EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/55 New Supreme Court decision on the distinction between independent contractors and employees (NO)

<p>EU employment protection is usually limited to “employees”, meaning that independent contractors are not covered. However, EU law often leaves it to Member States to determine the meaning of employee. The directives regulating transfers of undertakings, collective redundancies, written working conditions, information and consultation, part-time work, temporary agency workers etc. are all examples of protection covering only ‘employees’ as defined by each Member State.<lb/>Consequently, the interpretation of ‘employee’ at the national level determines whether protection in EU law applies. This case report concerns the distinction between an independent contractor and employee. The question was whether a support worker for a child needing extra care and support should be considered as employed by Ålesund municipality. The majority (4-1) found that the support worker was an employee. The case illustrates how the notion of employee in Norwegian law adapts to new ways of organising work and may be of interest in other jurisdictions.</p>

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Background

The claim was triggered by a Supreme Court judgment regarding a similar contractual relationship, where a support worker was granted holiday pay as an employee in the municipality of Oslo (Avlaster I). The case had certain similarities with another Supreme Court judgment (Beredskapshjem), where a foster carer in a temporary foster home was not considered to be an employee. In Beredskapshjem the court emphasized that the assignment clearly differed from an ordinary employment relationship, as the core of it was to provide a home for the child.

The new Supreme Court decision (known as 'Avlaster II') seems to confirm previous case law and clarifies the meaning of employee.

Facts

By Norwegian law, municipalities are required to offer certain social care services. The Ålesund municipality had engaged a woman (B) since 2003 on fixed-term contracts as a support worker for a child with Down's syndrome. B was a childcare and youth worker. The purpose of the contracts was to provide respite for the boy's family, increase his ability to manage daily activities and improve his social skills. The package consisted of approximately 70 hours of work per month, depending on the boy's needs. The contracts normally lasted for two years, with a one-month mutual notice period.

The contracts were entitled 'assignment contracts', and they expressly stated that B was not employed by the municipality. They also stated that she was not entitled to holiday pay or paid sick leave, and that she was not included in the pension and insurance schemes of the

municipality.

The work was performed in B's home. This distinguished the case from Avlaster I, where the services were provided in the home of the family. In Beredskapshjem, the connection to the home was an important reason why the foster carer was not considered to be an employee.

In June 2013, B claimed holiday pay and back payment of holiday pay from Ålesund municipality. Ålesund municipality disputed the claim, and B sued the municipality by subpoena on 1 July 2014. The parties agreed to claim a 'certifying decision' as to whether B was employed by the municipality of Ålesund.

Judgment

Firstly, the Supreme Court gave no weight to the contracts' formal classification and waivers. The Norwegian Working Environment Act is mandatory and there is no possibility of derogation from it. Legal classification is based on the reality of the situation and not on what the parties call it. The fact that service providers of this kind have traditionally been treated as independent contractors is also not important. The legal classification of service providers in the public sector depends on an interpretation of the concept of 'employee'.

The Supreme Court assessed the concept of 'employee' as provided in the Working Environment Act. The concept is determined by case law and depends on a broad discretionary assessment. According to case law, the following criteria indicate an employment relationship:

The person performing the work performs the work himself, and cannot use another person to perform the duties to fulfil his obligations.
The person performing the work submits to the employer's instructions and control.
The employer provides the workplace, equipment and other assets necessary to perform the work.
The employer is responsible for the result of the work performed.
The person receives compensation in the form of a wage.
The relationship between the parties is stable but can be terminated on specific terms.
The person works mainly for one employer.

Further, the Court emphasised the protective purpose of the employment relationship by referring to the Avlaster I case, which said that it was the legislator's intention that those in need of protection by the Working Environment Act, should receive such protection. The

preparatory works for that Act indicate that the most prominent features of a contract of employment are dependency and subordination. The Supreme Court therefore found the question of the extent to which there was instruction and control to be particularly important.

In fact, in its assessment of B's situation, the Court concentrated on the first two criteria above – the question of whether B had a personal obligation to provide the services, and the question of instructions and control.

The Court pointed out that being a support worker is undoubtedly is a personal position. B did not have the opportunity to ask others to fulfil her obligations. This indicated an employment relationship. The Court also said it was not sufficient to exclude the possibility that this was a service contract, as service contracts may also be of a strictly personal nature. But if B could have used other people to fulfil her duties, she could not have been considered as an employee.

In regard to the question of instructions and control, the Court followed a 'double' reasoning. It found that B was subject to the family's instructions and control but was legally obliged to comply with instructions and control by the municipality. The Court reasoned that if the instructions and control are given by an employer, this clearly points to an employment relationship, but the same applies to continuous instructions from the recipient of the service (in this case, the family). In other words, whether the instructions and control came from the employer or a third party was not important. A service provider should not be placed in a void simply because the people paying the salary were not the same as the ones giving the day-to-day instructions. Moreover, specific instruction and control is not necessary. The person performing work may not need to be instructed, for example, because she is sufficiently experienced. Simply to have the authority in law to provide instructions and control is therefore also sufficient, even when not used. Otherwise, people in identical jobs could be characterised differently, depending on their experience and need for instructions. This could potentially undermine the concept of 'employee' in the Working Environment Act. According to the Supreme Court, such a situation would not be appropriate.

The Court also commented on the work location. B performed the work as a support worker in her own home. Therefore, it was B, and not Ålesund municipality, that provided the workplace. As mentioned, this was different from the situation in Avlaster I, and an important reason why the foster carer in Beredskapshjem was considered an independent contractor. In the current case, however, the Supreme Court did not find this decisive. The important element of her service was to provide respite to the family, not to provide a home.

In Avlaster I, the risk and responsibility for the result of the work was not considered a

relevant criterion when assessing on-going care performance. In cases of that kind, it may not be clear what the 'result' should be. In Avlaster I, the Supreme Court found that it was the municipality that carried the risk, since the municipality was obliged by law to ensure the service was provided. The same applied in the current case. Ålesund municipality would be responsible if the contract ended as a result of a poor personal relationship with the service users, for example.

The Supreme Court's overall assessment was that B, in the same way as the support worker in Avlaster I, was an employee.

Commentary

The case clarifies the concept of 'employee' in the Working Environment Act and confirms the principles laid down in prior case law. The Supreme Court reaffirms the protective purpose guiding its assessment, namely that those in need of protection by the Working Environment Act should be covered by it.

It is encouraging that the Supreme Court did not apply the assessment criteria mechanically to a situation that was not an exact fit. It is also helpful that the court has clarified which criteria are the most important overall.

Crucially, the Supreme Court has highlighted the importance of instructions and control exercised by third parties. This approach can be transferred to other three-way work relationships, such as those in the so-called 'sharing economy'. This perspective is probably necessary to ensure the intention in the Act to protect "those who are in need of protection" is fulfilled.

Comments from other jurisdictions

Lithuania (Inga Klimašauskienė, Glimstedt Law Firm): How to make a proper distinction between employees and independent contractors is a worldwide issue. Object lessons include the Uber drivers' case in the United States challenging the classification of workers as independent contractors – and now this Norwegian case in Europe. From a European perspective, several aspects must be considered: a) whether EU legislators should harmonise the determination of employment status and/or b) whether existing legislation should be amended to provide a clear method of classifying employees. This could be done both at an EU and national level.

In my view, the way in which the Norwegian Supreme Court determined employee status is not entirely satisfactory, taking into account the evolving nature of jobs in the modern

economy. This is because the assessment was based entirely on the Norwegian Working Environment Act and case law. An economic and commercial test based more on contract law is required.

For example, the Supreme Court of Lithuania, when distinguishing between employment contracts and other paid services or service contracts, applies the following test: 1) whether the employee performs the work of a certain profession, speciality or qualification or performs specific duties; and 2) whether the employee performs the work within the work regulations established at the workplace. The first feature means the employee performs work that is defined by specific properties, rather than according to whether he or she fulfils specific tasks. The second feature means that the employee, while fulfilling his or her work functions, is not independent and must conform to the lawful directions of the employer (Ruling of 27 June 2006, No. 3K-3-387/2006 of the Supreme Court of Lithuania.)

Thus, if the employee performs specific tasks, but not functions defined by the hirer, this will imply a contractual relationship by an independent contractor. In addition, in an employment situation, the relationship between the employee and the employer is that of superior-subordinate, which does not exist in civil contracts. This means that fulfilment of job responsibilities may not be separable from the employer's supervision and instructions. (Ruling of 15 March 2011, No. 3K-3-114/2011 of the Supreme Court of Lithuania.)

Notwithstanding this, it is not always clear in Lithuania either whether someone is an employee or an independent contractor and so Lithuania would also benefit from an update of EU legislation to meet the need of society, so to be able to use independent contractors without the risk that they might be regarded in law as employees.

United Kingdom (Bethan Carney, Lewis Silkin LLP): In the UK, the right to statutory holiday pay is governed by the Working Time Regulations 1998 ('WTR'). Under the WTR, 'workers' (a wider category than that of 'employees') are entitled to holiday pay. 'Workers' include those working under a contract of employment and those working under any other contract, whereby the individual undertakes to perform personally any work or services for another party unless that other party is a client or customer of any profession or business undertaking carried on by the individual. This definition includes many people who are not employees (such as freelancers or casual workers) but does not include people who are genuinely in business on their own account. To meet this definition there must be a requirement of personal service, in other words, the individual cannot send a substitute in their place to do the work. There must also be mutuality of obligation – the employer is obliged to offer work and the individual is required to provide it.

The question of who is a 'worker' has become an important one in the new 'gig' economy and was recently considered in a test case brought by Uber drivers in which the employment tribunal decided that the drivers were 'workers' of Uber and therefore entitled to holiday pay amongst other rights. Uber had denied that the drivers were its workers arguing that it was merely a technology platform rather than a taxi service. The tribunal found that this did not reflect the reality of the relationship and declared that in determining the reality of the relationship, tribunals will not allow themselves to be 'deceived' by the terms and conditions issued by the party in a dominant bargaining position.

Instead, the tribunal considered that the drivers undertook to provide work personally under a contract for Uber and so fell squarely within the definition of 'worker'. In the tribunal's view, the drivers were working for Uber when the app was switched on, the drivers were within the working territory in which they were licensed to use the app and were able and willing to accept assignments.

Given the rapid expansion of the gig economy in the UK, this case has received significant attention. Many businesses of this type use technology as a platform for connecting supply and demand. This tribunal decision does not rule out flexible business models which use self-employed individuals. However, in this case, the tribunal concluded that Uber's business model did not achieve this.

Uber is appealing the decision.

Denmark (Søren Terp Kristophersen, NorrbomVinding): The concept of 'employee' versus 'independent contractor' has been frequently debated in Denmark over the years.

According to the preparatory works to the Danish Statement of Employment Particulars Act, which implements Directive 91/533 on employers' obligation to inform employees of the conditions applicable to the contract or employment relationship, the concept of 'employee' under employment law should be in line with the concept of 'employee' under tax law. Therefore, a rather brief definition of an 'employee' is laid down in the Danish Statement of Employment Particulars Act: "a person who receives wages in an employment relationship". As this shows, this clearly leaves room for interpretation by the courts.

According to case law of the Danish Labour Court, the main criteria when deciding whether a person is an employee are the business's power to give instructions and exercise control over the person performing the work (irrespective of whether the person acts for his or her own personal risk and gain), and whether the person performing the work can let others perform the work. It is not surprising that the criteria are quite similar to those mentioned in the case report from Norway.

Interestingly, on 11 November 2016 the Danish Supreme Court decided that a case between the Danish Ministry of Taxation and a round-the-clock carer concerning the question of whether the carer is an independent contractor or an employee will be heard by the High Court in the first instance with direct access to appeal to the Supreme Court. The reason for this is that the case gives rise to fundamental questions about what criteria are deemed most important when assessing whether a person is an employee or an independent contractor. This shows that – at least in Denmark – the concept of 'employee' is still evolving and it will continue to do so as a result of technological developments and the sharing economy, as mentioned in the case report.

Germany (Nina Stephan, Luther Lawfirm): The differentiation between self-employment and employment is one of the central problems in German labour, social insurance and tax law. As with Norwegian law, if the contractual relationship is a dependent employment relationship, the parties must be classified as employer and employee, no matter what the parties call it. This gives the employee the full protection of German labour law and social security regulations.

Nevertheless, in German law, there is no exact definition of the term 'employee'. As in Norway, the German courts have developed certain criteria that indicate an employment relationship. Those criteria, though constantly evolving, are quite similar to those used in Norway.

Moreover, there have been many legal disputes in the German courts concerning care. The Higher Social Court of Hessen (LSG Hessen) recently had to decide whether a nurse who was hired to provide intensive care in a hospital as freelancer based on a service contract, was in fact a freelancer or was actually an employee. The LSG Hessen held that she was an employee, basing its decision on the fact that the nurse was fully integrated into the organisation and workflows of the intensive care unit. She had to do what the attending doctors told her to do and perform her work on the premises of the employer. She was therefore considered an employee.

Subject: Employment status

Parties: B and Fagforbundet (intervener) – v – Ålesund municipality and KS (intervener).

Court: Høyesteret (Supreme Court)

Date: 23 June 2016

Case number: HR-2016-1366-A, (case no. 2015/2308),

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Publication:
https://www.domstol.no/globalassets/upload/hret/avgjorelser/2016/avgjorelser-juni-2016/sak-2015-2308-anonymisert.pdf

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Creator: Høyesteret (Supreme Court)
Verdict at: 2016-06-23
Case number: HR-2016-1366-A (case no 2015/2308)