OSLO TINGRETT

Doc 56

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Deres referanse	Vår referanse	Dato
	23-130279TVI-TOSL/02	26 January 2024

Request for an Advisory Opinion in proceedings between Bygg & Industri Norge AS and Others and Staten v/Arbeids- og inkluderingsdepartementet

Pursuant to section 51a of Act No 5 of 13 August 1915 on the Courts (Courts of Justice Act) (*lov av 13. august 1915 nr. 5 om domstolene (domstolloven)*) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), Oslo District Court (*Oslo tingrett*) hereby requests an Advisory Opinion from the EFTA Court on the interpretation of Article 36 of the EEA Agreement.

The parties to the case before Oslo District Court are:

Plaintiff 1: Arbeidskraft Valdres AS

Plaintiff 2: Monia AS

Plaintiff 3: Bygg & Industri Norge AS

Plaintiff 4: CBA Fagformidling AS

Plaintiff 5: CBA Vestfold AS

Plaintiff 6: HIRE Norway AS

Plaintiff 7: NH Bemanning AS

Plaintiff 8: Fleksi Bemanning AS (suspended)

Plaintiff 9: Morten Riseth (and Others)

Plaintiff 10: TBE Bemanning AS

Counsel: Advokat Nicolay Skarning

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Defendant:	Norwegian State, represented by the Ministry of Labour and Social Inclusion (*Staten v/Arbeids- og inkluderingsdepartementet*)
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1. INTRODUCTION AND REASONS FOR THE REQUEST

The plaintiffs are temporary work agencies established in Norway. One of the temporary work agencies has non-Norwegian owners established in the EEA. All of the plaintiffs hire out workers in Norway to undertakings which are established in Norway. Some of the plaintiffs' employees are nationals of other EEA States, and some of them are not resident in Norway. The plaintiffs have brought proceedings, claiming compensation for an alleged infringement of EEA law. The plaintiffs claim that amendments to the Norwegian legislative provisions on hiring in workers are contrary to Article 36 of the EEA Agreement on the freedom to provide services.

Oslo District Court is uncertain as to whether the plaintiffs have documented a relevant cross-border element in relation to the freedom to provide services so that they are able to rely on Article 36 of the EEA Agreement. The District Court has accordingly come to the conclusion that it is necessary to refer questions of interpretation on this point to the EFTA Court, see question 1.

If the plaintiffs are able to rely on the freedom to provide services under Article 36 of the EEA Agreement, the parties agree that the legislative amendments at issue must be deemed to be restrictions. The District Court takes the view that there is some doubt as to which legitimate interests may justify such restrictions, and as to the assessment of which criteria will be relevant for the determination of whether such restrictions are suitable and necessary. For that reason, the District Court wishes also to refer questions of interpretation on these points to the EFTA Court, see questions 2 and 3.

The court shall address the EEA law issues raised in the case in part 5 below.

2. BACKGROUND TO THE CASE

In December 2022, the Norwegian parliament (*Stortinget*) adopted rules limiting the possibility of hiring in workers from temporary work agencies by abolishing the general possibility of hiring in workers when the work is of a temporary nature. Nevertheless, it is still possible to hire in temporary workers in a number of situations, such as replacement workers or by agreement between the employer and the company's union representatives, see below in part 3 on national law.

In addition, in January 2023 a regulation was adopted prohibiting hiring in from temporary work agencies for construction work in [the counties of] Oslo, Viken and the former Vestfold.

Both legislative amendments entered into force on 1 April 2023, with transitional schemes in place until 1 July 2023.

The plaintiffs claim that their ability to hire out workers has been limited by those rules, and that this has caused them financial loss.

By letter of 10 February 2023, the EFTA Surveillance Authority (ESA) requested the Norwegian Government to explain whether the new rules on hiring in workers are compatible with the EEA Agreement. Norwegian authorities sent their response to ESA on 5 May 2023,[1] taking the view that the new rules were restrictions on the freedom to provide services under Article 36 of the EEA Agreement, but that they could be justified because they were based on legitimate general interest and were suitable and necessary.

On 19 July 2023, ESA sent Norway a letter of formal notice, in which it was stated that the rules were unlawful restrictions on the freedom to provide services under Article 36 of the EEA Agreement.[2] Norwegian authorities replied by letter of 19 October 2023, in which they maintained their contention that the rules are compatible with the EEA Agreement.[3] A letter with further information was sent to ESA on 4 December 2023.

3. RELEVANT NATIONAL LAW

The rules on hiring in workers from temporary work agencies are laid down in section 14-12 of Act No 62 of 16 June 2005 relating to the working environment, working hours and employment protection, etc. (Working Environment Act (WEA)) (*lov 16. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)*) and Regulation No 3 of 11 January 2013 on hiring in workers from temporary work agencies (Regulation on temporary agency work) (*forskrift 11. januar 2013 nr. 3 om innleie fra bemanningsforetak (FOR-2013-01-11-33)*). The amendments to the first paragraph of section 14-12 WEA, enacted through amending Act No 99 of 20 December 2022, and the new section 4 of the Regulation on temporary agency work, introduced through amending Regulation No 2355 of 20 December 2022, entered into force on 1 April 2023. Certain transitional rules applied until 1 July 2023.

[1] https://www.regjeringen.no/contentassets/e910c0d912284297aee61d97d7d0daea/svaret-til-esa.pdf
[2] https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Letter%20of%20formal%20notice%20-%20Own%20initiative%20case%20concerning%20restrictions%20on%20the%20use%20of%20temporary%20agency%20workers%20in%20Nor.pdf
[3] https://www.regjeringen.no/contentassets/3140794a705d42d791059c22e72e1519/combinepdf.pdf

The general rule in Norwegian labour law is that employees are hired on a permanent basis, directly by the employer, see the first paragraph of section 14-9 WEA. Other forms of connection, such as temporary employment and the use of temporary agency workers may be used, subject to certain conditions.

The conditions for hiring in workers from temporary work agencies are laid down in section 14-12.

Under the first paragraph of section 14-12, hiring in workers from temporary work agencies is permitted to the extent that temporary employment may be agreed pursuant to letter b to e of the [second] paragraph of section 14-9 of the Working Environment Act.

This means that it is possible to conclude agreements to hire in workers from temporary work agencies:

b) for work as a temporary replacement for another person or persons;

c) for traineeships;

d) for participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Administration; and

e) for athletes, trainers, referees and other leaders within organised sports.

Section 14-12 WEA further provides that, in undertakings bound by a collective agreement with a trade union with the right of nomination (that is to say, at least 10 000 members), 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 letter b to e of the [second] paragraph of section 14-9.

It is also permitted to have time-limited hiring of health personnel to ensure proper operation of the health and care service, when the work is of a temporary nature: letter a of [the first paragraph] of section 3 of the Regulation on temporary agency work. It is also permitted to have time-limited hiring of "workers with special expertise who are to provide advisory and consulting services in a clearly limited project": letter b of [the first paragraph of] section 3 of the Regulation on temporary agency work.

The entry into force of the amendments to the first paragraph of section 14-12 WEA is suspended until further notice for "hiring in of replacements in agricultural undertakings" or "hiring in for short-term events", see sections 4 and 5 of the Regulation on transitional rules in relation to amendments to the Working Environment Act (FOR-2022-12-20-2301).

The prohibition on hiring in temporary workers for construction work in Oslo, Viken and the former Vestfold is laid down in section 4 of the Regulation on temporary agency work:

> *"Hiring in from temporary work agencies for construction work on construction sites in Oslo, Viken and the former Vestfold is not permitted.*
>
> *'Construction work' shall be understood to mean:*

1. *erection of buildings;*

2. *furnishing, decoration and installation work;*

3. *assembly and dismantling of pre-fabricated components;*

4. *demolition, dismantling, reconstruction and refurbishment,*

5. *redevelopment and maintenance, other than routine or minor work;*

6. *digging, blasting and other ground work relating to the construction site; and*

7. *other work performed in connection with construction work.*

'Construction site' shall mean any workplace where temporary or variable construction work of a certain magnitude is performed."

Thus, this is a geographically limited prohibition on hiring in workers from temporary work agencies in the construction industry. No exceptions may be made to the prohibition in the area covered by it.

4. RELEVANT EEA LAW

Article 36 of the EEA Agreement is worded as follows:

> *"Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."*

Article 4(1) of the Temporary Agency Work Directive (Directive 2008/[104]/EC) is worded as follows:

> *"Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented."*

In judgment C-533/13 *AKT*, the Court of Justice of the European Union (ECJ) held that Article 4(1) of that directive may not be relied on by private parties before national courts.

5. THE DISTRICT COURT'S VIEW OF THE NEED TO MAKE A REFERENCE

In order for the plaintiffs to be able to rely on the freedom to provide services under Article 36 of the EEA Agreement, a cross-border element must be demonstrated.

The District Court considers that there is some doubt as to whether there is a cross-border element in the present case. The temporary work agency services in question are performed largely by workers who are EU nationals and who have travelled to Norway in order to work in the country. The view could be taken that this scheme makes temporary work possible for nationals from other EEA States.

The Norwegian State has observed that the plaintiffs are temporary work agencies established in Norway which hire out temporary workers in Norway to undertakings which are also established in Norway. The Court considers, however, that there is some doubt as to whether there is a purely internal situation for the purposes of EEA law in the present case. As stated above, the temporary work agency services in question are performed largely by workers who are EU nationals and who have travelled to Norway temporarily in order to work in the country. Thus, the temporary work agencies employ nationals who come to Norway from other EEA States and then hire them out to the undertakings who hire them in. If a Norwegian recruitment company assists with recruiting a national who comes to Norway from another EEA country, then the service (the person recruited) will also have crossed a border. The District Court considers that there is some doubt as to whether the present case must be adjudicated on differently in relation to whether there is a cross-border element as a result of the fact that the hiring-out (of the temporary workers who come from other EEA States) itself takes place in Norway. The plaintiffs have further submitted that the ECJ's case-law shows that the requirement of a cross-border element seems to have gradually been relaxed.

The District Court takes the view that the question of interpretation concerning a cross-border element in the present case justifies a reference to the EFTA Court.

The District Court finds it appropriate also to refer other questions of interpretation raised by the present case to the EFTA Court. If the plaintiffs may rely on the freedom to provide services under Article 36 of the EEA Agreement, the parties agree that the amendments at issue must be deemed to be restrictions. The District Court takes the view that there is doubt about which legitimate interests can justify such restrictions and which criteria will be relevant for the determination of whether such restrictions are suitable and necessary.

In considering whether to make a reference, the District Court has taken particular note of the fact that ESA has initiated infringement proceedings against Norway. It is assumed that ESA has been aware of the legal sources on which the Norwegian State has relied in support of its position. The letter of formal notice further indicates that ESA and the Norwegian State hold divergent views on the interpretation of existing case-law. On the basis of the obligations under EEA law, including the general principles of homogeneity and loyalty, the District Court finds that questions of interpretation should be referred to the EFTA Court.

6. PARTIES' SUBMISSIONS ON EEA LAW

Plaintiffs' view of the case

The plaintiffs' position in the case largely coincides with ESA's statements in its letter of formal notice of 19 July 2023 to Norway, in which it is concluded that there are restrictions which are "far-reaching and severe and are liable to have serious consequences for undertakings" (paragraph 48 of the letter of formal notice). ESA further emphasises that:

"… the adopted restrictions are particularly detrimental to small and medium sized undertakings which are more dependent on high flexibility, and which cannot benefit from the exception in Section 14-12(2) WEA, as they do not have a collective agreement with one of the big trade unions."

The plaintiffs' undertakings are largely small and medium sized businesses. The plaintiffs also agree with ESA that:

"Although the Authority acknowledges that the Norwegian Government may decide the level of protection afforded to workers and how the labour market should function, it must still do so within the confines of EEA law. The Authority considers that the aim of reducing the use of temporary agency workers and increasing permanent and direct employment cannot be a legitimate aim under the Temporary Agency Work Directive."

The position cannot be different following an assessment under Article 36. The Norwegian State has, in addition to prohibiting the use of hired-in workers for work of a permanent nature, also removed the possibility of using such hired-in workers for work of a temporary nature. The plaintiffs accordingly submit that that in itself supports the position that such a restriction cannot be justified, for the reasons set out by ESA in paragraphs 63-66 of the letter of formal notice.

The plaintiffs are of the firm view that the real reason behind the restrictions that entered into force on 1 April 2023 is to limit the temporary work agencies' role in the Norwegian labour market by limiting the use of tripartite employment relationships. An objective of limiting the temporary work agencies' role in the Norwegian labour market cannot in itself constitute a legitimate objective under Article 36 of the EEA Agreement and the Temporary Agency Work Directive, since the temporary work agencies are recognised employers under EEA law, see Article 2 of the Temporary Agency Work Directive. Nor can an objective of reducing tripartite employment relationships in itself be a legitimate aim under EEA law because the Temporary Agency Work Directive is intended to ensure the agencies a normal place in the labour market.

Nor does the general rule in Norway, under which workers are to be employed on a permanent basis, in itself establish a general, legitimate objective of limiting the temporary work agencies' role by making it virtually impossible in practice for those businesses which are not bound by a collective agreement with a trade union with the right of nomination to sell their services.

Both the tightening-up of the general possibility of hiring in workers from temporary work agencies, and the total prohibition on hiring in temporary workers in the construction industry in Oslo, Viken and the former Vestfold, must be regarded as being highly restrictive measures affecting the freedom to provide services under Article 36 of the EEA Agreement. In order for the restrictions to be upheld, it must be established that there are no alternative, less restrictive measures capable of achieving their objective.

In the preparatory works, the Ministry writes that, following input, they did consider alternative measures, but ruled them out without stating the reasons why, see legislative proposal Prop. 131 L (2021-2022), part 6.4.2. It is further observed that the assessments undertaken in connection with the introduction of the restrictions on the use of hired-in temporary workers from temporary work agencies relate only to workers' rights, whilst the role of the temporary work agencies is not taken into consideration at all.

The plaintiffs also concur in ESA's statements (paragraphs 70 and 71):

"As regards the proportionality of the restrictions in this case, the Authority observes at the outset that it cannot see that an overall evaluation or analysis had been conducted of the temporary agency work industry in Norway or the intended restrictions, including their need and possible consequences, when these measures were adopted in December 2022.

(…) reference is also made to a report dated 13 March 2022 of the Norwegian Better Regulation Council (Regelrådet), which is an independent public oversight body tasked with issuing advisory statements on proposals for new regulations of the business sector at the stage of public consultation. […] The report gave the Government's proposal on the restrictions at issue here a red light and concluded that the proposal had not been sufficiently investigated, that it lacked a socio-economic analysis, that alternative and less restrictive measures had not been considered (including the possibility of not adopting any measures and seeing how the situation would develop) and that there had been no weighing of the positive and negative effects against each other. (…)"

The plaintiffs submit that there are a number of alternative, less restrictive measures that also make it possible to attain the objective of ensuring and protecting employment relationships, including in tripartite employment relationships as well. Such measures could, for example, be more stringent substantive requirements imposed on undertakings that hire out or hire in temporary workers, and more stringent control of the temporary work agencies and the companies who hire in temporary workers.

The parties disagree as to what the threshold is in order for a cross-border element to be established, see Article 36 of the EEA Agreement. The plaintiffs submit that the threshold is very low, as follows from settled case-law of the ECJ on corresponding provisions in the EU Treaties.

The plaintiffs submit that the requirement that there must be a cross-border element is satisfied. First, some of the plaintiffs' owners are established in the EU. Secondly, and more decisively, the temporary work agency services in Norway are often performed through the use of workers who are EU nationals and who travel to Norway in order to work in the country. This is sufficient for a finding that there is not a "purely internal situation" for the purposes of EEA law. By way of illustration, in C-208/05 *ITC*, the ECJ held that the requirement of a cross-border element was satisfied for a German recruitment agency that had acted as an intermediary for a German national in another Member State. In the plaintiffs' submission, it is only logical that the reverse situation would also come within the scope of Article 36 of the EEA Agreement. Thirdly, it must be clear that there is a cross-border element for all EEA-based service providers who are prevented from providing and using temporary work agency services in Norway.

<u>The Norwegian State's view of the case:</u>

In order for the rules on the freedom to provide services under Article 36 of the EEA Agreement to apply in the present case, the plaintiffs must show that there is a relevant cross-border element, see C-245/09 *Omalet*, paragraphs 12–14. It is not sufficient that the legislative provisions at issue may potentially have implications for undertakings from other States if no relevant cross-border element is demonstrated in the specific case. Such implications are relevant for the question whether the EFTA Court has jurisdiction to deal with the reference, but not for the question whether the plaintiffs have demonstrated a

relevant cross-border element in relation to the freedom to provide services, see the Opinion of Advocate General Szpunar in C-311/19 *BONVER WIN*, points 26–35.

The plaintiffs are temporary work agencies which are established in Norway and hire out workers in Norway to undertakings which are also established in Norway. When the service provider and the service recipient are established in Norway and the service itself does not involve any crossing of a border, there is no relevant cross-border element in relation to the freedom to provide services under Article 36 of the EEA Agreement.

It does not matter that some of the employees of the temporary work agencies are nationals of other EEA States, and that some of them are also resident in other EEA States. These may be relevant cross-border elements in relation to Article 28 of the EEA Agreement on [freedom of movement for] workers, but not in relation to the freedom to provide services under Article 36 of the EEA Agreement.

Nor is it relevant that one of the plaintiffs has a parent company from another EEA State. This may be a relevant cross-border element in relation to freedom of establishment, but not Article 36 of the EEA Agreement.

If there is a cross-border element in relation to the freedom to provide services under Article 36 of the EEA Agreement, the parties agree that the rules at issue constitute restrictions.

The general possibility of hiring in workers when the work is of a temporary nature has been abolished, but it is still possible to hire in workers in a number of situations where there is a need for temporary workers, such as replacement workers or by agreement between the employer and the company's union representatives.

The Norwegian State takes the view that the restrictions at issue can be justified, as they are based on legitimate interests and are suitable and necessary to safeguard those interests. Reference is made to pages 1–2 of the response to ESA's letter of formal notice:[4]

" … it should be recalled at the outset that employment contracts of an indefinite duration are the general form of employment relationship. This is reflected in the laws of the EEA States as well as the legislative action of the EU.[5] Temporary agency work is thus an exception to the main rule and, according to the Court of Justice (CJEU), constitutes a particularly sensitive matter from the occupational and social point of view.[6]

It is settled case law, therefore, that the EEA States may justify restrictions on the provision of manpower for overriding requirements of public interests, such as inter alia protection of relations on the labour market and the lawful interests of the workforce concerned.[7] This case law is reflected by Article 4 of the Directive [on temporary agency work], which maintains – for the purposes of the States' internal review – that the EEA States may justify restrictions, and even prohibitions, of temporary agency work for reasons of such general interests.

Norway is consequently entitled to regulate the labour market with the aim of promoting employment contracts of indefinite duration rather than temporary agency work, thus also protecting relations on the labour market and the lawful interests of the workforce concerned,

[4] https://www.regjeringen.no/contentassets/3140794a705d42d791059c22e72e1519/combinepdf.pdf
[5] Opinion of 20 November 2014 in *AKT*, C-533/13, point 111.
[6] Judgment of 17 December 1981, *Webb*, C-279/80, paragraph 18.
[7] Ibid.

as well as promoting health and safety at work and preventing abuse. Such regulation also strengthens the ability of the social partners to regulate work conditions through collective agreements, thereby supporting the tripartite collaboration upon which the Norwegian labour model is based, as well as, in effect, promoting the fundamental right to bargain collectively.

Those objectives are apparent from the preparatory works … and it is in any event clear that the rules, viewed objectively, promote those objectives. Nor, therefore, should the suitability requirement present much doubt in this case.

The remaining question is whether the rules are also necessary. In this regard, it should be recalled that, in the absence of harmonisation, the EEA States retain a broad discretion to define the situations in which temporary agency work is justified and to determine their own level of protection. It appears that the Authority does not altogether acknowledge these limitations, from the perspective of judicial review, partly by arguing for particularly strict evidence requirements, [8] and partly by overtly challenging the chosen level of protection .[9] Neither approach is fully in conformity with the case law in this field, however.

Drawing the lines together, the fact remains that both the case law of the ECJU and the legislation adopted by the EU legislature acknowledge the sensitive nature of temporary agency work and the latitude retained by the Member States to regulate the situations in which such work, being an exception to the general form of employment relationship consisting of permanent and direct employment, are justified. Several EEA States have acted accordingly, without, to our knowledge, having incurred any adverse reactions by the Commission. This contrasts with the ambit and tenor of the present LFN, in which the Authority appears to take a more restrictive view of the EEA States' ability to regulate labour markets with the aim of promoting permanent and stable employment as well as collective agreements."

The Norwegian State maintains its position that there are no alternative measures which would protect, to the same extent, the legitimate interests which the rules at issue are intended to safeguard. A number of alternative measures were considered during the legislative process, in which the Norwegian State also expressly called on the consultation bodies to propose alternative or supplementing measures. The conclusion, however, was that none of those alternative measures could advance those legitimate interests as effectively as the measures at issue.

7. QUESTIONS REFERRED TO THE EFTA COURT

Oslo District Court requests an advisory opinion from the EFTA Court on the following questions:

1. Does the fact that a temporary work agency from an EEA State that hires out workers to undertakings in the same EEA State has employees who are nationals of other EEA States have any implications for the determination of whether there is a cross-border element under the rules on the freedom to provide services, ref. Article 36 of the EEA Agreement?

[8] [See, to that effect, letter of formal notice, paragraph 83 et seq.]
[9] [See, to that effect, letter of formal notice, paragraph 94.]

2. What can constitute legitimate objectives for restrictions on the freedom to provide services under Article 36 of the EEA Agreement in the form of prohibitions and limitations on the hiring-in of workers?

3. Which criteria will be relevant in the determination of whether the hiring-in of workers will be suitable and necessary in order to safeguard legitimate objectives? In that context, should any significance be attached to the fact that the restriction constitutes a geographical and sector-specific prohibition on the hiring-in of workers from temporary work agencies?

Oslo District Court

Jonas Petter Madsø
District Court Judge