EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2017/13 A Supreme Court decision on the collective agreement exemption from competition law, freedom of establishment, and the lawfulness of a notified boycott (NO)

<p>This case report concerns the lawfulness of a notified boycott against Holship Norge AS ('Holship') by the Norwegian Transport Workers' Union ('NTF'). In its decision, the Supreme Court considered whether the collective agreement exemption from competition law could be applied, and whether the boycott was unlawful pursuant to the right to freedom of establishment established by Article 31 of the EEA Agreement, cf. Article 101 of the Constitution and Article 11 of the European Convention on Human Rights.<lb/>The boycott would prevent Holship's staff from loading and unloading ships docked at the Port of Drammen. NTF's purpose was to force Holship to enter into a collective agreement containing a priority of engagement clause, reserving loading and unloading work for dockworkers associated with the Administration Office for Dock Work in Drammen. The majority of the plenary Supreme Court found (10-7) that such boycott would be unlawful pursuant to section 2 of the Boycott Act. The dissent concerns the EEA rules.</p>

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Facts

This case concerns Holship, a company with approximately 40 employees and a subsidiary of the Danish shipping group Holship Holding A/S. Their main activity in Norway is to clean fruit crates. Loading and unloading assignments are a minor part of the company's operations. Until 2013, Holship used the services of the Administration Office when needed. At this time, Holship employed one terminal worker at the Port of Drammen. Early in 2013, Holship acquired a new customer, which entailed an increase in the company's activities at the Port of Drammen. Following the increased activities, Holship had to employ four new workers to handle loading and unloading operations.

With reference to Holship's newly employed workers, NTF demanded in early April 2013 that a collective agreement should be established, and that Holship should respect the Framework Agreement containing a priority clause. Holship did not respond to NTF's demand, and in late April 2013, NTF gave notice of a "boycott/blockade of the company". A second notice of boycott was given 11 June 2013. NTF also informed Holship that legal action would be initiated to determine the lawfulness of the notified boycott. In a writ of summons of 12 June 2013, NTF brought a case before Drammen District Court against Holship, declaring that the boycott notified in the letter of 11 June 2013 was lawful. Drammen District Court found the boycott lawful. The District Court's decision was later upheld by Borgarting Court of Appeal.

Both courts concluded that the right to priority of engagement in the Framework Agreement falls under the scope of the exemption for working and employment conditions pursuant to the competition rules of the EEA Agreement and Norwegian competition legislation. Further, the appellate court found that the demand for a collective agreement did not conflict with freedom of establishment pursuant to Article 31 of the EEA Agreement.

Holship appealed to the Supreme Court, which decided to request the EFTA Court for an advisory opinion. Such opinion was issued in April 2016,

Link to the advisory opinion from the EFTA Court:
http://www.eftacourt.int/uploads/tx_nvcases/14_15_Judgment_EN.pdf.

In May 2016, the Supreme Court decided to limit the appellate proceedings to the "issue of whether the collective agreement exemption from competition law can be applied in this case, and whether the boycott is unlawful pursuant to the right to freedom of establishment established by Article 31 of the EEA Agreement, cf. Article 101 of the Constitution and Article 11 of the European Convention on Human Rights". The chief justice also decided that the case would be heard in plenary session by the Court.

Judgment

In addition to interpretation of the EEA rules, the judgment clarifies the Supreme Court's fundamental understanding of two constitutional provisions and the relationship between the constitutional right of freedom of association and the EEA rules on freedom of establishment. The Supreme Court was unanimous regarding the interpretation of the Constitution. According to the wording of Article 92 of the Constitution, the authorities of the State shall respect and ensure human rights as they are expressed in the Constitution and in the treaties concerning human rights that are binding on Norway. The wording may indicate that the state authorities have an obligation to incorporate all human rights, and the question was whether the provision was 'incorporative', implementing the ILO Conventions and the European Social Charter as equal in rank to the Constitution. The Supreme Court found, that Article 92 could not be interpreted as an incorporative provision, but rather as an instruction to the courts and other authorities to enforce human rights at the level at which they have been incorporated into Norwegian law. The court also found that Article 101 (freedom of association) must be interpreted in accordance with the freedom of association established by Article 11 of the ECHR.

A restriction on freedom of association can therefore only be imposed if the restriction is prescribed by law, justified by a legitimate purpose, and necessary in a democratic society. The assessment must be based on a comprehensive consideration of proportionality. In considering whether the boycott was proportional pursuant to the various international instruments, the boycott must, amongst other things, be reconciled with the rights established in the EEA Agreement. The court held that the freedom of establishment under Article 31 of the EEA Agreement is one of the cornerstones of the European Economic Area, and that in a

consideration of proportionality one must seek to strike a fair balance between this right and freedom of association.

The priority clause was considered to be a restriction on the freedom of establishment, according to the EEA Agreement, Article 31. The question was whether the restriction had to be regarded as a lawful or unlawful interference with freedom of establishment. Although NTF's collective agreement and the priority clause had the primary goal of safeguarding workers' interests, the court held that this was not sufficient for it to conclude that the restriction was legitimate. The Supreme Court referred to the European Court's opinion in the case Viking Line (C-271/08) where the European Court of Justice established that while a collective action "could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat". The majority of the plenary court did not consider the framework agreement to fall within this category. They upheld that the Administration Office was a separate legal person, and that "the type of collective agreement provision demanded by NTF is irregular in nature". The Court also found that "the protection of working and payment conditions provided by the right to priority of engagement is relatively indirect." The priority of engagement for loading and unloading operations for dockworkers with the Administration Office would entail a regulation marked by effectively shielding the company from outside competition and limiting access to this market for other operators. Given this, the boycott could not be recognised as an "overriding reason for restricting freedom of establishment".

ILO convention No. 137 did not have any significance in this matter. According to the majority, the purpose of the convention could be protected by other and less radical means. Freedom of establishment under Article 31 of the EEA Agreement has been given precedence over the ILO convention through Article 2 of the Norwegian EEA Act, which incorporates the EEA Agreement.

The majority of the court could not undetermine whether the right to boycott under circumstances not related to a strike is protected under Article 11 of the ECHR. However, as such right would be subject to the same restrictions of proportionality as other rights, it was not necessary for the majority of the court to consider whether the right to boycott was protected by that Article. Although the European Social Charter and ILO Convention Nos. 87 and 98 provided protection for the right to boycott, they could not, according to the Supreme Court, be interpreted as granting trade unions an unrestricted right to use boycotting as a means of collective action. The Court held that these Conventions must also "allow for specific considerations similar to those required for rights under Article 11, No. 2, of the ECHR".

As the effect of the boycott in the current case was to limit the access of other operators to the market for loading and unloading services, the court considered that the boycott imposed "considerable restrictions on freedom of establishment" and that it also "conflicts with the interests of other workers". In this regard, the majority of the Supreme Court felt that it was hard to argue that potential loading and unloading work generated at Holship should carry less weight than jobs at the Administration Office.

The court found that the boycott could not supersede freedom of establishment, regardless of whether the boycott was considered to have legal protection under EU and EEA law. The "principal, and desired, effect is to limit the access of other operators to the market for loading and unloading services. As such, the boycott imposes considerable restrictions of freedom of establishment, and it also conflicts with the interests of other workers." Based on this, the Court stated that "Priority of engagement, as demanded by NTF, is not sufficiently justified and does not satisfy the requirement of striking a fair balance between freedom of establishment and a possible fundamental right to boycott".

The minority of the court did not address the question of whether the principal and desired effect of the boycott was proportional, as they had a different view of the collective agreement, the purpose of the priority clause and the competition rules of the EEA Agreement. A minority of the court found that the collective agreement was covered by the collective agreement exemption. They emphasised that this provision: "was put in place to prevent the social policy objectives pursued by collective agreements from being undermined by the requirement of competition. Given the unique nature of dock work, the parties have sought to reduce wage and employment insecurities by collectively agreeing that dockworkers are to be given permanent employment by an administration office and have priority of engagement for that type of work. One consequence of this type of agreement must necessarily be a restriction of competition for this type of work."

The majority and the minority of the court had the same view regarding the principle meaning of the advisory opinion from the EFTA Court, in accordance with previous statements from the Supreme Court. The minority did, however, uphold that: "if the national court finds that the actual circumstances of the case differ from those considered by the EFTA Court in its opinion in relevant ways, the national court may arrive at a different conclusion than the EFTA Court. In this case, this is relevant". In contrast to the majority, the minority found that the EFTA Court had based its consideration on the view that NTF and the Administration Office have a vested interest in preserving the market position of the Administration Office, and that these interests went beyond simply protecting the payment and working conditions of its members. The majority of the court found no basis on which such interpretation could

be supported.

Commentary

The majority of the court settled the case based on the question of whether the boycott violated freedom of establishment. The case provides a good illustration of the difficulties associated with the assessment of proportionality, which needs to be made when human rights (freedom of association and collective action) are balanced against the economic interests protected by the EU/EEA law (freedom of establishment). In this regard, it is interesting that the Supreme Court did not give any emphasis to ILO Convention No. 137.

As the majority found that the boycott had an unlawful purpose – with reference to violation of freedom of establishment under Article 31 of the EEA Agreement – they did not find it necessary to consider the scope of the collective agreement exemption. However, the Court found no sufficient grounds to set aside the advisory opinion of the EFTA Court. This would suggest that the majority of the Supreme Court would also have found that the exemption to the EEA competition rules that applies to collective agreements did not cover the assessment of a priority of engagement rule such as the one at issue.

The practical implication of this Supreme Court case is that the priority of engagement arrangements at Norwegian ports will lapse. This means that companies who want to establish their own business with their own employees can do so without being forced to use employees from the Administration office. Further, the judgment is an example of the significance of the EEA Agreement in Norwegian law, and its implications for the Norwegian labour market.

Comments from other jurisdiction

Greece (Harry Karampelis, KG Law Firm): No specific provision exists under Greek law about boycotts conducted by employees or their unions against a company or the basis on which they may be considered lawful. The only relevant law concerns the competitors of businesses in general. When faced with a similar case to the Norwegian one, the Greek courts would also assess and compare the various conflicting rights to reach their decisions. They would evaluate the scope and object of the boycott, the means by which it would be conducted, its duration and its context. They would apply the principle of proportionality, as provided for by Article 25 of the Greek Constitution, and as further divided into three distinct parts: 1) in the principle of necessity, 2) the principle of efficacy and 3) the principle of 'stricto sensu' proportionality, in order to decide whether the boycott was the appropriate and necessary. Consequently, the Greek Courts would reach their view by applying the constitutional right to freedom of expression (in the context of the right to freely exercise one's trade union rights

versus a company's right to freely exercise its business), and the general provisions of Greek civil law on good faith and moral ethics.

Subject: Collective labour law, industrial actions/unions

Parties: Holship Norge AS (party) and Bedriftsforbundet and Næringslivets Hovedorganisasjon (intervener) – v – Norsk Transportarbeiderforbund (party) and Landsorganisasjonen i Norge (intervener).

Court: Høyesteret (Supreme Court)

Date: 16 December 2016

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

Publication: https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/case-2014-2089.pdf

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Creator: Høyesteret (Supreme Court)
Verdict at: 2016-12-16
Case number: HR-2016-1366-A (case no 2015/2308)