

# Employment Agreements and Contract Work in the Nordic Countries

Kent Källström

## 1 Employment and Contract Work

Work can be performed under different legal forms. A person can perform work entirely in the interest of another legal or physical person. In such cases the person who provides the work normally is selected for the task and the protection of the interest of the principal, not the performance of work, is the focus of the relationship. This group is regulated in commercial law, i.e. members of a board in a company or an association, and does not concern the labour market regulations. On the labour market work can be performed mainly under two types of agreements, the employment agreement and the contract work agreement. These two types have their origin in the corresponding concepts of Roman law, *locatio conductio operarum* and *locatio conductio operis* (Bruno Venetiani, *The Evolution of the Contract of Employment* in Bob Hepple (ed.) *The Making of Labour Law in Europe* 1986). In theory, these two types of agreements are clearly distinguishable. Contract work entails that the labour-provider produces a particular result. This is the case when an artist paints a portrait or the lawyer prosecutes his client's claim in court. The employment agreement, on the other hand, entails that the person performing work makes his entire labour available mostly for a longer period and for one person, the employer. It is a question of the personal service of the labour-provider. The worker in an employment relationship is subordinated when performing his work. The primary duties of the employee are to obey the orders of the employer and to uphold a loyal behaviour, which means not to cause damage to the employer in any sense. The employee is also economically dependent on his work. He earns his living by being employed and his pay is normally related to the time he has made his work available to the employer.

Labour law deals with employment agreements and the scope of labour law depends on the concept of employee, whether it is wide or narrow. To distinguish employment agreements from contract work is a basic question for the courts when applying labour law rules. The employee concept is important

for the effectiveness of the labour law regulations as labour law consists to a large extent of mandatory rules, whereas contract labour agreements are subject to freedom of contract. In the Nordic countries as well as in most of the Member States of the EU it is of the utmost importance whether a worker is subject to labour law or to commercial law. However, there is a difference between the Nordic countries and continental law. In, for example France and Italy, the protection of the worker is the main purpose of the legislation and minimum wages, hours of work, vacation, employment protection etc is extensively regulated in statutes. In the Nordic countries the law protection of the worker is to a large extent assigned to the unions and one could say that labour law, at least in Scandinavia (Denmark, Norway and Sweden) establishes a structure for the collective influence on employment terms and the decision-making on the enterprise level. However, the employee concept is also determinant for the scope of collective bargaining. Even if collective bargaining in Sweden is applicable to contract work (dependent contractors according to Section 1 (2) Codetermination Act) this has had no effect in practice.

## **2 Employee Concept in Statutory Rules**

There is no definition of the employee concept in Denmark, Iceland, Norway and Sweden. There are some criteria mentioned in the preparatory works of labour law statutes. In the preparatory works of the Danish Act on Civil Servants is mentioned that the work of the employee must be performed under the instructions of the principal. It seems that this criterion is fundamental in Danish legislation.

In Norway and Sweden there is no definition. In Sweden it is said in the preparatory works that a uniform concept should be used, while in Norway the purpose of the specific statute is stressed. The difference seems to be theoretical.

In Finland there is a definition of the employment contract in Sec 1 of the Employment Contract Act. According to this definition an employment contract is an agreement under which a person perform salaried work under the instruction and control of the principal. Whether this kind of definition has any value can be questioned but as in Denmark it is pointed out that the fundamental criterion is that the work is not performed freely but within the framework set up by the employer.

## **3 Labour Law and Commercial Law: Dependant Contract Work**

The distinction between employment and contract work is easily made in theory but more complicated in practice. As Ole Hasselbalch has pointed out the employee concept is much influenced by the general opinion within the society (Ole Hasselbalch, *Arbejdsrettens almindelige del*, 2 ed. 2000, at 56). It seems that this is also the case in other European countries (see for example Paul Davies and Mark Freedland, *Employees, Workers, and the Autonomy of Labour Law*, Zur Autonomie des Individuums, Liber Amicorum Spiros Simitis, ed.

Dieter Simon and Manfred Weiss). In Sweden there are even examples from case law where the court has referred to the general opinion of actors on the labour market (AD 1983 nr 168 and Tore Sigeman, *Arbetsrätten. En översikt av svensk arbetsrätt med europarätt*, 3 ed. 2001, at 26).

Labour law regulation deals with the protection of the labour provider in a contractual situation where the legal sanctions are difficult to use for several reasons. However, there are “employee like” persons in contract work relations who have the same need for protection as the employee. There are specific regulations for this group in Germany (arbeitsnehmerähnliche Personen) as well as in Italy and Britain. This group is economically dependent upon one or a small number of employers. They perform work personally and they are subordinated due to the casual nature of the relationship. It is not the entire labour law regulation which is applied to this group. It is mainly statutes on health and safety, working time, discrimination etc and the dependent worker is not subject to legislation on minimum wages, employment protection and vacation. As Ruth Nielsen pointed out the labour law regulation must not be extended in a way which disturbs the function of the market (Ruth Nielsen, *Laerebog i Arbejdsret*, 8 ed. 2001, at 250 ff).

It is only in Sweden that the concept dependent workers is recognised in legislation (Section 1(2) Codetermination Act). In the 1930s and 1940s a politically important group of small farmers hauling timber for forest companies with their own equipment (horse or tractor) was in need of protection and the legislature placed them under some of the labour law statutes. Nowadays this extension remains in the legislation on collective bargaining (not employment protection and vacation and other labour law statutes) but its impact on the labour market is little. Theoretically the statutory rules on dependant workers provide a possibility for groups like the labour provider in a franchise relationship to organise and bargain collectively. This option has however had little effect in practice.

It should be observed that there is no conflict between the extension of the collective bargaining system to dependent contractors in Sec 1 (2) Codetermination Act and the statutory rules on competition. In the Competition Act there is an exemption for employee as well as for dependent workers (*see* Jonas Malmberg in *Collective Agreement and Competition in the EU* Ed. Niklas Bruun & Jari Hellsten, at 195 f). One could argue that this exemption can cause damage to the market system as a collective regulation and preclude the dependent contractor from competing with prizes. On the other hand one could say that the balance of the market is already destroyed by the dependency of the labour provider.

As pointed out the concept dependent worker is not used in Denmark, Finland, Iceland and Norway. The broad scope of the employee concept makes the dependent workers fall within the scope of the labour law legislation, especially in areas where the purpose of the legislation implies a wider scope. In Finland, for example, the employee concept is wider in tax law than in private law legislation. A general impression is that the courts in Denmark, Finland and Norway are more inclined to consider the purpose of the specific legislation than in Sweden. In Sweden a uniform concept in civil law, social law and tax law is the prevailing principle. The use of the concept dependent workers in Section 1

(2) Act on Joint Regulation in Working Life is a way of making it legitimate to make an exemption from the uniform employee concept and give this statute a broader scope than other labour law statutes.

As we can see the legislatures in the Nordic countries have met the new forms of contract work and new forms of collaboration on the labour market by using a wider employee concept and thus made the scope of labour law broader. In all quarters there is awareness that there is a need for a smother labour law but a common view is that this belongs to the responsibilities of the bargaining system, national and local. The need for labour providers to operate under different legal forms is not recognised and there are few signs of a changing position in legislation so far. One example of a changing attitude, which could be mentioned, is found in tax law. According to the Swedish Tax Collection Act (Section 33) a contractor has the possibility to apply for a so-called Business Tax Certificate (F-skattebevis). If a labour provider has such a certificate there is a presumption that he is a contractor and not subject to labour law regulation. The Swedish regulation is reminiscent of the French loi Madelin of 1994. (This law is recently repealed and goes back to the same period of high unemployment in the 1990s.) The effect in practice of the Swedish rules, as well as the French, seems uncertain.

#### **4 Employment Agreements and Contract Work Agreements in Labour Policy of the State**

A primary goal of the legislature is to promote the societal interest in collaboration and an effective distribution of labour. The promotion of collaboration is an objective of all civil law even if it is not as important as a way of settling and insulating disputes in society. In contract law the accent is often on the interest of business, i.e.. the legislation should encourage and facilitate the conclusion of contracts. This is accomplished by, for example, providing rules that enable the parties to predict the consequences of their actions.

In labour law predictability is not as important as in commercial law. The main purpose of labour policy is to bring about an effective use of the working population. The wealth of a nation depends on a large portion of the population being active on the labour market. This requires the state to stimulate work opportunities and to take employment-promoting measures. Employment is in this context preferable to other collaborative forms; i.e. contract work. This is because employment ensures social order, control and financial support. It also gives the labour market easy access to an individual's entire labour capacity.

Historically, governments have striven to place as much of the population as possible in employment-like structures. Such an objective was natural at a time when the population mainly consisted of unskilled labour. However in a labour market that puts a premium on highly skilled labour and specialists, such an objective is no longer self-evident. A specialist desires to exploit his market value, which in turn presupposes that he can offer his services to a broad clientele. Society, too, has an interest in specialized competence being utilized to

the greatest extent possible. Today, employment is no longer the most natural form of collaboration in every situation and it is not evident that a broad scope of the concept of employee, which means a broad scope of labour law regulations, results in the optimum use of resources, nor the best way to spur the individual to obtain an education and specialized knowledge

In the Nordic countries the old mercantilistic structure of the labour market has been preserved for more than one reason. As the market is regulated to a great extent by collective agreements new legal patterns also have an effect on the balance of power in society. The mechanism is not transparent but it is obvious that the power of the unions is founded on a control over the supply of manpower on the labour market. If labour could be supplied in new legal forms the monopoly of the unions on the labour market will cease.

## **5 Employment as a Social Pattern**

The problem of distinguishing employment agreements from contract work agreements and other agreements concerning work performance is the same and solved in the same way in the Nordic countries as well as in most countries within the European Community. Employment is a collaborative form based on a foundational social pattern. It is a collaboration where a person, or mostly a group of persons, is subordinated another and performs work under the guidance of the latter. The labour-provider relinquishes a part of his freedom, more or less depending on the type of society, in exchange for financial security and a shield against e.g. tort claims from a third party based on faulty performance of the work task. The master and servant relationship, a collaboration form based on subordination and loyalty, has a long tradition and is well known from most countries. Surprisingly many features of the modern employee-employer relationship go back to the fundamental dynamic of the human “herd”. Codetermination and workers’ influence over the operation has for instance not changed the subordination of the individual worker as the influence is collective and channelled through unions and other forms of staff representatives. In Europe today we often talk about membership of the labour market and *citoyens de l’entreprise*.

It is obvious that the subordination and the fact that the worker is subject to the decision of the principal when performing work is decisive for the employee concept in the Nordic countries. Perhaps the subordination even of free highly qualified men is natural for the Nordic societies. Already Tacitus describes in Germania the Teutonic peoples as strongly subordinated compared with the Mediterranean’s.

## **6 Differences Between the Labour Markets in the Nordic Countries**

Even if the foundational social patterns are the same the collaborative forms might differ depending on social facts. The type of enterprises operating on the labour market in the West Nordic countries (Denmark, Iceland and Norway)

countries is slightly different from the East Nordic countries (Sweden and Finland). The agriculture sector and small enterprises related to the needs of this sector seems to be especially important in Denmark. Small enterprises related to the needs of fishing shipping and agriculture are also important in Norway and in Iceland. Sweden and Finland have a long tradition of big export firms in forestry, mining and the metal industry. The needs of the export firms and the mercantile tradition has affected the industrial policy in all the Nordic countries but it seems that the strongest influence can be seen in Sweden and Finland (the difference between the West Nordic and the East Nordic countries is treated in Kent Källström & Tore Sigeman, *Komparativ nordisk arbetsrätt i huvuddrag* 1990).

It can be discussed whether the broad scope of the concept of employment agreement, which means a broad scope of the labour law system, has something to do with this mercantile tradition. It can be assumed that in a labour market where many small enterprises operate the scope of labour law tends to be narrower as the need for freedom of contract is greater. The Nordic model of labour law has its origin in Denmark and it is in this country the autonomy of the bargaining parties is most stressed and where the legislature is most reluctant to regulate by statutory rules. The contradiction in the system is also most obvious here. Much small enterprise has a need for flexibility on the individual level but the bargaining system needs a wide employee concept to curb the use of contract work.

## **7 The Legal Manifestations of Collaborative Forms**

The first question that arises is whether the concept of employee is uniform or is different depending on the legal context and the objective of the statute applied. In Sweden the legislature has proclaimed that one uniform concept should be applied and that the scope of all labour law legislation should be the same regardless of the kind of regulation and the kind of dispute. The Finnish law on employment agreements (Section 1) contains a definition of employment as a relationship where a person is committed to perform paid work under the guidance and supervision of the other party. This definition is also relevant to other legislation in the labour law area, i.e. law on working hours. The situation in Sweden and Finland is similar. In both countries the concept of employment agreement is uniform and the scope of different labour law statutes is assumed to be the same. A person who is an employee according to tax law and social security programs should also be regarded as an employee in a civil law context.

It is obvious that such a uniform concept is not easily upheld and uniform application does not really exist in case law. The concept must be interpreted differently depending on the purpose of a statute. When tax authorities apply the concept the purpose is to decide who is to be regarded as a tax subject and fiscal interest underlies the ambition to give the concept of employee a broad scope, which in turn has ramifications for the application of civil law.

In Sweden the collection of taxes is no longer linked to the existence of an employer-employee agreement. Taxes and social security fees are payable by the principal, regardless whether the party performing the job is regarded as an

employee or a contract worker (Social Security Act, Ch. 3 Section 2 (2) and Ch. 11 Section 2 (2)). The decisive factor is instead whether the labour-provider is a businessman as the term is defined in tax legislation (Local Government Tax Act, Section 21). A businessman has to be a contract worker, i.e. e. the work must be carried out independently and the labour-provider must not be subordinate to the principal, but this does not suffice. The business operation must also be independent. One manifestation of this is that the labour-provider has several principals and that he has not previously been employed by one of them. As already mentioned a person fulfilling the requirements for conducting operations as a businessman can apply to the tax authorities for a Business Tax Certificate, issued pursuant to Section 33 of the Tax Collection Act. This certificate entitles the contract worker to receive full payment for services without the principal being required to withhold tax or social security fees.

If we look at the social security programs, e.g. worker injury insurance or sick pay insurance, the ambition is to protect all persons who are in need of protection. A broad scope is natural and the economic and social situation of the person who performs work is the basis for characterizing the relation. A broad concept is required and the application must be based more on social facts than on the rights and duties of the agreement. It is when looking at the case law on social security we first find a concept of employee based on an overall assessment of the labour agreement seen in the light of basic social facts. We have here the same concept as applied in EC law concerning freedom of movement of work in art 39 (former art 48) of the Treaty of Rome.

The concept of employment is also of crucial interest in cases concerning the employer's liability for damage and breach of work environment provisions. In most countries the employer bears an overall responsibility for the operation in both the penal law and the tort law area. In these cases the concept of employee has the function to delimit the employer's liability. It makes good sense to establish the same concept of employee in both penal and tort law contexts as a crime supports a tort claim and the crime and the tort claim are often tried in the same proceeding. The considerations underlying penal law and tort law are partly different. Penal law seeks to steer the behaviour of the individual and create some form of moral balance. Tort damages, at least with regard to vicarious liability, seek to place the liability on the party best able to pay damages. When using the concept of employee and deciding the scope of penal and tort laws the decisive factor is the organisation of the work. The person who in fact is the leader of the work should also be responsible according to penal and tort laws.

Typical for penal law and tort law cases is that the claim is brought against the employer and that the other party in the agreement, the employee, is not involved. The employee's interest in the case is indirect. In disputes concerning the employee's priority in connection with the employer's bankruptcy and guaranteed salary the employer has the position of a third party. The conflict is between the employee and other creditors of the employer. A judgement in a conflict between one of the parties to an employment relationship and a third party must be based on criteria visible for a person outside the relationship, such as social facts, organisational facts, duration of the relationship, kind of

remuneration, etc., while facts related to the parties, intention etc, must be in the background.

In disputes concerning employment terms the parties to the employment agreement have the possibility to supply the court with all the details about the relationship and making it possible for the court to make an overall assessment of the character of the agreement. In this type of dispute the intention of the parties to the agreement is important. Most significant is how the intention of the parties can be traced in the application of the contract terms during the performance of the contract duties, especially when the parties declare different intentions.

Typical for the situation in the Nordic countries is that the legislature desires to give the collaborative form of employment a broad scope and this is reflected by the movement towards a uniform concept of employee. A person deemed an employee under a particular law should be deemed an employee for other purposes as well. As described above it is impossible to disregard the objective of a particular law. We have different kind of disputes in civil law where the employee concept is crucial and the typology above highlights the different purposes. The typology is built on the experience from all the Nordic countries. Even more important is however that the concept of employee is used in private law as well as in tax law and social security. The concept of employee does not only concern the interpretation of agreements. The concepts must be useful for the authorities that administrate tax laws and social security laws.

## 8 Criteria for an Employment Relationship

Common for all the Nordic countries is that the scope of the employee concepts and accordingly the scope of the labour law legislation depends on an overall assessment of the specific case. If we look at the case law from the Nordic countries we notice that the criteria used when deciding if a relationship is an employment is the same. The differences between the countries as well as the differences between the different kinds of disputes can be explained by the way these criteria are treated.

In Swedish literature Axel Adlercreutz has pointed out these criteria in his book from 1961 (Axel Adlercreutz, *Arbetstagarbegreppet*). His perspective was empirical and he tried to find a concept that covers the employment relationship as a legal form as well as a social concept. The same idea has rather recently been put forward in international labour law. The principles laid down in Axel Adlercreutz's book have had a great impact on case law in Sweden as well as in the other Nordic countries.

These criteria could be described in the following way (*see* Axel Adlercreutz, *Sweden* at 27 in *International Encyclopaedia for Labour Law and Industrial Relations*, Ed Roger Blanpain and Tore Sigeman, *The Concept of Employee: Some Comparisons between British and Swedish Law*. Law and the Weaker Party Vol. V at 51 – 66, ed. Steve Anderman, Alan C Neal, Tore Sigeman and Anders Victorin).



- a personal duty to perform work under the agreement
- no predetermined work tasks; the work tasks are decided during the performance of the agreement
- a lasting relationship
- the labour-provider is legally or factually encumbered from performing work for another party
- the principal decides the mode of performing the work as well as time and place
- the labour-provider uses material and equipment belonging to the principal
- the labour-provider is reimbursed for expenses in relations to the performance of the work
- Remuneration is at least partly paid in the form of guaranteed salary, i.e. e. the other party bears the economic risk for the work result
- the organisation and the economic and social situation of the party performing work

Regardless of what the parties initially agreed to or the wording of any contractual test, the agreement may be deemed an employment if the above criteria are essentially fulfilled. The assessment of courts and authorities seeks to check whether an agreement fairly reflect the collaboration form and the realities that the agreement is linked to.

As earlier pointed out it seems that there is a difference between how the concept of employment is treated in the West Nordic and the East Nordic countries. In Finland and Sweden the uniform employee concept is more strongly stressed than in Denmark and Norway where the system is more flexible. On the other hand it seems that the concept is used more legalistically in these countries, which means that the focus is on the legal obligations and the terms of the contract.

Even in tax law cases one can see that the first two criteria, i.e. an employment relationship comprises a duty to perform work for another and the work tasks is decided afterwards, is of great importance. A good example is the Norwegian Supreme Court Case (Rt 1994 s 1064) where the court had to decide if the income of the work provider should be regarded as income from employment or from commercial activity. The court found that the work provider had a duty to produce a result, not to make his work available to the other party. The agreement was deemed as contract work as the principal had to accept the work before the provider could get his pay.

The Supreme Court Case Rt 1994 s 1064 shows that the first criterion “to perform work under an agreement” is crucial. To perform work must be distinguished from a duty for a person to produce a result, in e.g. painter painting a portrait. The employee makes his work available, not a result. This is an

important criterion in all Nordic countries but one gets the impression that the courts in Norway are looking more at the contract while for instance the courts in Sweden and Denmark look more on how the contract in fact is applied. If the social situations do not reflect the wordings of the contract you disregard from it.

The Norwegian way of applying the concept of employee could be characterized as legalistic since it emphasises the terms of the contract while social fact seems to be more important for the courts in Denmark and Sweden. The terms of the agreement relevant to the purpose of the law are often pointed out as decisive in case law. In Rt 1973 s 1136 the court had to decide whether some musicians in an orchestra should be deemed employees of the person who had hired the orchestra according to tax law and social security law. The court held that the musicians were not employees of the person who had hired the orchestra as the leader of the orchestra who received money paid them and it was up to him to decide how the money should be divided between the members of the orchestra. The purpose of tax law is to make the collection of taxes effective. The way the remunerations are paid is crucial according to this purpose (*compare* the Swedish case NJA 1942s 122).

However the differences between the countries are small. It is a question of different gravitation points rather than different principles when using the above-mentioned criteria.

In a comparative study of the employee concept in Britain and Sweden Tore Sigeman has pointed out that the custom of the occupation in both countries is an important factor when deciding whether a person is an employee or not (Sigeman at 62). Maybe the most important explanation of the differences between the Nordic countries is to be found in different occupational customs. The broad scope of the employee concept in Sweden could maybe be explained by the simple fact that employment contract is more commonly used as a collaborative form in Sweden than in other countries.