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Case Document No. 4

Norwegian Association of Small & Medium Enterprises (SMB Norge) v. Norway
Complaint No. 238/2024

RESPONSE FROM SMB NORGE TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

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Complaint No. 238/2024 Norwegian Association of Small & Medium Enterprises (SMB Norge) v. Norway – Final Written pleadings No 2

1 Introduction

Reference is made to the Government of Norway written observations of 20 November 2024, which will be commented from this side, especially sections 42-45. However, there are some general remarks to be made firstly.

Large unions with 10.000 members or more have significant advantages in Norwegian law. Firstly, they may nominate judges to the central Labor Court and have the advantage of having two out of seven judges to sit on their cases before the court on the interpretation of their collective agreements. Smaller unions don't have this advantage and neither SMB Norge. SMB Norge is not bound by collective agreements but have a lot of members who are bound.

Secondly, large unions with 10.000 members or more may deviate from the working time regulations in the Working Environment Act chapter 10, ref. section 10-12 (4). This gives them a huge advantage.

This kind of preferential treatment of larger unions is made in order of inspiring employees to organize themselves in the larger unions.

2 Working Environment Act section 14-12

The topic of this complaint is concentrated on the problem the Norwegian Government has made for smaller employers and smaller unions in the area of hiring in of personnel from Temporary Work Agencies, especially to be found in the Working Environment Act section 14-12. Subsection 2 states:

> *"In a business bound by a collective agreement entered into* ***with a trade union with the right to recommend under the Labor Disputes Act****, the employer and the elected representatives, who together represent a majority of the employee category to which the hiring applies,* ***can enter into a written agreement on temporary hiring notwithstanding what is determined in the first paragraph****."*
>
> (our underlining and the "right to recommend" means at least 10.000 members).

The Government has by this regulation given the large unions a huge advantage at the expense of smaller unions and employers in general and is meant to inspire employees to organize themselves in the larger unions, and even to inspire the employers to ask the employees to organize themselves in larger union in order for the business to be able to hire in personnel from the Temporary Work Agencies.

The second problem with section 14-12 (2) is the tremendous power given to the elected representative of the larger unions. The Government pretends this may be any elected representative, but in fact we are mostly talking about the elected representatives of the large unions, especially the ones organized in LO because it is so much larger than other unions in Norway with one million members. LO with suborganizations have three representatives in the central committee of the Labor Party, currently the party in Government and with the Labor Minister also in the previous Government: Peggy Hessen Følsvik (LO), Mette Nord (Fagforbundet/LO) and Jørn Eggum (Fellesforbundet/LO). It was a LO initiative to restrict the hiring in of personnel from Temporary Work Agencies in Norway, because the agencies are seen to compete with the interests of LO.

The elected representatives on the business have the power to say yes or no to any proposal of agreement of hiring in of personnel, and they are not obliged to give any reason for their answer. Additionally, there is no right of appeal to their answer. These elected representatives are hence in the position of being able to discriminate against other unions or unorganized personnel by simply refusing to accept hiring in from agencies they don't like. This problem has been taken up by the largest employer's organization for service and trade in Norway, NHO SH (Confederation of Norwegian Business, Service & Trade):

3 The NHO SH Letter to the Ministry of Labor

Annex 1. NHO SH letter to the Labor Ministry dated 30 September 2024
Annex 2. Labor Ministry answer dated 12 November 2024
Annex 3. LO Media 1 April 2023: "Now the elected representatives gets veto power – use this opportunity"

Translated into English, NHO SH asks the Ministry (Annex 1):

> *"Hiring agreements with employee representatives The Working Environment Act § 14-12, second paragraph, allows companies bound by collective agreements to enter into written agreements with employee representatives regarding hiring from staffing agencies. The provisions set certain conditions for such agreements, such as the company being bound by a collective agreement with a union that has the right to nominate, the employee representatives must represent a majority of the employee category concerned, and the agreement must be in writing. Although the provision regarding employee representatives' ability to enter into hiring agreements in the Working Environment Act § 14-12, second paragraph, is not new, it has gained new relevance after the rules for hiring workers from staffing agencies were tightened from 2023. As the employer organization for the staffing industry, we receive many inquiries from members who feel that their ability to provide leased employees has been more restricted than the legislation actually implies.*
>
> *In practice, employee representatives in client companies have gained veto power regarding the hirer's access to hire from staffing agencies. We question whether employee representatives or the unions they represent are in practice free to set conditions for entering into hiring agreements from staffing agencies according to the Working Environment Act § 14-12, second paragraph. It can be mentioned here that the EFTA Surveillance Authority (ESA) has challenged both the Norwegian approach and the legal basis related to the rule changes. We perceive that Norwegian authorities have indicated to ESA that companies bound by collective agreements can still largely hire from staffing agencies, making the restrictions less extensive. If it now turns out that employee*

representatives/unions have effectively gained a veto right on hiring – without any limitations – this means that the hiring access is neither transparent, verifiable, nor proportional. Arbitrary requirements or EEA-incompatible conditions related to the use of the exception do not become more acceptable even if the practical exercise of authority (permissions) is assigned to unions.

In light of this, we will point out some practical issues below, where we also request the department's interpretation. We see examples where employee representatives require as a condition for entering into a hiring agreement that the relevant staffing agency must have a collective agreement, including specifying which collective agreement the staffing agency must be bound by. In this context, it can be noted that it is not necessarily up to a company to decide which collective agreement it should be bound by. Firstly, the collective agreement must be suitable for the operations of the relevant company, and secondly, there is a requirement that a certain proportion of employees are organized in the relevant union. Furthermore, we have seen examples where employee representatives also require that a majority of the hired employees must be organized in a given union.

The reasonableness of these conditions can also be questioned, or whether conditions are generally set to make hiring more difficult. In the current provision, there appear to be no criteria for assessing whether such a hiring agreement should be entered into from the employee representatives' side, and a related question is therefore: Are employee representatives free to set any type of conditions for entering into a hiring agreement from staffing agencies according to the Working Environment Act § 14-12, second paragraph? If the answer is no, the next question is: Can employee representatives set conditions that the hiring company can only hire from a staffing agency bound by a collective agreement? If the answer is yes, the next question is: Can employee representatives set conditions regarding which collective agreement the staffing agency must be bound by? The final question, which is not dependent on the previous questions, is: Can employee representatives set conditions that the majority of the hired employees must be organized, and if so, in which union the hired employees are organized?"

The Ministry responded in this way (Annex 2):

"Hiring agreements with employee representatives The Ministry refers to the letter dated September 30, 2024, which questions whether unions are free to set conditions for entering into agreements on hiring from staffing agencies according to the Working Environment Act § 14-12, second paragraph. The Working Environment Act § 14-12, second paragraph, allows for the hiring of workers from staffing agencies if the hiring company is bound by a collective agreement with a major union and has entered into an agreement with employee representatives in the company regarding hiring. ***There is no requirement for a specific justification or specific needs to be present in order to agree on hiring with employee representatives. However, the parties must agree that workers will be hired. It is not within the Ministry's remit to assess what is necessary for a union to consider it desirable to enter into a hiring agreement****. However, it is emphasized that any requirements set must not conflict with current regulations." (our underlining).*

From the LO Media organization (Frifagbevegelse) was published on 1 April 2023 (Annex 3):

*"**Now the elected representatives gets veto power – use this opportunity***

The government's new rules for hiring will come into effect on April 1. It will be illegal to hire employees to cover seasonal peaks without the approval of employee representatives.

Veto for employee representatives

With one important exception: If the hiring is discussed with employee representatives and they sign off on it, then it is allowed. In principle, employee representatives thus have veto power against hiring. This must be done through a union that has the "right to nominate." This means that small in-house associations, i.e., local associations within the company without affiliation to a trade union, cannot approve hiring. The association must belong to a larger union in order to sign off.

Basic staffing?

The Norwegian Confederation of Trade Unions (LO) has been advocates for the tightening of regulations. The goal is to create more equal and better working conditions for those who might be employed on temporary contracts, and in the long term, it is hoped that more will be permanently employed. "The new rules will likely make it easier to organize employees as well," says Jarle Wilhelmsen, responsible for collective agreements and deputy leader of the Norwegian Union of Food, Beverage and Allied Workers (NNN). The union organizes various industries within the production of food and beverages."

The SMB Norge alleges that giving this kind of tremendous veto power to the elected representatives from the large unions is in contradiction to the freedom of organization because this kind of power might be abused, and there is no control-mechanism and no appeal.

4 Some remarks to the Government's observations sections 42-45

As shown above, rather large concessions are given to the large unions in Norway on the expense of smaller unions, and to the detriment of members of SMB Norge, who in practice don't have the possibility to hire in personnel in a situation of temporary need (except sick leave).

The veto power given to the elected representatives from unions with at least 10.000 members is arbitrary, contrary to rule of law because they don't have to give reasons and there is no right of appeal. This opens up for discrimination against competing unions, smaller unions and unorganized personnel.

SMB Norge alleges that when a small company needs hiring in temporary personnel, and is in a difficult situation, it may ask the employees to become member of a LO union to be able to get the staff that the company needs. And if these elected representative demands that the company only should hiring in personnel from an agency that has a collective agreement with an LO union, the company might not be in a position to refuse.

5 In conclusion:

The Government has given the larger unions a tremendous veto power which most likely will be abused by the larger unions in the Norwegian labor market in contradiction to the Revised European Social Pact article 5.

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