Norwegian employment law

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TOPICS

• Purpose of today’s session is to give an overview of Norwegian employment law with case studies and examples
• Introduction: Characteristics of Norwegian employment law
• Recruiting employees
• Employment contracts – permanent/temporary
• Working time
• Benefits
• Changing the terms and conditions of employment
• Termination of employment
• Discrimination
CHARACTERISTICS

• Norwegian employment law is characterized by strong worker protection through legislation and collective agreements
  – Employment protection
  – Mandatory benefit schemes under law, including leave of absence, insurance, sickness benefits and unemployment benefits
  – Mandatory holiday pay
  – Mandatory occupational pension

• Worker codetermination and participation

• Detailed formal mandatory procedures

• New legislation enters into force 1\textsuperscript{st} July 2015
  – Age limits, temporary employment, working time
HISTORY

• What has developed Norwegian employment law?
  – Strong unions, high unionization rate and development of collective agreements since early 1900
  – Post WW2 welfare development (The Nordic model)
• Development of employment legislation through 70s and 80s
• Since 1994 – strong influence from EC legislation
  • Non-discrimination law
  • Transfer of undertakings protection
  • Collective dismissals
• Recruitment is based on employer’s choice and is not regulated by law

• Private sector
  – No requirement to announce positions to the public, but employees of the company should be informed of open positions
  – Employers should observe preferential rights for previously terminated employees, temporary employees and part time employees (WEA ch 14)
  – No regulation regarding the employer’s choice of candidate

• Public sector
  – Requirement to announce position and to employ the best qualified candidate

• Employer’s choice of candidate is limited by discrimination laws
  – Case law from the discrimination and equality ombud and board
CASES

• LDN 2014-52
  – A government body recruited to a senior position.
  – Plaintiff A was 58 years and was not called for an interview despite relevant competence and experience.
  – This gave reason to believe that he had been discriminated due to age.
  – The employer had the burden of proof and it was not sufficient that the employer assumed that elder employees did not have up to date education and experience.

• LDN 2006-10
  – Job announcement encouraging «mature woman 30-50 years» to apply was discriminatory.
  – Sex discrimination and age discrimination.
GATE GOURMET CASE

• Airline caterer won tender for new contract

• The company entered into an agreement with the union to recruit its members who worked for the previous airline catering company

• The agreement was found discriminatory as it favoured members of one union as opposed to members of other unions and non-union members

• Employees were awarded damages for up to two years salary as a result of union membership discrimination
EMPLOYMENT CONTRACTS

• General principle in Norwegian employment law: permanent employment

• Temporary employment and employment through agencies is restricted
  – Temporary work
  – Substitutes
  – Trainees

• New legislation gives employers a general right to use temporary employment for up to 12 months.
CASE LAW

• The Supreme court has in several cases over the years underlined that the provisions regarding temporary employment should be interpreted strictly
  – Focus has been on temporary work and substitutes

• If a temporary employment contract does not comply with the law, the employee is entitled to permanent employment

• Cases include substitutes who has been (re)hired several times demonstrating that the employer has a permanent need for employees and should therefore use a permanent contract
RECENT DEVELOPMENTS

• Assistant doctor case (2013)

• WEA section 14-9 allows temporary employment for «trainee positions»

• Traditionally not a focus area

• In the assistant doctor case, hospital doctors had temporary positions for a long time, until obtaining a specialist license (typically when the doctors were in their 40s)

• Supreme court accepted that the Ads had trainee positions, defined as Work related to training and qualification within an area of expertise

• Consequences?
NEW LEGISLATION

• What are the limits on temporary employment under new legislation?
  – Limited to a period of 12 months
  – Can be used for both temporary and permanent work
  – Up to 15% of the employees
  – Quarantine period of 12 months
    • Applies to same type of work
    • Means that an employer who has used a 12 months temporary contract can not enter into new 12 months temporary contract for the same type of work during the quarantine period

• Temporary employees are entitled to permanent employment after 3 year
AGENCY WORKERS AND SERVICE PROVIDERS

• Agency work is subject to the same restrictions as temporary employment.
  
  – fair to assume that agency work is used to a large extent and not only for substitutes and temporary work

• Agency workers are entitled to equal treatment with the employers regular employees regarding salary and terms of employment
  
  – Includes salary, working time, bonuses (?)
RECENT CASES

• Statoil post office case (2013) shows that it is necessary to differentiate between agency workers and employees working for a service provider
  – Agency workers are under the control and management of the hiring company (typically employees from Manpower etc)
  – Service providers are under the control and management of the service provider (typically an external IT service provider)

• Statoil had outsourced its internal post office to a service provider. The employees were previous Statoil employees who were made redundant.
  – The employees argued that the were under the control and management of Statoil in their daily work and therefore should be considered as agency workers.
  – Argued that they had been employed for more than 4 years and therefore entitled to permanent employment with Statoil
  – Supreme court found that they were indeed under the control and management of the service provider
WORKING TIME

• WEA – normal working hours are 40 hours a week
  – Norway has implemented EC working time directive
  – Labour market practice of 37.5 hours per week

• Detailed regulation of working time, overtime pay, week-end work, night work, shift work, stand-by work

• Working time regulations apply for all employees with a few exemptions:
  – Senior posts
  – Particularly independent posts
WORKING TIME - EXEMPTIONS

• “Senior posts” and “particularly independent posts”
  – Depends on an overall assessment
  – Degree of responsibility and independency on resolving matters,
  – Degree of self evaluation and self control on i.a.:
    • work efforts
    • working hours
    • problem solving
    • how and when to do what
  – Salary

• Traditionally – most office employees have been exempted

• Recent development – increased focus from the Labour Inspection Authority force businesses to review policies on working time
  – Many companies have found it necessary to review their salary grade system to determine which positions are exempted
SENIOR TECHNICAL ADVISOR CASE (2012)

• Senior technical advisor in oil service company had a contract stating that he was not entitled to overtime pay

• Filed a law suit claiming overtime compensation (after he had left the position)

• Appeal court found that he was entitled to overtime pay as his position was not «particularly independent»
  – Work was assigned to him by his superior
  – He work on projects and his time was governed by the project
  – He could not himself prioritise what work he should do

• Entitled to overtime pay for the period from 2002 to 2012
WORKING TIME

• Employees must be granted at least one rest break if their daily working hours exceed five hours and 30 minutes.

• Where daily working hours total at least eight hours, the rest breaks must collectively amount to at least 30 minutes.

• Breaks are not normally included in working time.

• If the employee is not free to leave the workplace during the break or there is no satisfactory break room, the break must be paid and regarded as part of working hours.
WORKING TIME – NEW LEGISLATION

• Working time and overtime are strict regulated in law

• Normal working time must not exceed nine hours per 24 hours and 40 hours per seven days

• Possibility to calculate average normal working hours
  – The employer and the employee can agree in writing that normal working hours may be extended up to 10 hours per day and 50 hours per week as long as, on average over a reference period not exceeding 52 weeks, they do not exceed 40 hours.

• In organisations covered by a collective agreement, the employer and employees’ elected representatives can agree in writing that normal working hours may be extended up to 12,5 hours per day and 50 hours per week as long as, on average over a reference period not exceeding 52 weeks, they do not exceed nine hours per day and 40 hours per week. Further, within this overall reference period, it can be agreed that normal weekly working hours may be extended up to 54 hours, as long as, on average over a period of eight weeks, they do not exceed 48 hours.
WORKING TIME

• Working time in excess of the statutory normal working hours is considered as overtime
  – Unless otherwise agreed this means work above 40 hours per week

• Overtime is permitted only where there is an “exceptional and time-limited need” for it

• Before using overtime, the employer must, if possible, discuss the necessity for such work with the employees’ elected representatives

• There are limitations on the amount of overtime that can be worked.
  – Limits are increased according to new legislation

• Overtime pay
  – supplement must be paid (min. 40%)
NEW LEGISLATION REGARDING OVERTIME

• Limits for overtime work

  – Upper limit for overtime agreed between union and employer is raised from 15-20 hours per week and 40 to 50 hours per month.
  – Labour Inspection Authority can approve up to 25 hours overtime work per 7 days

• Maximum total working time per week

  – 48 hours in average of 8 weeks
  – Absolute limit of 69 hours per week
BENEFITS

• Main rule is that benefits are a subject of agreement between employer and employee
• Statutory benefits include; holiday pay, pension, insurance, leave of absence
• Recent developments: changes in the pension system
MANDATORY OCCUPATIONAL PENSION

• Since 2000 – extensive development of pension legislation
  • Detailed requirement regarding tax favoured pension schemes

• All employees are entitled to an occupational pension scheme.
  • Minimum requirement is a defined contribution scheme of 2% of salary
  • Trade practice within oil and gas industry based on collective agreements offers substantially better benefits
  • Normal practice in DC scheme of 5/8% or DC scheme of 60% and above

• Changes in the pension system:
  – The Norwegian national Insurance has changed. It offers pension contribution of app. 18.1 % from 0 to 7,1G (G=)
  – Defined contribution schemes are allowed to offer 7% up to NOK 640.000 and 25,1% from NOK 640.000 to 1.080.000
HOLIDAY

- Norwegian holiday pay system is old and is not followed in practice
  - Most employers pay salary for 11 months and holiday pay on the 12th month
  - No signal of revision of the holiday act

- Statutory holiday is 4 weeks and 1 day per year.
  - Labour market practice based on collective agreements is a minimum of 5 weeks

- Statutory holiday pay of 10.2% of annual income
  - Labour market practice based on collective agreements is a minimum of 12%

- Additional holiday for employees above 60

- Transfer of unused holiday and payment in lieu
  - Latest revision of the holiday act is that unused holidays cannot be paid out in cash

- Employer can force the employee to take unused holidays during notice period

Arntzen de Besche • 16.06.2015
**SALARY COMPUTATION**

- No particular regulation on salary, no minimum requirements
- Annual salary computation - example:

<table>
<thead>
<tr>
<th>Annual salary fixed in the employment contract</th>
<th>NOK 800,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly salary</td>
<td>NOK 66,666</td>
</tr>
<tr>
<td>Salary for 11 months (No salary in June)</td>
<td>NOK 733,333 annually</td>
</tr>
<tr>
<td>Holiday pay (June)</td>
<td>12% of NOK 733,333 = NOK 88,000</td>
</tr>
<tr>
<td>Total salary including holiday pay</td>
<td>app 820,000</td>
</tr>
</tbody>
</table>
• Supreme court of Norway in the “Nøkk” ruling

«According to the Managerial prerogative, the employer is entitled to organise, manage, control and distribute the work within the framework of the employment relationship that is entered into. The employment agreement should be interpreted inter alia with consideration of the job title, the circumstances related to the recruitment process, trade practices, practice in the employment relationship at hand and also what seems fair in light of the development of the society”

• The managerial prerogative is limited by legislation and agreements, and it is dynamic (may change with the changes of society)
• In order to grasp the content of the managerial prerogative, we need to look more closely at the limits.
PRACTICAL ADVICE

• Balance between unilateral decisions and agreed solutions

• The process will depend on the type of decision
  – Day-to-day decisions and comprehensive re-organisations
  – Regular management and changes of terms and conditions
  – Temporary and permanent changes
  – General changes or individual changes
RT 2008 – 856 THEATERCAFEEN

• Issue: Theatercafeen decided to split tips between waiters and other restaurant staff.

• Question for the Supreme court:
  – Was the waiter's legally entitled according to their employment agreements to keep the tips for themselves?

• Assessment
  – The right to tips was not part of the written employment agreements
  – The fact that the waiter's for a long time (70 years) had kept the tips for themselves gave them an expectation, but not an expectation that constituted an agreed right.
  – Type of benefit and development in society where more and more restaurants has mowed towards shared tips.
RT 2009 -1465 LATE SHIFT

• Change of schedule from late shift to revolving shift

• Employment agreements stated that the nurses should work late shift

• Supreme court assessment:
  – Not all provisions in an employment agreement limits the managerial prerogative
  – If the employer has not explicitly waived the managerial prerogative, the employer can change provisions in the agreement as long as they don’t define, characterise or are considered essential to the employment relationship
RT 2011-841 SUPERVISORY TEACHER

• Issue:
  – Transfer from one school to another within the Municipality of Oslo as a result of co-operation conflict
• Employment agreement clearly stated a right to transfer
• Employee argued that changes were comprehensive and outside the managerial prerogative
• Supreme court assessment:
  – Even though she might have experienced the changes as comprehensive, she has to accept them.
  – Argued that the changes in «Fire boat Nøkk» was much more comprehensive
OTHER CASE-LAW

• RG-2010-488: Managing director was removed from the position during notice period: Accepted by the court

• LB-2011-184685: Headmaster at school was entitled to distribute classes to teachers even though one teacher had thought the same class for 15 years
• RG-2007-756: Drilling company was entitled to move an employee from one group company to another which implied moving from a permanent unit to a movable unit on the Norwegian continental shelf.

• LB-2006-171727: Employee was terminated when she refused to accept new work schedules. Court did not accept her argument that she had an agreement to come late on Mondays.
ISSUES FOR DISCUSSION

• Change of working time
• Order employee to work overtime
• Change of place of work
• Change of office
• Change of department
• New position – removal of responsibilities
OBJECTIVE JUSTIFICATION - PROCESS

• Rt 2001 – 418 Kårstø

  – General requirement of objectivity
  – Due process
  – Decision to be based on correct facts
  – And not random or based on irrelevant circumstances

• Supervisory teacher ruling

  – The court shall not determine if a decision is necessary or optimal
  – The test of objectivity is to make sure the employer does not abuse his managerial prerogative
• Employers may dismiss employees only if the dismissal is objectively justified on the basis of circumstances relating to the organisation, the employer or the employee.

• Possible grounds for dismissal relating to the employee include breach of contract, breach of duty and other circumstances related to the employee's actions or behaviour.

• With regard to circumstances relating to the organisation or employer that can objectively justify dismissals - essentially redundancies

   – legislation specifies that dismissal due to curtailed operations or restructuring measures is not objectively justified if the employer has other suitable work in its organisation to offer to the employee.
Several cases demonstrate that the threshold for termination during the probationary period is significantly lower than after the probationary period.

Case law also demonstrates that the employer will have to substantiate that there has been underperformance and that the employee has been given the chance to improve.

Case regarding employee who was detained in the custody of the police for 4 weeks (varetektsfengsling). The Supreme court stated that this was a relatively short absence.
TERMINATION - PERFORMANCE

• Poor performance is often a reason for ending the employment relationship

• The employer should preferably address the issue as early as possible after underperformance is detected.

• The employer has the burden of proof that the alleged reasons for the termination satisfy the legal requirements
  – Ensuring the burden of proof means produce minutes of all follow-up meetings and document targets and performance against target.

• It is important that the employee has a fair chance to prove her suitability to the position
  – The employer has a particular responsibility with regard to the guidance and feedback during the probationary period
TERMINATION MISCONDUCT

• Misconduct will often be a warranted ground for termination

• Typical situations will be:
  – breach of confidentiality
  – refusal to follow instructions
  – unwarranted absence

• We often recommend that a prior formal warning in writing has been given

• The warning should be signed by employee and the company.
TERMINATION - ILLNESS

• An employee who is wholly or partly absent from work owing to an accident or illness may not be dismissed for that reason during the first 12 months after becoming unable to work.

• The employment may be terminated on other valid grounds during this period. However, dismissal during this period is deemed to be on the ground of absence from work due to accident or illness, unless other grounds are shown by the employer to be highly probable.

• After 12 months the employee may be dismissed if there is no prospect of recovery within a reasonable time.
TERMINATION DUE TO ILLNESS

• Traditional approach: Possible to terminate employment after 12 months absence.

• Recent case law: Appeal court 2013

• Employee had been absent for 1 ½ years. Termination was not accepted.
  – Employer should have done more to try to help the employee back to work.
  – NAV had accepted to pay «arbeidsavklaringspenger» to help the employee recover in the work place.

• Development in case law seems to be that the courts demands more from the employer in relation to recovery from illness.
DISCRIMINATION LAW

• Norwegian legislation based on EC legislation
  • Sex, political view, union membership, age, disability, ethnical and national origin, colour, language, religion

• Recent development – more focus on discrimination law and more disputes and litigation

• Examples
  • Retirement ages
  • Differences in working time for different employee groups
RETIREMENT AGES

• General retirement age is 70 years

• Traditional case law
  – Companies are entitled to retire employees at 67 provided that the company has a good pension scheme, that the retirement ages is communicated to the employees and is practiced consequently.
  – Case law in many European countries shows that such retirement ages are not age discriminatory

• New legislation:
  – General retirement age lifted to 72 years
  – Company specific retirement age not lower than 70
  – Lower retirement age only for HSE reasons
OTHER AGE DISCRIMINATION CASE LAW

• SAS pilot case (2009)
• Airline needed to downsize
• The airline selected those pilots who had full pension benefits (above 60 years).
• Pilots argued that seniority principle should have been applied
• The Supreme Court stated that the seniority principle can be set aside if it is objectively justified
• Accepted that consequences of redundancy was less devastating for senior pilots due to their pension benefits.
• Consequences?
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