Nordic Employment Law Bulletin - December 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

- **Bill on amendments to the Danish Act on Working Time:** We have previously written about the bill on amendments to the Danish Act on Working Time which was sent in consultation in October. On 8 November 2023 the Danish Ministry of Employment submitted the bill to the Danish Parliament. The bill proposes, among other things, that the main representative labor market parties in Denmark can agree that employees can work more than 48 hours a week on average if the employer and employee agree upon it. Moreover, the bill proposes that employers must introduce an objective, reliable and available working time recording system that makes it possible to measure the daily working hours of each employee. If the bill is adopted, the amendments will enter into force on 1 July 2024.

- **Summary dismissal due to lack of corona test was unjustified:** An employee found out that he was infected with Covid-19 during his sick leave. After the employee has reported fit for work, the employer ordered the employee to be tested for corona. The employee rejected to take the corona tests and, therefore, the employer terminated the employee's employment immediately. The Danish Act on Employer's Right to Order Employees to Present Corona Tests, etc. stated that an employer could order an employee to be tested for corona as soon as possible and to inform the employer of the result of the test. However, the order must be objectively justified by the need to limit the spread of corona infection. The employee had not had any symptoms for 48 hours when he reported fit for work. Based on that the Eastern High Court found that the summary dismissal was unjustified.

Highlights from Finland

- **Supreme Court ruling on non-competes:** To some extent there has been uncertainty whether an employer would be able to apply for an injunction to forbid an employee to breach or continue to breach post-employment non-compete agreement. Based on a recent Supreme Court decision KKO 2023:83, the Employment Contracts Act or the fact that non-competes relate to employment relationship does not prevent injunction. However, we note that in practice an injunction may not be the most efficient way to manage such a situation especially if the non-compete restriction is short as the court process may take at least few months.

- **Is a high salary request an acceptable reason for not selecting a job applicant?:** According to the decision of Helsinki Court of Appeal from last April, not necessarily as explained in our May Bulletin. However, an appeal has been filed to the Supreme Court and we will get the final word on this topic roughly estimated within a year. You'll find the May Bulletin here.

- **Implementation of the CSDR Directive:** The process to implement the CSDR Directive that sets out, among other, certain ESG related reporting obligations is ongoing in the Finnish Parliament and the national act is expected to enter into force on 31 December 2023. Companies of all sizes should be aware of the obligations the Directive and the national law impose because even though not all companies are obligated by the reporting requirements, to be able to meet the requirements and secure sustainability of value chains, a company may need information on e.g. social and employee related matters from their contracting parties not bound by the reporting obligations. Companies who are bound by the reporting obligations should also note that questions relating to ESG reporting must be consulted with the personnel. In Finland this would mean consultation in connection with continuous dialogue pursuant to Co-operation Act.

Highlights from Norway

- **Recent Supreme Court ruling with important clarification on working hours (HR-2023-2068-A):** The Supreme Court's recent ruling delves into the concept of 'disposable time' and it's relation to working time for offshore employees. The case in question involved an employee in the oil service industry operating under a working time arrangement characterized by, in addition to ordinary working hours, alternating fixed available periods (/'disposable time') and periods off work. While the primary objective was to conduct work during the available periods on the offshore shelf, the employee could also be called out during the periods off work. The Supreme Court concluded that the employee was not subject to significant limitations that that would necessitate the classification of available time as working hours. The fact that the employee was available to be called out to work offshore during his time off work did not mean that available time had to be defined as working time. The Supreme Court placed particular emphasis on the fact that the response time was a few hours after assignment and that the employee remained exempt from any specific instructions until officially called out for duty on the offshore shelf.

  The ruling underscores the complexity involved in classifying time as working hours when the employee is not physically present at the workplace, reaffirming the principle that particular criteria, such as response time, frequency and duration of the call outs, must be met for such periods to be considered within the scope of official working time.

- **New ruling from Court of Appeal regarding preferential right to a new employment (LB-2023-44825):** A former employee who had previously been temporarily employed by Oslo municipality at a corona testing centre in the municipality claimed to have a preferential right to a temporary role as a lawyer in the same municipality. According to the Working Environment Act ('WEA') Section 14-2, an employee who is not offered continued employments due to circumstances relating to the undertaking shall have a preferential right to a new appointment at the same undertaking unless the vacant post is one for which the employee is not qualified. It was clear that he was qualified for the position. However the Court of Appeal ruled that the employee did not have a preferential right to this position, as the preferential right should be interpreted to be limited to positions that have approximately the same duties as the original position.

- **Representative proposal from the left-wing political party 'Rødt' to close loopholes in the regulations on hire from temporary work agencies by clarifying the concept of 'elected representative':** According to WEA Section 14-12 (2), in undertakings bound by a collective pay agreement concluded with trade unions with the right of nomination pursuant to the Labour Disputes Act, the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired, may enter into a written agreement concerning the hiring of workers for limited periods notwithstanding the provisions laid down in the first paragraph of the same section.

  The Labour and Social Affairs Commitee urges the Government, in collaboration with social partners in the labour market, to assess the need for clarifications on the terms "elected representatives" and "collective agreement" in WEA. The new Minister of Labour and Social Inclusion, Tonje Brenna, has voiced an opinion that this should be understood as representatives from the union with the right of nomination, cf. above. If there is a need for amendments, clarifications or both in this context, the Government is asked to return with proposals for legislative amendments.

Highlights from Sweden

- **Gig economy: a new CBA and a win for Wolt:** The food delivery company Wolt has signed a collective bargaining agreement (CBA) with the union for retail workers. Wolt operates a number of small depots from which food can be delivered to consumers' homes in about half an hour. A CBA has now been signed for the 60 or so employees in these stores. As a result, the employees will receive higher hourly wages, higher compensation for weekend work and higher pension levels. At the same time, Wolt will have more flexibility in terms of night-time work and extended opening hours. However, Wolt's food couriers are not covered by the CBA.

  Meanwhile, Wolt is being pursued by the Swedish Work Environment Authority, which argues that Wolt has a great deal of power to influence the conditions of the delivery staff and that Wolt is therefore responsible for their working environment. However, the administrative court in Gothenburg has now ruled that Wolt is not responsible for the working environment of the couriers because they do not direct the work of the couriers and have only limited control over it.

- **Industrial actions: strike against Tesla:** As reported in last month's bulletin, the large blue collar union IF Metall is taking industrial action against Tesla, trying to persuade Tesla to sign a CBA. Since the last newsletter, several other unions have initiated sympathy measures against Tesla, such as a blockade of unloading/loading of Tesla cars in the Swedish ports and the blocking of repair/service of electrical installations at charging stations and Tesla's service centers. The trade union SEKO has given notice of sympathy measures at the postal companies PostNord and CityMail, in the form of a blockade against distribution, delivery and collection of parcels, letters and packages to Tesla, which was implemented on 20 November. This has resulted in Tesla not being able to receive the license plates sent to them by the Swedish Transport Agency. Tesla has now filed law suits against both the Swedish Transport Agency and PostNord. Tesla has claimed that the Swedish Transport Agency should ensure that all license plates come into Tesla's possession, and that PostNord should deliver all items addressed to Tesla that PostNord has or will have in its possession. The complaint against the Swedish Transport Agency has had an effect and Norrköping District Court announced on 27 November in an intermittent ruling that the Transport Agency has to agree to allow Tesla to collect its license plates from the license plate manufacturer within one week, otherwise a fine of SEK 1 million may be imposed. Regarding the law suits against PostNord, Solna District Court has given PostNord 3 days (until 1 December) to submit a statement before the district court makes its decision.

- **The Whistleblower Act on trial:** The Whistleblower Act, or the Act on the Protection of Persons Reporting Irregularities, has been in place for almost two years but has never before been tried in a Swedish court, until now. The case concerned a surgeon who raised alarms about irregularities at a private clinic in Sweden. The surgeon claimed that a colleague had shown a lack of competence and communication difficulties. The surgeon therefore wrote a large number of reports related to the colleague and his professional practice. According to the surgeon, she was then subjected to reprisals because of her repeated alarms, which the employer opposed and furthermore claimed had no connection with the whistleblowing.

  In its ruling, the District Court agrees with the employer. The District Court writes that only two of the surgeon's reports are covered by the Whistleblower Act, as they show sufficiently serious deficiencies to be considered "of public interest". The rest of the reports concern such things as patients being cancelled due

to a cold and do not rise to the level of actual irregularities. Regarding the two reports that are covered by the Act, the employer succeeded in showing that there was no causal link between the reports and the reprisals. Although the measures taken by the employer have "*features of punitive measures*", the employer has shown that these "*have had entirely different causes than the reports made*.