Summary

The assignment

In September 2011, the Government assigned a Commission to review the rules regarding disputes concerning dismissals, and to propose how the employers' costs in conjunction with such disputes can be limited, in order to promote employment. The proposals should also contribute to the predictability of the system. According to the directive, there is no reason to significantly change the current Employment Protection Act, 1982:80 (LAS), but the balance between the employer and the employees interest in conjunction with disputes concerning dismissals should be reviewed.

One task of the Commission was to survey how disputes concerning dismissals are handled in practice, and to analyse what problems the rules and regulations are causing for the employer and the employee. During the analysis of the problems of the existing law and what effects the Commissions' proposals may have, special attention should be paid to small enterprises.

Furthermore, the Commission has had the task to compare the laws on disputes regarding termination of employment in a number of different countries. The Commission has chosen Denmark, Norway, Finland, Germany and The Netherlands.

According to its directives, the Commission should not make any proposals concerning the priority rules ("first in last out principle") in relation to collective redundancy.

Proposals

The Commission proposes a combination of amendments, which aims at a faster handling of disputes concerning dismissals with lower costs for the employer, without the employment protection and the employee's rights being jeopardised. We have considered how the system works today and the effects of the existing laws.

The Commission proposes three amendments to the Employment Protection Act. First, an employment shall not last more than one year during an on-going dispute regarding the validity of a dismissal. Second, economic damages according to § 39 LAS shall be reduced in proportion to the number of employees of the employer. Third, it shall no longer be possible to declare a dismissal due to shortage of work to be void, because the employer has not fulfilled its responsibility to find the employee alternative work within the company. Since the proposal includes an introduction of a new section in the Employment Protection Act, the Commission also suggests consequential amendments to a number of other statutes that refer to the LAS.

Employment during dispute

When an employee is dismissed, the employment ceases at the end of the period of notice. However, if there is a dispute regarding the validity of the dismissal, the employment does not end as a result of the dismissal until the dispute has been finally resolved (§ 34, second paragraph LAS). The employee is entitled to salary and other benefits as long as the employment is in-force, and he/she is also obliged to perform work for the employer.

The surveys of the Commission show that half of all disputes concerning dismissals take more than 17 months from the dismissal until the Labour Court delivers its judgment as the first and only court. At the District Courts, it often takes an additional few months. This is a problem because the parties spend a lot of time and resources on the dispute. Further, for the employer it is unpredictable how long they will have to pay wages to the employee during the dispute. The Commission, therefore, proposes that the employment during the dispute shall last no longer than one year from the dismissal. We believe that such a change will increase the predictability; but above all, it allows the parties (and the courts)

strong incentives to handle disputes more expeditiously than before.

In order for the employee to have a reasonable chance to invalidate the dismissal without the employment being terminated, the time should be long enough that it is possible, with an efficient handling, to conclusively resolve a dispute during that period even if the dispute is brought to court.

The Commission proposes that the employment shall last, at the most, one year from the notice of dismissal. In most cases, it should be possible to have a trial within a year if both the negotiations of grievance and the court procedures are conducted as expeditiously as possible. If a District Court declares the dismissal to be void and there is an appeal to the Labour Court, there shall be a possibility for the employment to continue while in the Labour Court, even if more than a year has elapsed since the dismissal.

The Commission also proposes an exception, according to which, the Courts may decide that the employment shall last longer than one year if the employer through carelessness or neglect has led to the judgment being delayed.

Damages according to § 39

If an employee is dismissed without just cause, he or she is entitled to damages (§ 38 LAS). Damages, which compensate for economic loss after the termination of employment may not exceed the amount specified in § 39 LAS, corresponding to 16, 24 or 32 months wages depending on the employee's total period of employment. If a dismissal is declared invalid, but the employer refuses to comply with the judgment, the employer shall pay standardised damages amounting to the above-described levels in § 39.

According to the Commission's assessment, a reduction in the level of compensation, governed by § 39, can affect the view of what it costs to lose a dismissal dispute and thus, the risk assessment that an employer does when he/she considers hiring an employee. The amendment may primarily have importance for small enterprises as they are said to be particularly sensitive to the economic risks that hiring a new employee is associated with.

The Commission is of the opinion that a general reduction of damages is not appropriate because, among other things, the reduction would affect employers of different sizes in different ways,

and that large employers' incentive to follow the law would decrease. Instead, we believe that the levels in § 39 should depend on the employer's size.

The Commission proposes that the highest and the lowest level of damages under § 39 shall remain unchanged, but that the damages for an employer with fewer than 50 employees shall be reduced by one month's salary for every fifth employee below that number.

Invalid shortage of work dismissals

Upon dismissal due to shortage of work, the employer must follow certain priority rules (§ 22 LAS). If an employee is dismissed in violation of the priority rules, he or she cannot have their termination invalidated (§ 34 first paragraph LAS). According to the preparatory work of the LAS, an employer must be able to implement the redundancy, without this being stopped by workers claiming that they should not have been dismissed according to the priority rule, and thus remaining employed during the dispute. Further, it is stated that it is not appropriate for the employee winning a dispute regarding the priority rules to have the right to return to employment, since this would lead to another employee being dismissed instead (see Section 6.3.3).

A dismissal is not subject to a just cause if the employer can reasonably be expected to find the employee alternative work within the company, § 7 second paragraph LAS. In such a situation, the termination may be declared invalid under § 34 first paragraph. The Commission considers that the same reasons given for why a dismissal should not be declared invalid only because it is in violation of the priority rules is also applicable for violations of the reassignment requirement of § 7 second paragraph. According to the Commission, the current system delays and obstructs structural changes, and enhances employment protection for some workers at the expense of other workers. Therefore, the Commission proposes that dismissal due to shortage of work shall no longer be declared invalid on the grounds that the employer has not fulfilled its reassignment responsibilities. It shall only be possible to claim damages in such situations.

The Survey

In accordance with the directive, the Commission has carried out a survey of how dismissal disputes are handled in practice. The survey also includes disputes concerning summary dismissal because the rules are closely related to those concerning ordinary dismissal. The survey has included both disputes settled in court and disputes settled outside of court.

The survey covers a large number of judgments, relating both to invalidity of dismissals and damages, during the period 2005–2010. With regard to disputes that are solved at the negotiation stage, we have posed questions to the reference group that has provided support with the help of their respective organisations.

The survey showed that the vast majority of terminations and dismissal disputes, probably over 90 per cent, are settled without the dispute being brought to court. The most common solution is that the parties agree that the employment ends on a certain date, and that the employer pays compensation to the employee.

Based on the collected material, the Commission's calculations reflect that there is a total of about 600 dismissal disputes brought to court each year. Every second dispute tried by the Labour Court takes more than 17 months from the dismissal until judgment. If the dispute is tried by the District Court, it takes a slightly longer time. Every second trial before the District Court that is appealed to the Labour Court takes more than 35 months from the dismissal to the final judgment of the Labour Court.

The average duration is shorter among the cases where the employee claims invalidity of dismissal than in the cases where the employee only claims damages.

The survey further shows that the Labour Court, on average, declares three ordinary dismissals invalid per year. In approximately seven out of ten District Court rulings, the Court confirms a settlement between the parties. In the Labour Court, the proportion is just over one in ten.