Nordic Employment Law Bulletin - November 2023

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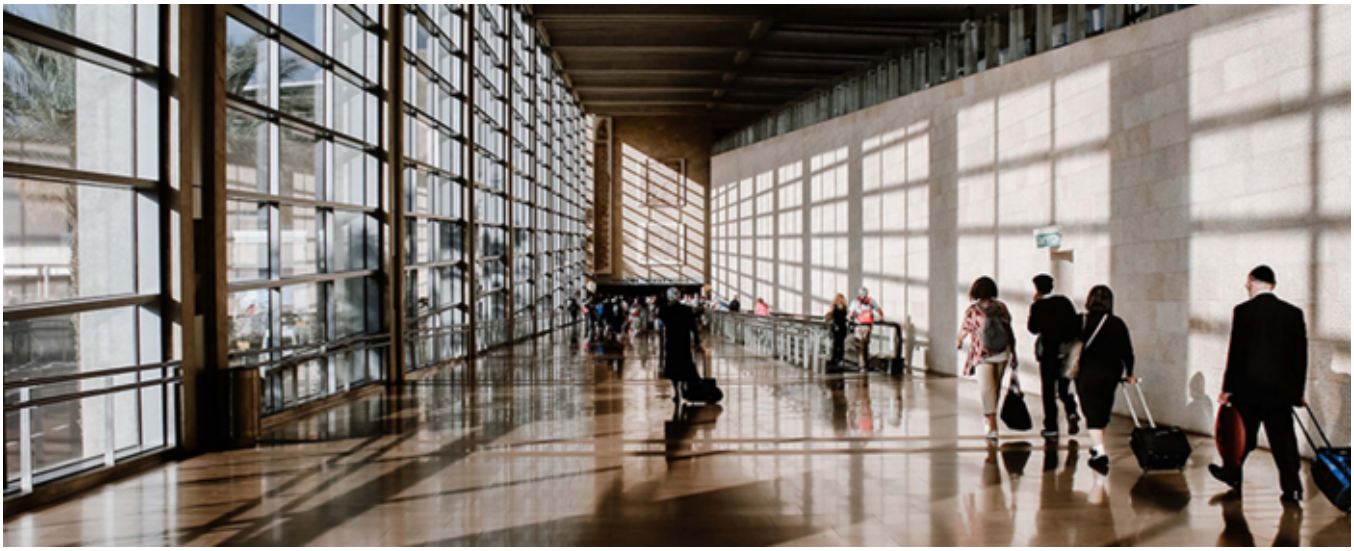
In our monthly Nordic Employment Law bulletin our employment lawyers across the Nordic region highlight relevant news and trends on the Nordic employment market scene. The bulletin intends to provide high-level knowledge and insight. Want to learn more? Our experts will be happy to hear from you.



Highlights from Denmark

- **The European Court of Justice's decision on overtime pay for part-time employees:** There were certain rules which entailed that part-time employees only received "additional pay" when they had worked 37 hours. A pilot had had part-time employment with 90% of the working time compared to a pilot who works full-time. The question was whether it contravenes with the provision which states that part-time employees must not be treated less favorably than comparable full-time employees, solely because they work part-time, unless the discrimination is justified by objective reasons.

  The European Court of Justice determined that it was a "less favorable" treatment of part-time employees when national legislation which makes the payment of additional remuneration for part-time employees and comparable full-time employees uniformly contingent on the same number of working hours being exceeded in a given activity, such as a pilot's flight duty, in order to compensate for a workload particular to that activity.

- **Whistleblowing policy:** The Danish Parliament passed the Danish Act on Protection of Whistleblowers in June 2021. The Act obliges all companies (or public authorities) with 50 or more employees to implement a whistleblowing policy. Moreover, the Act provides comprehensive protection for the whistleblower. By 17 December 2023 all private sector companies with 50-249 employees are obliged to implement a whistleblowing policy.

Highlights from Finland

- **The new Government Programme:** The Ministry of Economic Affairs and Employment has set two tripartite working groups in July to handle and investigate the questions concerning measures to limit the possibilities to resort to industrial actions and how to advance local bargaining. In relation to industrial actions, the working group has produced a report that has been circulated for comments until 4 December 2023. The working group was not unanimous in its proposals that includes increasing the amount of compensatory fines for unlawful strikes on an association and employer that are party to a collective agreement and bound by the industrial peace obligation, a penalty payment of EUR 200 payable by an employee to the employer for continuing an industrial action which the Labour Court has found to be unlawful, limitations on disproportionate solidarity actions, limitation of duration of political work stoppages to 24 hours and with regards to other industrial action to 2 weeks. Notification of such industrial actions should be informed 7 days in advance. For further information do see our July and September bulletins.

- **Employers pay attention to the wording of employment agreements**: The Supreme Court reminded us once again that the wording of employment agreements actually matters and that the employer's right to supervise work may be limites with employment agreements. In a recent case, the employees' work was covered by a CBA which was also stated in the employment agreements. The working time clause in the employment agreements stated without a separate reference to the CBA that the working time is period-based working time and also whether the work is shift work or day work. The provisions concerning period-based working were removed from the CBA and consequently, the employer amended the working time of the employees with a unilateral decision on the basis of the employer's right to supervise work to general working time. In connection with the change, the employees' lunch break was excluded from the working time. The Supreme Court decided, in line with its previous decisions, that the working time clause in the employment agreements was in fact a binding contractual term between the employer and the employees and not based on the CBA. Furthermore, there was nothing in the agreements that would have implied that the working time clause was only for information purposes. Therefore amending the clause unilaterally without the employees' consent or valid termination reason was not allowed.

- **Complying with CBA may lead to discrimination:** Occasionally a question arises whether a provision in a CBA may be discriminatory and whether an employer may deviate from such a provision. In a recent Labour Court case, according to the applicable CBA absence days due to an employee's own sickness accrued overtime in a similar way as working days provided the employee would have otherwise been working on the day of absence. Two employees claimed overtime compensation on the basis that absences due to taking care of a sick child should be treated in a similar way. The Labour Court decided based on the evidence that the provision of the CBA corresponded to the purpose of the parties to the CBA. However, application of the provision could lead to a situation where salary of an employee absent from work when taking care of a child would be lower than of an employee who has been absent during equivalent time due to own sickness. Thus, these employees were put in a more unfavorable situation due to family related reasons compared to peers who do not have such commitments relating to parenthood and family. Therefore, assumption of discrimination was established and as the employer association respondent was not able to invoke any acceptable reason or aim that would have overruled the assumption, the provision of the CBA was considered as against the prohibition of discrimination and the two employees were entitled to the claimed overtime compensation.

Even though the case concerned also interpretation of the specific CBA, employers should assess in comparable situations both their own practices and also whether complying with their applicable CBA could potentially lead to disadvantageous situation for an employee group due to discriminatory reasons.

Highlights from Norway

- **The National Government Budget and the labour market:** The Norwegian Government recently presented its proposal for next year's government budget. Amongst the proposals is to continue the *additional* employer's national insurance contribution of 5% (Nw: arbeidsgiveravgift), although with a suggested change in the threshold from the current level of 750,000 NOK to 850,000 NOK. There are no proposed changes in the tax rate or the basis for the additional employer's contribution. The proposals in the National Government Budget also indicate that the Government maintains its focus on combating labour market crime, social dumping, and unscrupulous actors in the labour market. The Government is allocating an additional 20 million NOK to this effort, with 5 million NOK earmarked for the Norwegian Labor Inspection Authority (Nw: Arbeidstilsynet). Furthermore, the Government continues to prioritize efforts to promote gender equality on the labour market.

- **Proposed changes to the violation fine regulations:** The Government's efforts against labor market crime continue beyond the government budget. The Government suggests amendments to the Working Environment Act Section 18-10 concerning violation fines. Under the current wording, Arbeidstilsynet can impose fines limited to 15 times the National Insurance Basic Amount (G), equivalent to approx. NOK 1,8 million. The Government's proposal is to raise this threshold to 50 G, resulting in nearly NOK 6 million with today's rate. The Government also proposes that, alternatively and if necessary, Arbeidstilsynet should be able to impose fines of up to 4% of the company's turnover. The Government's new proposal may, for the biggest enterprises, result in fines totalling tens of millions of NOK. The deadline for submitting responses to this proposal is December 22, 2023.

- **Court of Appeal decision regarding the night work exemption (LG-2022-171722):** The recent decision addresses the exemptions from night work as stipulated in the Working Environment Act Section 10-2. In this particular case, it was evident that the employee faced health challenges, and the employer's work schedule included regular night shifts, both being required by the law. The central question before the court, was whether a permanent exemption would result in "*significant inconvenience to the employer*". In its assessment, the Court of Appeal conducted a balance of interests and considered factors such as the availability of daytime work that the employee was qualified to perform, the feasibility of reallocating other employees to work more night shifts, other challenges with staff allocation and organization, as well as the potential conflict with the employer's obligation to consider the well-being of all employees when imposing additional night work on a permanent basis. The Court of Appeal concluded that the cumulative inconveniences to the employer, when weighed against the employee's need for exemption, constituted significant inconvenience to the employer in granting a permanent exemption from night work. The Court of Appeal also established that the employer is not obliged to create a new position for the sole purpose of granting the employee an exemption.

Highlights from Sweden

- **Increasing unemployment rate among academics** – The union Akademikerna's unemployment fund reports that unemployment among academics has increased by 18% since the beginning of the year. 13,502 of Akademikerna's members were unemployed in September 2023. This represents 1.8% of all members and is described as a 'relatively high level'. At the same time, the share of long-term unemployed people, with at least one year of unemployment, has decreased from 33% to 27% of the unemployed.

- **Collective bargaining agreement for the football players** - As mentioned in the September edition, the players in the Swedish women's football top division have been playing without a collective bargaining agreement since December last year. However, shortly after it was expressed that the entire league could be cancelled, the parties have agreed on a new agreement. The collective bargaining agreement applies to *OBOS Damallsvenskan* as well as *Elitettan* - the two highest series in women's football in Sweden - and comes into force on 1 November this year and is valid until 30 November 2026. The agreement regulates, among other things, conditions for sick pay, leave, occupational pension, skills development and the right to adjustment support after the career.

- **The relationship between the union and Tesla does not drive itself** – For the past five years, the trade union IF Metall has worked hard to get Tesla to sign a collective bargaining agreement, but so far without success. The union has now given notice of a strike in Tesla's service stations and workshops. IF Metall has already initiated a strike in the workshops on October 27 and is also escalating the strike by planning to blockade 17 workplaces among the service workshops with a total of 470 employees from November 3. The union has stated that if Tesla does not come to the negotiating table, both blockade and strike may be necessary.