

Employment & Labour - Norway

Supreme Court Decision on Temporary Employment

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On May 7 2009 the Supreme Court passed a judgment regarding the regulations on temporary employment which clarifies certain aspects of these regulations.

Background

In Norway, the main rule is that an employee shall be appointed permanently. Temporary employment may nevertheless be agreed upon under the following certain circumstances:

- when it is warranted by the nature of the work and the work differs from that which is ordinarily performed in the undertaking;
- for work as a temporary replacement for another person or persons;
- for work as a trainee;
- for participants in labour-market schemes under the auspices of or in cooperation with the Labour and Welfare Service; and
- for athletes, trainers, referees and other leaders within organized sports.

If an employee has been employed temporarily for more than four consecutive years and the temporary employment is based on either of the first two circumstances above, the ordinary provisions concerning termination of employment relationships apply. This means that the employee must be considered as employed on a permanent basis and may not be dismissed unless it is objectively justified; the expiration of the temporary term will not be sufficient for termination.

Further, it is set out in non-statutory law that where there is a permanent absence of a certain scope in the undertaking, the employer must employ on a permanent basis in preference to temporary employment. The Supreme Court judgment clarified the state of the law both in this regard and with regard to the regulation on temporary employment that lasts longer than four consecutive years.

Facts

In 2001 a man was employed on a temporary basis at a hospital. The employment was a labour-market measure and hence was not to be included in the four-year regulation. In 2003 he started his education as a licensed practical nurse and approximately every second weekend he worked as a temporary employee as a replacement for other persons. After finishing his education in January 2005 he was called in for temporary work at the hospital, but worked longer hours than would qualify as a full-time position. He also replaced employees with long-term absences in their rotation schemes and took on additional work.

From early 2006 the employee participated in post-qualifying education and from then on the hospital based his temporary employment on his being a trainee, which meant not being subject to the four-year rule. However, he was working as a replacement for other employees and his salary was financed by funds designated to cover such temporary employment.

Towards the end of 2006 he confronted the hospital and claimed that he was entitled to a permanent position as he had been employed in different temporary employment positions for longer than four years. The hospital refused and a conflict arose. This led to the employee's absence on sick leave from November 2006. The hospital terminated his employment in Autumn 2007 by not offering him any new temporary positions.

The employee then proceeded against the hospital and demanded to be employed on

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a permanent basis. The case was appealed to the Supreme Court after the employee had lost in the district court and won in the Court of Appeal.

Decision

The Supreme Court first evaluated whether the employee had a right to permanent employment based on there being a permanent absence of a certain scope at the hospital and the employer's ensuing obligation to employ on a permanent basis in preference to temporary employments. The average absence at the hospital department in question was approximately 15% and it was estimated that three full-time positions would be needed to cover the absence. However, the Supreme Court concluded that, based on the nature of the work to be performed, it was not an option for the hospital to increase the base staff as the department in question was small (only 25 employees).

The court further established that the four-year rule does not apply to trainees and temporary employment based on labour-market measures. This applies to any period during the four years where the employment was based on these circumstances and not just that which constituted the basis of the employment at the end of the four-year period. However, it was stated that even though the hospital had categorized some of the employee's work as trainee work, the employee actually served as a replacement for other persons. This work was therefore to be included in the calculation of the four-year period, which was set to start on April 1 2003.

The Supreme Court also assessed whether the roles performed by the employee in the different temporary positions were to be considered as consecutive. Even though during 2003 and 2004 the employee worked only every second weekend, the court considered this to be consecutive. However, the court found that the employee's sick leave could not be included in the calculation of the four-year period. From April 1 2003 until he reported sick in November 2006, three years and seven months had passed. Hence, he was not entitled to a permanent position at the hospital and lost the case.

Comment

The judgment establishes clearer guidelines on (i) when the employer is obliged to offer permanent employment based on a permanent employee absence of a certain scope, and (ii) the regularity required for temporary employment to be considered consecutive. Two out of five judges differed on the portion of the judgment on sick leave and voted for this to be included in the four-year period. However, the result of the majority vote will remain as applicable law as long as the legislature makes no amendments.

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