC does not permit an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, unless this can be justified on the basis of public policy provisions. »

(140)

This conclusion is based on the EFTA Court's view that compensation of expenditure does not constitute pay, cf. paragraph 97 of the opinion, which reads:

« Such payments cannot fall within the notion of pay within the meaning of Article 3(1) of the Directive, because of their nature as compensation of necessary expenditure related to the posting. Neither can they fall within any other of the matters listed exhaustively in Article 3(1). »

(141)

It is my understanding that the court, based on its view that compensation for expenditure does not constitute pay – and therefore not minimum wage – finds that this type of provision is not covered by the exhaustive list of matters which can be declared generally applicable under Article 3(1)(1).

(142)

It is the opinion of the Norwegian State that the EFTA Court's view on what constitutes minimum rates of pay in the sense of the Directive is erroneous. In this connection I point out what I have stated earlier on the importance of the EFTA Court's opinion.

(143)

For the purpose of the Supreme Court's own review of the minimum rates of pay issue, Article 3(1)(2) constitutes a natural starting point. The provision reads:

> **« For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted. »**

(144)

In my understanding, this means that Norwegian law will decide what constitutes pay in the sense of the Directive with respect to workers posted to Norway. However, the EFTA Court's position on this issue is according to its wording not founded on the legal basis provided by the Directive. Nor can it be inferred from the court's wording that the final decision of this issue is left to the national court, which would have been the natural thing to do. I nevertheless wish to make the following comments:

(145)

When determining what constitutes pay under Norwegian law, it is helpful to look at section 14-12(a)(1)(f) of the Working Environment Act, which deals with equality of pay and employment conditions for workers contracted from an employment undertaking. This provision stipulates that a contracted-in worker is entitled to "pay and compensation for expenses" in the same way as if he had been employed by the undertaking contracting him in. This provision was introduced in order to implement the so-called Agency Workers Directive in Norwegian law, and came into force on 1 January 2013. On page 56 of Proposition no 74 L to the Storting (2011-2012) concerning the notion of pay, the provision reads:

> **« The Ministry stated in the consultative paper that any compensation for board, lodging and work-wear expenses will form an important constituent of the concept of pay with respect to equality of treatment. Many consultation bodies on the employer side have pointed out that it is unusual for the compensation for expenses to be interpreted as part of the concept of 'pay' and feel that this must either fall beyond the scope of the equality provisions or be expressly laid down in the wording of the law. »**

(146)

The proposition also points out that compensation for expenses in connection with work away from home may constitute relatively large amounts of money, and that in such instances contracted-in workers would be subject to

significant discrimination in relation to employed workers were these entitlements to be excluded from the requirements for equal treatment. Compensation for expenses has therefore been incorporated as an independent part of the provisions relating to equal treatment, similar to the payment of wages. It is expressly stated that contracted-out workers are therefore entitled to receive compensation for work-wear, board, lodging and other expenses to the same extent as if they were employed to carry out the same jobs by the undertaking contracting them in.

(147)

In my view, the solution chosen by the legislature in this instance is clearly based on the view that contracted-in workers would be left with less remuneration for the same piece of work if they did not have their costs reimbursed on equal terms with directly employed workers.

(148)

The practical considerations on which this solution is based, pursuant to section 14-12 (a)(1)(f) of the Working Environment Act, should also be of relevance to the assessment of whether workers who are assigned to perform a certain job obtain the minimum rates of pay in the sense of the Directive if they have to bear their own necessary expenses incurred in connection with the job.

(149)

In this respect, the numerical material submitted in the case demonstrates that the real costs of travel, board and lodging for posted employees are calculated at an average of approximately NOK 50 per hour of work. These figures have not been disputed. Based on the generally applied minimum rates of pay under the 2008 Regulation, i.e. NOK 126.67 an hour for skilled/semi-skilled workers and NOK 120.90 for unskilled workers, the real attainable rates of hourly pay are NOK 76.67 and 70.90 respectively before any out-of-town allowance. If the Directive does not allow the imposing of an obligation to pay compensation for this type of expenditure, we are in my opinion at risk of undermining the entire system of minimum wage; a system which is founded on the need for social protection.

(150)

Section 7.3 of the Engineering Industry Agreement, which corresponds to section 7 of the Regulation, contains provisions imposing an obligation on the employer to compensate workers for travel, board and lodging expenses if their work assignments require overnight stays away from home. The rules are based on the principle that workers should not have to carry the employer’s cost incurred in having the work carried out.

(151)

As I have mentioned above, the Board has in the General Application Regulation relied on the premise that compensation for this type of expenditure is payable even if the worker’s place of residence is abroad. The numerical example above illustrates that without such a rule it would be

impossible to ensure that *workers de facto* obtain the minimum rates of pay, which is the very purpose of the general application. In my opinion, great importance should be attributed to these practical considerations when determining the definition of minimum rates of pay under the Directive.

(152)
I draw attention to the fact that Article 3(7)(2) of the Directive clearly points in the same direction. It reads:

> **« Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as travel, board and lodging. »**

(153)
This provision is not discussed in the EFTA Court's opinion.

(154)
It is difficult to understand this rule in any way other than that the minimum wage cannot be considered to have been paid by compensating workers for their posting expenses, such as travel, board and lodging. If this type of provision for the payment of compensation cannot be made generally applicable and the posted workers are accordingly left to pay the costs themselves, then the de facto result – as I have demonstrated – will be that the workers will not obtain the minimum rates of pay. An obvious interpretation of Article 3(7)(2) is therefore that it is based on the premise that such compensation for expenses constitutes minimum wage in the sense of the Directive, which may be made generally applicable.

(155)
However, it is not necessary for me to form a final opinion on whether the above factors provide grounds for diverging from the Advisory Opinion on this point. This because I, in any circumstance, consider it evident that provisions for compensation for travel, board and lodging expenses to posted employees are in fact justified by public policy provisions pursuant to Article 3(10) of the Directive.

(156)
I will now address this issue in further detail. The provision reads as follows:

> **« This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States on a basis of equality of treatment of**
>
> **- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,** »
>
> ...
>
> -

(157)

In other words, the Directive allows Member States to apply mandatory conditions of work and employment of a different type than those which are exhaustively listed in Article 3(1)(1) – i.e. regarding matters other than maximum period of work, minimum rates of pay etc. – provided this is a question of « public policy provisions», as stated in the English text of the Directive.

(158)

What is meant by « public policy » is discussed in paragraph 99 of the EFTA Court's opinion (E-2/11), with further references to the Court of Justice of the European Union case-law. The notion of public policy – particularly when it is cited as a justification for diverging from the fundamental principle of the freedom to provide services - must, however, be interpreted strictly and cannot be determined unilaterally by each individual EEA State. The decision of the Court of Justice of the European Union in Case C-319/06 *Commission* v *Luxembourg,* establishes in paragraph 50 *et sec.* that public policy may only be cited « if there is a genuine and sufficiently serious threat to a fundamental interest of society». According to the EFTA Court's decision in paragraph 59 of Case E-12/10 *ESA v. Iceland* the measure «must be considered imperative for the protection of workers and crucial to the social order in Iceland ».

(159)

In the case at hand, the question of whether a general application of the Engineering Industry Agreement's provisions relating to compensating posted workers for travel, board and lodging expenses is justified by «public policy» must be considered in the light of the Norwegian so-called labour market or wage negotiations model. This is described as follows on page 179 of NOU 2009:10 (Official Norwegian Report):

> **« The Norwegian wage negotiation model is characterised by a high degree of co-ordination compared to many other countries. There is a long tradition for such co-ordination in Norway. The main industrial organisations play essential roles in the wage settlement process, and a number of mechanisms and institutions support the co-ordinating aspect of the wage formation process, such as the Technical Calculating Committee, the State Mediator and the National Wages Board. The model rests on, among other things, the recognition that over time, wage formation impacts significantly on the level of unemployment, while the development of real wages is primarily linked to the development in productivity. Experience from Norway and other countries indicates that a high nominal wage growth which is not matched by a similar growth in productivity will over time essentially give rise to higher inflation and increased unemployment rather than a rise in real wages, cf. Holden I (NOU 2000:21). A smoothly running wage formation system helps maintain a low level of unemployment, a high level of labour force participation and good framework conditions for businesses.**
>
> **Facilitating a shared understanding of the current economic situation in Norway is an important part of incomes policy cooperation relating to wage formation, to ensure that the social partners agree, as far as**

possible, on the numerical basis of their negotiations. However, it is the responsibility of the respective parties to conduct the collective wage settlement negotiations.

The Norwegian tradition is one of broad social dialogue and the participation of the social partners. The Government's Contact Committee and the Technical Calculation Committee for Wage Settlements contribute significantly to this dialogue. »

(160)

Furthermore, the so-called wage leadership model holds a key position in the wage settlement negotiations. NOU 2009:10 describes this model on page 180:

«The Norwegian wage negotiation model is based on an understanding that wage growth must be adjusted to a level which is acceptable to the exposed sectors over time. This principle has been safeguarded by ensuring that wage agreements involving a large proportion of exposed industries (the wage leader) are negotiated first, and that these agreements go on to form a norm for other sectors. The wage leadership model is based on the so-called Aukrust model from 1966, also referred to as the main-course model. »

(161)

Even though the wage formation model is an intrinsically political issue, the above review demonstrates that the Norwegian labour market model, including the wage leadership model, stems from a long tradition and forms part of our social system. The question is whether provisions that affect the stability of such a basic social arrangement may be said to concern «public policy» in the sense of the Directive. Based on the explanation provided by the Ministry in Proposition to the Odelsting no. 88 (2008-2009) this must in my view largely be answered in the affirmative. I quote from page 11:

« A number of basic considerations suggest the use of strong tools to combat social dumping, most importantly the consideration for the protection of the pay and employment conditions of foreign workers. Social dumping is also unfortunate for other workers and businesses in Norway. It may for instance lead to unfair competition with unreasonable pressures exerted on rights achieved, and failing recruitment to particularly exposed trades and industries, and it may cause serious undertakings to lose out in the competition for contracts and customers to unreliable players. Based on the Norwegian Labour Inspection Authority's findings and assessments, as well as other sources, the Government is of the opinion that unless we gain better control of the situation, a negative development may, long term, contribute to the undermining of the Norwegian labour market model with a regulated labour market, a high level of unionisation and a well functioning tripartite cooperation.

(162)

The Ministry here emphasises the importance of maintaining the stability of the Norwegian labour market model while pointing out the challenge represented by social dumping in this respect. It is subsequently made clear that the general application institution is a tool for safeguarding the stability of the model.

(163)

The Norwegian State has submitted comprehensive statements to the Supreme Court, providing details of the consequences of revoking the right of posted workers to receive compensation for travel, board and lodging expenses. The common denominator of the statements is that they generally point to the negative consequences of a revocation, but opinions vary with respect to the severity of these consequences. However, professor Ragnar Nymoen's statement, which I consider to be the most moderate in this respect, concludes as follows:

> **If employers within a specific wage area, either through direct employment or by using posted workers, can avoid paying parts of their overall payroll cost, this will alter the symmetry of working life relations, and it will alter the competition between Norwegian and foreign workers, and between companies as employers.**
>
> **If we were talking about minor cost components, the effects could have been negligible. In this case, however, the premise is that the employer's duty to pay compensation for travel, board and lodging expenses to posted workers in the maritime construction industry is revoked and that the same takes place in the construction sector and the cleaning industry. Auxiliary document no. 3 demonstrates that travel, board and lodging expenses make up a considerable part of the total hourly cost of pay under the collective agreement.**
>
> **Within the framework of the Norwegian wage formation system, as described in paragraph 1 of the response, the following effects are to be expected:**
>
> 1. **Weakened position of the workers' side: Reduced welfare, pressure on Norwegian wages**
> 2. **Reduced social benefit from wage leader settlements.**
> 3. **Lower degree of co-ordination and poorer collaborative climate.**
> 4. **Lower level of unionisation.**
> 5. **Larger wage differences, between agreement areas and industrial sectors, but also between households and individuals**
>
> **……"**

(164)

Nymoen goes on to provide more detailed grounds for his conclusion. He summarises in conclusion as follows:

> **Especially in the longer term, and if general application is reduced in**

sectors with a high level of employment, co-ordination will deteriorate on a broad front, and the collaborative work climate may suffer. We would need to anticipate a drop in the level of unionisation, because the usefulness of union membership will gradually diminish. The legitimacy of collective bargaining may therefore partly or wholly disappear. In consequence, the Norwegian labour market model may no longer be able to provide a framework for regulating the relationship between employees and employers.

It may be argued to the contrary that the levels of unionisation, coordination and legitimacy constitute robust pillars capable of withstanding a certain reduction in the scope of collective bargaining. On the other hand, it may be wise to consider that there is a limit to how far a process of gradual weakening can proceed before the very system is perverted or falls apart. I believe that no-one is in a position to know exactly when this threshold is about to be crossed. In any circumstance, the question of what should replace the systems of wage leading and wage following sectors, and of collective agreements as a regulating instrument under private law, is extremely comprehensive indeed. "

(165)

The Appellants have disputed the notion that a number of the outcomes which form the premise for Nymoen's conclusion, will actually occur. In particular, they have countered the assertion that a revocation of general application will give rise to a lower level of unionisation. They point out, inter alia, that posted workers are not members of Norwegian trade unions, just as the employment undertakings for which they work are not members of the employers' organisations. Government statistics do not include these workers among their Norwegian employment figures, and they will therefore « not occur in any shape or form in any calculation of the level of unionisation in the labour market ». Furthermore, they dispute that revocation of general application will cause wage leader settlements to be of reduced social value. Such outcomes must be ascribed to a completely different set of circumstances, such as the low proportion of the working population employed in the manufacturing industry, in combination with the falling trend of this proportion.

(166)

In my view, Nymoen – when he expects a lower level of unionisation – is not bearing in mind the level of unionisation among posted workers, nor the proportion of Norwegian workers to posted workers, which appears to be the Appellants' position. I read his statement to mean that a lower level of unionisation should be anticipated because Norwegian workers over time will fail to see the usefulness of trade union membership when wages fall as a consequence of the wage pressure created by social dumping. The same applies with respect to the level of membership of employer organisations. For example, Nymoen states that:

« On the employers' side, a permanent opportunity to hire labour at an hourly rate of pay which is lower than that determined by a collective

agreement will make it less likely for companies to join employer organisations which are in a position to enter into collective agreements. »

(167)

In my view, this clearly refers to Norwegian employers who make use of posted workers rather than to employment undertakings.

(168)

Nor am I able to see that the general challenges as far as the wage leader is concerned pointed out by the Appellants will make the impact of a revocation of general application irrelevant in this respect. In his statement, Nymoen has explained that a reduction of the generally applied wage costs in the wage leader area will violate the intention and intrinsic logic of the main-course model.

(169)

In my view, no evidence has been submitted to the Supreme Court which may serve to weaken Nymoen's assessments. Admittedly, the Appellants have pointed out that the Norwegian labour market model over the past few decades has survived major challenges and has accordingly proved to be a resilient model. It is argued that this resilience demonstrates that the model will be able to withstand the consequences of a revocation of the benefits for posted workers in question here. However, it is my view that the empirical basis referred to is not of immediate relevance to the assessment of the factors that Nymoen has identified as risks to the system of wage formation and the Norwegian labour market model.

(170)

Based on the Ministry's general statements in the Proposition to the Odelsting no. 88 (2008-2009) about the destabilising potential of social dumping on the labour market model, and based on the socio-economic analyses submitted in the case, I find it to be adequately documented that a general application of the Engineering Industry Agreement's rules relating to compensation payable for travel, board and lodging expenses are of importance to the stability of the Norwegian labour market and wage leadership model. It follows from my general starting point that we are accordingly looking at « public policy provisions» under section 3(10). In my assessment I attach considerable importance to the domino effect that a revocation of section 7 of the Regulation would have for other generally applied collective agreements with identical, arrangements. If the reimbursement provisions are revoked, this would thus have consequences for a considerably larger number of posted workers than merely those employed in the maritime construction industry.

(171)

Because we are discussing the issue of public policy on the premise that compensation for travel, board and lodging expenses does not constitute wages, my overall assessment also attatches importance to the fact that these

provisions are, based on their content, intended to safeguard the social protection of posted workers. Under any circumstances, our discussion thus comes very close to the notion of wages and borders on the considerations which the Directive is intended to safeguard.

(172)

It should be mentioned that the written statements submitted to the Supreme Court tell us – as I have already suggested – that a growing number of employment undertakings establish themselves locally in order to avoid the extra cost caused by the general application regulation. The personnel are the same as those previously contracted by the shipyards, but they are now sourced from companies set up as Norwegian subsidiaries. For the foreign workers who have been hired locally, the consequence is that they are now left with less net remuneration than previously. This is illustrated by the numerical example I quoted above, which indicates that the cost of travel, board and lodging has been calculated to constitute an average of approximately. NOK 50 of the minimum hourly rates of pay.

(173)

Researchers Dølvik and Eldring point out in their statement that the shipyards have become increasingly dependent on the foreign labour offered by the employment undertakings, and that a number of shipyards hold a stake in or have some other close affiliation with such undertakings, or with sub-contractors. They go on to say:

> **« In reality, therefore, the companies that currently offer foreign labour in the form of contracted-in labour or subcontracts, generally *compete against each other* in a low-price market for labour-intensive work. This has led to some of them setting up a 'local' subsidiary in order to avoid the cost of travel, board, lodging and out-of-town allowances while most of their employees still commute between their home country and their Norwegian place of work. Once some of the foreign players have opted for this adjustment, the competition for contracts will mean that many will follow suit. Consequently, the people employed by these companies have hardly been forced to migrate to Norway to avoid being excluded from the Norwegian labour market by losing out in the competition with 'Norwegian' subcontractors. This is probably an adjustment based on their employers' realisation that this is necessary in order to keep up with the price competition against other businesses that contract foreign labour (including the shipyards' own). »**

(174)

The Appellants have commented that the regulatory framework «forces» undertakings to organise themselves in the way described. The Norwegian State and its intervenors, on their part, describe the situation as a mere circumvention of the General Application Regulation. According to the information submitted to the Supreme Court, it may be an obvious conclusion that in reality the only effect of the arrangements established by the employment undertakings is that formerly posted workers lose their

allowances. If this is the case, I find reason to question the legal validity of such an arrangement. Regardless, the way in which the players have organised themselves does not constitute an argument of relevance to the assessment of whether the general application of the provisions for compensation for the expenses concerned is covered by Article 3(10).

(175)

In conclusion, I point out that the documentation submitted to the Supreme Court concerning the issue at hand, clearly meets the requirement under EEA law for analysis and substantiation of the suitability and proportionality of the measure with respect to the protection of public policy.

(176)

Because section 5 of the General Application Act allows decisions to be made applicable to only parts of an industry I fail to see the validity of the Appellants' claim that the measure must apply to all sectors and not just one.

(177)

In this light I conclude that section 7 of the Regulation is compatible with EEA law.

(178)

Procedural errors

(179)

The Appellants have asserted that even if the Regulation is not incompatible with EEA law, the Tariff Board has nevertheless committed a procedural error which renders its decision invalid. They point out that the Board's decision fails to address the legal and discretionary assessments required under EEA law. Consequently, it is impossible to know whether the decision would have been the same had the Board considered the questions in the light of the correct legal issues.

(180)

In my view, the procedural error argument is not valid. It may well be argued that the Tariff Board could have kept a closer eye on EEA law in its discussions. However, there is no requirement for me to form an opinion on the question as to whether an error has been committed. I find it obvious that this has had no bearing on the Regulation concerning general application. The Board has underlined and justified the need for general application with respect to each of the points. I cannot see that any discussion of Article 36 of the EEA Agreement could have brought about any other conclusions. The Board has clearly wanted to avoid the emergence of a large low-pay group and a two-tier labour market, and nor would the outcome of an assessment with respect to Article 3(10) of the Directive have given rise to any doubt.

(181)

In the light of the above, the Appeal must be quashed.

(182)

Costs

(183)

The Norwegian State, represented by the Tariff Board, has won the case completely and shall pursuant to the main rule of section 20-2 of the Norwegian Civil Procedure Act be awarded costs. Even though the case has raised questions of principle, its resolution has given no grounds for doubt. I cannot see that the exemption rules set out in section 20-2 (3) are applicable. Costs are therefore awarded for proceedings at all levels.

(184)

For the District Court proceedings, the Norwegian State, represented by the Tariff Board, has submittred a statement of costs of a total of NOK 550,000, for the Court of Appeal proceedings a total of NOK 466,200, and for the Supreme Court proceedings a total of NOK 830.000, of which an amount of NOK 225,200 represents expenses. The statements are accepted. The claim for costs accordingly amounts to a total of NOK 1,846,200 of which NOK 225,200 represents expenses.

(185)

For the District Court proceedings, LO has submitted a claim of NOK 373,800 which is clearly based on an inadvertent mix-up of the interim and final statements of costs of the proceedings in the first instance. The amount awarded by the District Court according to the final statement was NOK 431,909 of which an amount of NOK 59,309 represented expenses. I have determined the award of costs on the basis of the correct amount. For the Court of Appeal proceedings a claim for a total of NOK 598,979 was submitted, of which an amount of NOK 6,979 represents expenses, and for the Supreme Court proceedings a total of NOK 540,100 of which an amount of NOK 1,100 represents expenses. The statements are accepted. The claim for costs accordingly amounts to a total of NOK 1,570,988 of which an amount of NOK 67,388 represents expenses and fees.

(186)

For the District Court proceedings, the Norwegian United Federation of Trade Unions has submitted a claim based on a statement of costs of a total of NOK 228,600, for the Court of Appeal proceedings a total of NOK 264,078 of which NOK 16,078 are expenses, and for the Supreme Court proceedings, a total of NOK 163,000. The statements are accepted. The claim for costs accordingly amounts to a total of NOK 655,678 of which NOK 16,078 represents expenses and fees.

(187)

I vote in favour of the following

JUDGMENT :t

1. *The Appeal is quashed.*
2. *STX OSV AS, STX Norway Florø AS, Kleven Verft AS, Myklebust Verft AS, Bergen Group Shipbuilding AS, Ulstein Verft AS, Havyard Ship Technology AS, Aibel AS, the Confederation of Norwegian Enterprise and the Federation of Norwegian Industries are ordered – jointly and severally – to pay costs incurred before the District Court, Court of Appeal and the*

Supreme Court to

- *the Norwegian State, represented by the Tariff Board, in the amount of NOK 1,846,200 – one million eight hundred and fortysix thousand two hundred.*
- *the Norwegian Confederation of Trade Unions in the amount of NOK 1,570,988 – one million five hundred and seventy thousand nine hundred and eighty, and*
- *the Norwegian United Federation of Trade Unions in the amount of NOK 655,678 – six hundred and fifty-five thousand six hundred and seventy-eight –*

within 2 – two – weeks from the service of this judgment.

(188)

Judge **Øie:** I concur in all essentials and as regards the conclusion with the first-voting judge.

(189)

Judge **Endresen:** Likewise.

(190)

Judge **Bergsjø:** Likewise.

(191)

Chief Justice **Schei:** Likewise.

(192)

Following the voting, the Supreme Court delivered the following

JUDGMENT:

1. *The Appeal is quashed.*
2. *STX OSV AS, STX Norway Florø AS, Kleven Verft AS, Myklebust Verft AS, Bergen Group Shipbuilding AS, Ulstein Verft AS, Havyard Ship Technology AS, Aibel AS, the Confederation of Norwegian Enterprise and The Federation of Norwegian Industries are ordered – jointly and severally – to pay the costs incurred before the District Court, the Court of Appeal and the Supreme Court to*
   - *the Norwegian State, represented by the Tariff Board, in the amount of NOK 1,846,200 – one million eight hundred and fortysix thousand two hundred,*
   - *the Norwegian Confederation of Trade Unions in the amount of NOK 1,570,988 – one million five hundred and seventy-nine hundred and eighty-eight – and*
   - *the Norwegian United Federation of Trade Unions in the amount of NOK 655,678 – six hundred and fifty-five thousand six hundred and seventyeight*

–within 2 – two – weeks from the service of this judgment..