

# Employment Protection in Scandinavian Law

Tore Sigeman

## 1 Introduction – Basic Concepts

In Denmark, Finland, Norway and Sweden the general rules concerning agreements are based on the principle of freedom of contract, which is usually also adhered to in relation to the conditions applying to the termination of contracts. If no agreement has been concluded regarding such conditions, the main rule is that each party may terminate a contract of unspecified duration at her or his own discretion, except that any applicable period of notice has to be observed. Regarding a contract of employment, however, an employer's right to terminate the contract has now been restricted in the four countries by statutory provisions or collective agreement's terms and conditions entailing mechanisms of legal control of dismissals initiated by an employer. This part of labour law falls normally under the heading of employment protection. To sum up the employees' rights in the sphere of employment protection the following formulation used in Article 24 of the European Social Charter (revised) from 1996 can be quoted:

“the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service”.

Regarding the formulation of concepts and structuring of norms concerning employment protection I have tried to adjust this chapter to what is commonly accepted in modern comparative presentations in the legal area,<sup>1</sup> but certain departures may occur.

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<sup>1</sup> Hepple in Blanpain & Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 6<sup>th</sup> ed., The Hague, 1998, Chapter 13; and Hepple in *Comparative Labour Law Journal* (Philadelphia), Vol. 18, at 204 ff.; as well as the European Commission, DG V, *Termination of employment relationships*, Luxembourg, 1997. See also below References: Rojot, *Security of Employment and Employability*.

The concept of *employment protection* refers to rules concerning an employer's duty to show objective or similar grounds for dismissal, irrespective of whether the sanctions for the breach of the rules make that the dismissal is invalid and the employee is entitled to remain at work or go back to work, or whether the sanctions entail only damages or some other financial compensation.

As suggested in the above-quoted Article of the European Social Charter there are reasons to distinguish between two different situations when the question of termination of employment arises, depending on the nature of reasons quoted for the termination. Similarly to other countries' legal systems Scandinavian law preserves this dichotomy. In this chapter the term *redundancy dismissal* or *economic dismissal* is used to refer to employment termination on the grounds of economic, technical, administrative or similar reasons, whereas the term *individual dismissal* is used to refer to termination based on an individual employee's conduct or competence or other reasons relating to the employee. The concept of *collective dismissal* used in the European Community law refers to situations in which there are economic reasons for dismissal, but where a whole group of employees is affected. The terms 'redundancy dismissal' and 'economic dismissal' used in this chapter cover, on the other hand, also cases when dismissal due to economic reasons refers to just one employee.

The distinction between the two main categories of dismissal is based on the apparent differences concerning the socio-economic consequences resulting typically from the two forms of dismissal. In simple terms it can be said that the ultimate aim of the rules concerning redundancy is to distribute the economic risks among employers, employees and society when an undertaking has to be closed down or the operations curtailed for economic reasons. The rules concerning individual dismissal take into consideration the humanitarian aspect, trying to provide grounds for as fair assessment as possible at individual level when the requirements of the employees' conduct and competence are evaluated.

In the Scandinavian countries the rules concerning employment protection crystallised step by step during the twentieth century. During the first decades the general contract law's principles concerning the right of both parties to terminate an employment contract without stating the reasons (unless otherwise agreed upon) were upheld. The employer's right in this respect was confirmed by case law.<sup>2</sup> As in many other areas of social protective legislation Norway was a forerunner of the statutory protection of employees against dismissal based on subjective grounds. By means of the Act on *arbeidervern* (workers' protection) provisions were introduced in 1936, stipulating that an employee who had been employed for a period of three consecutive years had the right to compensation if he was dismissed, and the dismissal was not based on objective grounds. It may be assumed that legislation in the German Weimar Republic acted as an inspiration for the Norwegian reforms. In the remaining Scandinavian countries norms concerning employment protection were introduced instead by means of the collective agreement. The first steps in this direction were taken in Sweden in 1938 by means of the *Saltsjöbaden* Agreement, and the protection was further

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<sup>2</sup> See, for example, *Den faste Voldgiftsrets kendelse* 1910 (Denmark), case no. 20, Decision of the Swedish Labour Court 1932 no. 100, and *Norsk Retstidende* 1935 (Norway), at 467.

extended by various amendments in 1946 and 1964. In Denmark collective agreement regulation took place in 1960 and in Finland in 1966. In Denmark, where no general legislation concerning employment protection was ever introduced, a certain amount of legal protection was given in 1964 to employees falling under the White-Collar Workers Act (*Funktionaerloven*). As in many other European countries the major breakthrough in more effective statutory legislation took place in the 1970s. General legislation concerning employment protection was introduced in Finland in 1970, and in Sweden in 1974. In Norway, where the 1936 legislation was extended in 1956, the statutory provisions were reformed in 1975. Since then many modifications have been introduced in the countries in question to the legislation in the area, as can be seen below. Some important amendments have been introduced under the influence of the European Community law, and especially the directives on transfers of undertakings and collective dismissals.

## 2 Sources of Norms

Regarding the character of the fundamental norms of employment protection there is an essential difference between Finland, Norway and Sweden, on the one hand, and Denmark, on the other. The three aforementioned countries have general legislative provisions concerning the matter, whereas in Denmark the most important rules in the area have been laid down in the collective agreement. This situation reflects the basic difference which may generally be observed in the attitude towards selecting the statute or the collective agreement as an instrument of regulation of the labour market's conditions.

In Finland the provisions of the Employment Contracts Act of 2001, which codifies the generally applicable rules for employment contracts, enunciate employment protection rules. The main rules concerning termination of employment can be found in Chapters 6-9 and in Chapter 12. The most important provision of Chapter 7, section 1 provides that an employer must have 'important reasons' to terminate an employment contract of indefinite duration. The Employment Contracts Act does not apply to employees in public service. This is regulated instead by provisions on employment protection stipulated in the Public Servants Act of 1994 and in the Act on Employment Security of Municipal Employees of 1996.

In Norway the main rules on employment protection can be found in Chapters 12 and 12A of the Work Environment Act of 1977. The key provision (section 60.1) stipulates that an employee cannot be dismissed without 'good cause relating to the circumstances concerning the undertaking's, employer's or employee's activities'. The Act also applies as a rule to public servants. Regarding employment protection special provisions relating to government employees have been laid down, however, in the Public Servants Act of 1983. Municipal employees are governed by the provisions of Work Environment Act on employment protection.

In Sweden the rules concerning employment protection have been collected in the Employment Protection Act of 1982. The key provision in section 7 sets

forth the requirement that dismissal shall be ‘based on objective grounds’. The Act applies also in all essential points to public employees.

In Denmark the most important rules on employment protection can be found in the Basic Agreement between the Danish Confederation of Trade Unions and the Danish Employers’ Confederation (hereinafter the Basic LO/DA Agreement). The rules were amended last time in 1993. The key provision in section 4(3) stipulates that dismissal must be based on reasonable grounds relating to the employee or the company. An equivalent provision regarding employees covered by the White-Collar Workers Act can be found in section 2b of the Act. According to general principles of administrative law public employees are as well protected against unjustified dismissals. It is uncertain whether employees in the private sector who are not covered by either the Basic Agreement (or any other agreement on protection of employment) or the White-Collar Workers Act have any legal claim to employment protection. It should be noted that Denmark has not ratified Article 24 of the European Social Charter. It should be added that both in Denmark and the other Scandinavian countries special laws have been promulgated to protect employees against discrimination on different grounds (membership of organisations, the employee’s sex, ethnic origin, etc.), providing a certain amount of protection against dismissal on these grounds.<sup>3</sup>

*Small enterprises* have been excluded from the legislation on employment protection in some countries, such as Germany, for example, where it does not apply to enterprises employing fewer than six employees. The Scandinavian countries do not possess a similar general exception. There are, on the other hand, a few special provisions concerning small companies (see below section 9.3 regarding the order of selection for redundancy - a legal rule of Swedish law which applies to companies with ten employees or less).

### **3 Preference of Permanent Employment**

Rules governing the requirements of objective grounds for dismissal on the part of the employer could be made quite worthless if employers were allowed to freely conclude employment contracts for a limited period of time. This is why in the Scandinavian countries which have general legislation concerning employment protection there are also rules restricting the employer’s right to conclude time-limited employment contracts. In these countries an employee shall normally be employed for a period of unspecified duration, which means permanent employment. Provisions restricting the right to employ for time-limited periods can be found in Finland in Chapter 1, section 3 of the Employment Contracts Act, in Norway in section 58A of the Work Environment Act and in Sweden in sections 4-6 of the Employment Protection Act. Certain provisions on the matter can be found in section 2 of the White-Collar Workers Act in Denmark, but otherwise Denmark does not possess similar rules. A closer

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<sup>3</sup> Peijpe, T. van, *Employment protection under strain*, The Hague, 1998, at 95 ff., has given an English account of Danish employment protection law.

account of the rules concerning time-limited employment is presented in another article in this volume.<sup>4</sup>

#### 4 Qualifying Conditions

In some other European countries, among them Germany and the United Kingdom, there are rules stipulating that an employee may acquire employment protection only after a certain specified period of employment. Rules of a similar kind can be found in Danish law. Section 2b of the White-Collar Workers Act stipulates that an employee shall have been in continuous employment with the employer concerned for at least one year before the dismissal in order to make demands on objective grounds regarding the dismissal. The Basic LO/DA Agreement stipulates that an employee shall have been continuously employed in the company in question for at least nine months in order to have the right to demand a written statement stipulating the grounds of the dismissal, and in this way acquire the right of having the employer's decision reviewed.

In Finland, Norway and Sweden no similar qualifying conditions have been laid down regarding the right to employment protection. For an employee with an employment contract of unspecified duration objective reasons for dismissal are required already from the first day of his or her employment. It must be mentioned, however, that the legislation in all the three countries allows for employment contracts on a trial basis, and that rules concerning this employment form may have principally the same function as the above-mentioned provisions concerning the requirements of a certain qualifying period. This outlook is particularly justified in Sweden, since under the provisions of section 6 of the Swedish Employment Protection Act concerning probationary employment, the employer has the right to a unilateral decision as to whether the employee satisfies the requirements of permanent employment or not. In Norway certain requirements have to be satisfied, on the other hand, in accordance with the provisions of section 63 of the Work Environment Act, stipulating that a dismissal of an employee appointed on probation has to be motivated by reference to the conditions concerning the employee. In accordance with the provisions of Chapter 1 section 4 of the Finnish Employment Contracts Act the employer's decision-making power is restricted only inasmuch as that a probationary appointment may not be terminated for reasons which are discriminatory or irrelevant.

#### 5 Period of Notice

All the four countries have rules stipulating that a certain period of notice has to be observed when dismissal concerns an employment contract valid until further notice. Here, only the employer's duty to observe the period of notice will be discussed. The function of these rules is, *inter alia*, to give the employee a

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<sup>4</sup> See the article written by Ann Numhauser-Henning, *Fixed-term Work in Nordic Labour Law* in this volume.

temporary guarantee against loss of income in cases the employer has to curtail his operations for business economic reasons. The legislation in all the four countries stipulates the shortest period of notice which has to be observed right from the beginning, and is based, in general, on the principle that the duration of the period of notice depends on the length of the employee's employment in the company or with the employer. Provisions concerning this issue can be found in Chapter 6 sections 2-4 of the Finnish Employment Contracts Act, in section 58 of the Norway's Work Environment Act, in section 11 of the Swedish Employment Protection Act and in section 2 of the Denmark's White-Collar Workers Act. The shortest period of notice is one month, except in Finland, where it is fourteen days during the first year of employment. To illustrate how the period of notice is extended it can be mentioned that a period of notice of two months is applied in Finland after four years of uninterrupted employment, in Norway after five years of continuous employment, and in Sweden after two years of a combined employment period with a given employer. Special rules apply in the four countries on how the length of an employment relationship shall be determined in different situations, for example, in the case of earlier employment in the same group of companies. In Norway the period of notice after ten years of employment depends also on the employee's age. The longest period of notice by statute in the Scandinavian countries is six months. This period of notice is reached in Finland after twelve years of employment without interruption, in Sweden after ten years of a combined employment period, and in Norway after ten years of continuous employment in the same company once the employee has reached 60 years of age. Under the provisions of the Danish White-Collar Workers Act the period of notice for white-collar workers is six months after nine years of employment.

Provisions concerning the period of notice for workers in Denmark usually form part of collective agreements, but this period is usually short. Regarding Danish employees whose period of notice is not stipulated by law or collective agreement, it is the court which determines a reasonable period of notice in accordance with the customary practice in a given sector. Case law of recent years shows examples of a period of notice between twenty and forty days.

## **6 Summary Dismissal**

The period of notice does not have to be observed if the employer wants to terminate an employment contract on the grounds that the employee has committed a particularly serious breach of contract. Statutory provisions concerning summary dismissal can be found in Chapter 8 of the Employment Contracts Act in Finland, in section 66 of the Work Environment Act in Norway and in sections 18-20 of the Employment Protection Act in Sweden. The relevant circumstances constituting the basis of summary dismissal must not be too distant in time (in Finland not more than 14 days, in Sweden, two months). The decision on summary dismissal has to be given in writing. The relevant Acts contain also other procedural provisions that must be observed by the employer. These procedural provisions make that in practice it takes time to terminate a

contract of employment by means of summary dismissal in these three countries. If the employee considers the summary dismissal to be unfounded, he may have the employer's decision reviewed by a court. The question of how serious a contractual breach must be to justify summary dismissal has been elucidated by extensive case law in the area.

In Denmark statutory provisions concerning summary dismissal can be found in section 4 of the White-Collar Workers Act.

## **7 Legal Redress: Courts and Arbitration Tribunals**

All the four countries have rules concerning the right to undertake legal measures against an employer's decision to terminate a contract of employment. The questions concerning sanctions for groundless dismissals are discussed below in sections 8.5 and 9.6. Regarding the authority of courts and other legal instances to try disputes concerning employment protection the following is, in the main, applicable.

Under the Basic LO/DA Agreement in Denmark disputes concerning the provisions of section 4 regarding objective grounds for dismissal may be referred to be decided, after negotiations at local and central levels, by a special industrial tribunal instituted by the parties (*Afskedigelsesnaevnet*). The procedure has been designed in such a way as to make it possible to reach a speedy decision. Other collective agreements also contain provisions on arbitration tribunals with equivalent duties. Decisions of such arbitration tribunals may not be appealed against. Disputes concerning employment protection under the White-Collar Workers Act are handled by the general courts, and ultimately by the Supreme Court. The same applies if an employee whose employment relationship is not regulated by a collective agreement or the White-Collar Workers Act institutes legal proceedings in regard of a dispute concerning employment protection.

In Finland disputes concerning the Employment Contracts Act are handled by the general courts, thus by the Supreme Court as the highest instance. Certain issues concerning employment protection (for example procedure in conjunction with dismissal) may be regulated, however, by the collective agreement under the provisions of Chapter 13 section 7 of the Employment Contracts Act, and disputes concerning interpretation of the collective agreement are handled by the Labour Court.

In Norway disputes concerning employment protection fall under the authority of the general courts (section 61-61 D of the Work Environment Act). In order to ensure competent assessment, the handling of these disputes in the first instance has been allocated to certain courts appointed by the government. In addition to professional judges the courts of first and second instances include representatives of employers and employees.

In Sweden in the case of a dispute concerning employment protection a trade union can bring an action in the Labour Court for an employee who is a member of the union, provided that a collective agreement applies to the working place. The Labour Court decides such a dispute as the first and only instance. A non-

unionised employee, similarly to a union member whose organisation does not support his cause, has to bring an action in an ordinary court of first instance. An appeal lies to the Labour Court as the final instance.

## **8 Individual Dismissal**

### **8.1 Substantive Conditions**

As mentioned before, in all the four countries there are rules on employers' duty to show objective grounds for dismissal, based on reasons relating to the individual employee's conduct, competence or other personal conditions. As illustrated before and below, the formal formulation of the rules varies from country to country. The substantive content of the regulations can be better understood by studying the case law of each country. The congruency of the regulatory framework considered from the substantive point of view appears to be relatively good as far as Finland, Norway and Sweden are concerned. To summarise in simple terms, the following can be said about these countries' rules concerning reasons constituting a just cause for individual dismissal.

The rules presume that the conflicting interests of the two parties will be weighed against each other and allow a wide variety of circumstances to be taken into account. Generally speaking, dismissal is justifiable only if the employee has been guilty of a breach of or failure to fulfil a contractual obligation of material interest to the employer, and if the existence and importance of this obligation have been made known to the employee. The court's assessment is based not merely on the course of events leading to the dismissal but, more particularly, on the inferences that can be drawn from the situation regarding the employee's suitability for continued employment. Accordingly, isolated instances of misconduct, provided they do not involve gross negligence, have often been deemed as insufficient grounds for dismissal, whereas in cases of repeated offences the courts have not infrequently taken a sterner view, especially if the offender has earlier been reprimanded by the employer.

The key provisions relating to objective grounds for dismissal have been presented above in section 2. In addition to these in Finland and Norway a number of extra provisions can be found, providing recommendations on how various specific situations should be handled. In conformance with the country's tradition this regulatory framework is especially detailed in Finland under provisions of Chapter 7 sections 2, 5, 9 and 10 of the Employment Contracts Act. The provisions stipulate expressly that an employee must be warned before he is dismissed due to a breach of his obligations in the employment relationship. Further instructions are given, among other things, regarding assessment of dismissal caused by an employee's illness, views or participation in industrial action. Similar recommendations are provided in Norway in cases of, among other things, illness and military service (sections 64 and 65 A of the Work Environment Act). Traditionally, the Swedish legislation is rather concise, but to even things up the preparatory materials abound in recommendations on

how various important practical situations shall be handled, for example, cases in which an employee's working capacity has been reduced due to illness. The courts usually try to follow these recommendations.

As a rule, illness does not constitute a just cause for dismissal either in Sweden or in Finland, unless it reduces an employee's working capacity in a permanent way and to such a degree that the employee is no longer able to do any useful work. Under Norwegian law there is a general prohibition to dismiss ill employees during the first six months of their illness (section 64 of the Work Environment Act). In Denmark illness as such is not regarded to constitute unreasonable grounds for dismissal - in any case not if it entails longer absences from work. Some collective agreements restrict, however, the employer's right of dismissal in connection with his employees' illness.

Regarding the position of older employees a rule in Norwegian law can be mentioned (section 60.3) stipulating that dismissal of an employee who has reached seventy years of age shall be considered as unreasonable if it is based solely on the fact that the employee has reached the retirement age in accordance with the social insurance legislation. According to Swedish law the general rule is that an employee may remain in his or her employment until sixty-seven years of age, even though there are exceptions.

All the four countries contain legislation forbidding dismissal on the grounds of pregnancy or parental leave. Legislation concerning prohibition of discrimination on various grounds, such as sex, ethnic origin, membership of an organisation, etc., contains also provisions restricting the right of termination. As regards Denmark the so-called negative right of association has been given some explicit protection by means of the Dismissal on Grounds of Union Membership Act of 1982, which makes it unlawful to dismiss employees who refuse to join a trade union. In the remaining Scandinavian countries an equivalent prohibition follows from the general rules on employment protection.

It is in keeping with the line of reasoning underlying the legal rules on justification for an employer's decision to terminate a contract of employment that the burden of proof concerning reasonable grounds for dismissal rests with the employer.

## **8.2 *Ultima Ratio: Transfer of Employees***

In accordance with the legislation applicable in Finland, Norway and Sweden individual dismissal appears to be a measure that should be used, in principle, only when the existing problems cannot be solved in any other way. The provisions of the Swedish Employment Protection Act, section 7, clearly stipulate that objective grounds for dismissal do not exist where it is reasonable to require that the employer shall provide other work for the employee in his service. Section 2 in Chapter 7 of the Finnish Employment Contracts Act contains similar provisions. The employer is required to investigate the possibilities of transfer not only within the context of the employee's existing job, but also in the context of providing a different job. The transfer obligation applies, however, only when it is reasonable: if an employee has been seriously at fault, the employer cannot be expected to transfer him to other duties even if

it is possible. Norway's Work Environment Act does not contain any explicit provision concerning the employer's obligation to try to arrange for a transfer of an employee before his dismissal due to reasons relating personally to the employee (in contrast to cases of redundancy, section 60.2), but case law shows that employers have a certain obligation to try to arrange for a transfer before an employee is dismissed.

Swedish employers are under an extensive obligation to assist in the rehabilitation of employees suffering from ill health. Chronic alcoholism is regarded as an illness by the Swedish Labour Court. When an employee's ability to work is impaired for reasons other than illness, the employer must make an effort to solve the problem in another way, for example by transferring the individual concerned to other duties. When all reasonable efforts have failed, the situation may constitute a just cause for dismissal, particularly if the costs incurred by the employer are demonstrably higher than the value of the employee's contribution to his business activities. In an international comparison employment protection in Sweden in conjunction with individual dismissal appears to be particularly strong.

### **8.3 *Constructive Dismissal***

Constructive dismissal refers to the termination of a contract of employment, which, although formally initiated by the employee, was in reality caused by the employer. In accordance with the preparatory materials for the Swedish Employment Protection Act and subsequent case law an employee will not be bound by his notice of resignation if he or she has been provoked to resigning by the employer. A notice of resignation may thus be pronounced as non-binding if the employer has acted in a manner which is contrary to good labour market practice or otherwise improper. In Norwegian judicial practice cases that can be related to the concept of constructive dismissal have likewise occurred.

### **8.4 *Procedural Requirements***

In Finland, Norway and Sweden an employee must be given an opportunity to be heard before the employer makes a decision to dismiss him. Under the Finnish Employment Contract Act an employee may turn to an adviser, for example a union representative, for assistance at such a hearing. Under Norwegian law an employer has to discuss the matter not only with the employee concerned but also with a union representative, unless the employee does not want it. In Sweden an employer must inform the employee concerned of his intent to dismiss him at least two weeks in advance, and if the employee is a union member, the relevant local union must be informed at the same time. Following the notification, the employer is obliged to engage in consultation if the union or the employee so requests. This provides an opportunity for the employee and the union to investigate whether the dismissal can somehow be avoided. The notice of dismissal must in Finland, Norway and Sweden be done

in writing, and if the employee so requests, it must stipulate grounds for the dismissal.

Denmark has no equivalent, general rules on the employer's duty to inform the employee about planned dismissal. Regarding the procedure in the case of prospective dismissal of a trade union representative collective agreements contain certain rules.

### **8.5 Consequences of Unlawful Individual Dismissal**

Regarding sanctions for dismissal without good cause a number of differences can be noticed in the regulatory frameworks of the four Scandinavian countries. The most strict sanction system applies in Sweden.

Dismissal based on reasons relating to the individual employee concerned will in *Sweden* be judged by the court as invalid if the employer is unable to show reasonable grounds for the dismissal. The time limit within which an employee must inform the employer of his intention to commence legal proceedings concerning invalidity is short (section 40 of the Employment Protection Act). It should be noted that it is the employee or his union who must take the initiative to commence legal proceedings. When a dispute has arisen over the validity of a dismissal, the employment relationship continues until the case is finally settled. Under section 34 of the Act the employer may not prevent the employee from working while the negotiations are in progress, or during subsequent legal proceedings. Neither is it permitted to prevent the employee from working after the dismissal has been ruled invalid by the court. The normal outcome here is for the employer to accept the judgement and re-institute the employee in his employment. As a last resort, however, an employer is able to extricate himself from an employment relationship by paying compensation ranging, in accordance with section 39 of the Act, from six to forty-eight months' pay, depending on the employee's length of service and age.

Under Swedish law in cases of unfair dismissal an employer will also incur liability in damages in relation to the employee even if the latter does not contest the validity of the dismissal. Damages may be awarded both for financial loss and for the non-material injury suffered. An employee who chooses to let an unjustified dismissal stand is entitled to receive, in addition to normal pay due up to the expiry of the period of notice, compensation for financial loss suffered as a result of a reduction in income following the dismissal. This is subject to certain restrictions (sections 38 and 39 of the Act).

Compensation for non-material injury caused by unjustified dismissal, known as *general damages*, is assessed on a case-by-case basis, amounting currently to about 6000 euros.

Under *Norwegian law* the principle rule stipulates that dismissal which is not based on objective grounds shall be declared invalid if the employee so requires, but the court may decide that the employment relationship shall cease if, after considering the pros and cons of the particular case, it appears that it would be manifestly unreasonable to maintain the employment relationship (section 62 of the Work Environment Act). According to the statutory provisions this exception shall be applied restrictively. It is primarily applied when the conflict between an employee and the employer or between an employee and his colleagues is so

serious that co-operation or teamwork is impossible. In addition to the invalidity of dismissal an employee may ask for damages, or else he may request damages only. When calculating damages, both economic and non-economic damage is taken into account. If by the decision of the court the employment relationship shall cease despite the lack of reasonable grounds for dismissal, economic damages may refer to compensation for future income deterioration. Compensation for damage of a non-economic nature has a more discretionary character. There are examples of the Supreme Court awarding approximately 7000 euro in compensation for this kind of damage.

In *Danish law* unfair dismissal may be adjudged invalid only if it is supported by the collective agreement. The Basic LO/DA Collective Agreement provides such support. Content-wise the provisions of the Agreement concerning invalidity of dismissal are similar to the above-mentioned Norwegian provisions. One prerequisite for an arbitration tribunal to decide that an employment relationship shall continue is that co-operation between the employee and the company has not been seriously damaged. The Agreement contains also regulations stipulating that damages shall be awarded in case of unfounded dismissal. The maximum amount of damages that can be awarded is equivalent to a fifty-two weeks' salary. The sanction applied for breach of section 2 b of the White-Collar Workers Act is not invalidity, but only damages. The maximum amount of damages that can be awarded is a six months' salary (according to a special rate stipulated by law), which can be imposed if the unlawfully dismissed employee has worked in the company continuously for fifteen years.

In *Finnish law* invalidity cannot be used as a sanction for unfounded dismissal. The sanction applied under Chapter 12 section 2 of the Employment Contracts Act is damages, the amount of which shall be equivalent, depending on the circumstances, to a minimum of a three months' and a maximum of a twenty-four months' salary. If a trade union representative has been dismissed in violation of the law the maximum amount is increased to a thirty-months' salary.

## **9 Dismissal Due to Economic Reasons**

### ***9.1 Substantive Conditions. No Rules on Prior Approval by Authorities***

In international comparison the possibilities of employers to terminate an employment contract due to economic reasons seem to be relatively extensive in the Scandinavian countries. As a rule such reasons are regarded as just cause for dismissal. A few other countries, for example the Netherlands and Spain, have provisions stipulating that approval must be obtained from public authorities before dismissal is executed for economic reasons.<sup>5</sup> The Scandinavian countries do not possess such rules. Scandinavian law concerning redundancy is based on the principle that companies must be able to apply modern methods of efficiency in order to survive in the long run.

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<sup>5</sup> Cf. a report presented by the Swedish Labour Market Board on 13 May, 2002, *Kartläggning av det europeiska rättsläget vad gäller arbetsgivarens ansvar vid företagsnedläggningar*. Cf. also references in footnote 1 above.

In Sweden the term 'shortage of work' is used as a generic term applied to all reasons of economic dismissal. The literal meaning of the term constitutes a misnomer in that it encompasses not only situations in which there is actual shortage of work, but also other situations in which dismissals may be occasioned by the employer's decision based on his right to manage his business, due to economic, organisational or other reasons. The courts do not examine business assessments made by employers which lead to decisions to reduce their workforce, unless there is reason to suspect that a given dismissal is due not to business considerations in the sense envisaged by the Employment Protection Act but to reasons which in reality relate to the individual employee concerned. Even in situations constituting redundancy within the meaning of the Act, however, the employer cannot arbitrarily decide who is to be dismissed, see below 9.3.

Finland possesses statutory provisions relating especially to dismissal by reason of redundancy (Chapter 7, section 3 of the Employment Contracts Act). A notice of dismissal may be given only if the amount of work has decreased 'considerably and permanently', and no grounds for dismissal will exist if the employer employed a new employee to do similar work either before or after the notice of dismissal.

Norway also possesses statutory provisions referring especially to grounds for dismissal due to economic reasons (section 60.2 of the Work Environment Act). When assessing a case of dismissal executed for the purposes of rationalisation the company's needs shall be weighed against the difficulties which the individual employee will have to face. If dismissal has been caused by so called outsourcing, it is not regarded as being based on objective grounds, unless the change is 'absolutely necessary' in consideration of the continued operations of the company.

Case law of the arbitration tribunal in Denmark, which handles disputes falling under section 4 of the LO/DA Basic Agreement, shows that redundancy caused by a drop in the amount of incoming orders, rationalisation measures, or the like constitutes acceptable grounds for dismissal. If an employer employs a new person shortly after dismissing another employee, his position in a dispute concerning redundancy will be seriously weakened.

All the Scandinavian countries obey the principle stipulated by the EC directive on transfers of undertakings, stating that such a transfer shall not in itself constitute acceptable grounds for dismissal.

## **9.2 *Re-employment after Redundancy Dismissal***

An employer's duty to give *priority concerning re-employment* during a certain period of time to employees who have been dismissed from work due to economic reasons can counteract dismissals which are not based on reasons of primary importance. Under Chapter 6 section 6 of the Finnish Employment Contracts Act an employer who needs employees for the same or similar working tasks within the period of nine months from the termination of a contract of employment has a duty to re-employ the employees dismissed due to redundancy. A similar rule applies in Sweden under section 25 of the

Employment Protection Act. In Norway an employee who has been dismissed by reason of redundancy has a similar priority to be re-employed during one year from the termination of the contract of employment (section 67 of the Work Environment Act).

### **9.3 Order of Selection for Redundancy Dismissal**

The most concrete and precise rules concerning the order of selection for dismissals occasioned by redundancy can be found in Sweden. Under section 22 of the Employment Protection Act a separate order of selection is normally to be drawn up for each group of employee who belong to the same area of collective agreement coverage in the establishment affected by redundancy (e.g. a retail shop or a factory). The position of individual employees in the order of selection for dismissal within the relevant selection category is normally decided on the basis of seniority, i.e. length of service with the employer concerned, according to the "last in first out" principle. In the event of equal periods of employment senior age priority applies. If an employee can be given continued work with the employer only by being transferred to other duties (thereby supplanting another employee with a shorter period of service) such seniority-based priority will depend on the possession of adequate skills for the performance of the new working duties by the employee concerned.

Following the amendments to the Employment Protection Act in 2001, before an order of selection for redundancy is established employers with ten or fewer employees may exempt from the procedure a maximum of two employees whom they consider to be of key importance to the survival of their business. This new rule was introduced in the interests of retaining necessary skills in small business.

Generally applicable rules on selection for redundancy differing from those laid down in the Employment Protection Act can be established by collective agreement. A different order of selection can also be fixed by collective agreement in particular cases, known as a 'collectively agreed redundancy list'. The drawing up of such a list usually requires some involvement of an industry-wide union, and the list must be based on objective criteria and must not be contrary to good labour market practice or otherwise improper. It is permissible under the Act for a collectively agreed redundancy list also to be applicable to employees who are not union members but are employed on the work covered by the agreement in question.

The other Scandinavian countries have no equivalent to the precise Swedish selection rules for dismissal. In Norway the selection of employees to be given notice of dismissal in case of redundancy forms part of the process of determination whether there are reasonable grounds for dismissal.<sup>6</sup> It is required that the employer presents the selection criteria applied in connection with the selection process, and shows that the issue has been satisfactorily investigated by, for example, negotiations with the union in question. Acceptable selection criteria include in the first place qualifications but also seniority. The former are

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<sup>6</sup> See Fanebust, A., *Oppsigelse i arbeidsforhold*, 4th ed., Oslo 2001, at 166 ff.

particularly important if the company's economy is in a bad shape. There is no general obligation to follow the seniority principle unless special legal grounds applies, for example due to a collective agreement. Attaching special importance to the employee's obligations to dependants or similar social obligations is not regarded to be contrary to the requirements of objectivity.

Finland's Employment Contracts Act does not contain any provisions concerning the order of selection. On the other hand, collective agreements contain certain guiding principles on the subject, entailing that skilled workers who are important for the company's operations shall be the last ones to be dismissed, if this is possible. In addition to that regard shall be paid to seniority and obligations to dependants.

The principal rule in Denmark is that in a case of redundancy an employer has the right to consider objective factors important for the running of the company when deciding which employees shall be given notice of dismissal. Practice of arbitration tribunals shows that the principle of 'last in first out' does not necessarily apply under the Basic LO/DA Agreement, but considerations of seniority should be taken into account in the overall assessment of whether a given dismissal is reasonable. Some individual collective agreements contain express provisions stipulating that seniority shall be taken into account when deciding on the order of dismissals.

#### **9.4 *Ultima Ratio? Obligation to Transfer***

As regards dismissal caused by a company's economic situation a Scandinavian employer has no obligation to go to the extremes and sacrifice his business objectives in order to avoid it. Dismissal can therefore not be described as the ultimate solution reserved for extreme cases, for example when a company is threatened by insolvency. In Danish and Norwegian legal literature the issue has been discussed of whether one should make any difference between dismissal occasioned by the fact that the company's operations show deficit and dismissal made for the purposes of rationalisation in order to improve the company's result, even if it is positive. Everybody seems to concur that reasonable grounds may exist for dismissal of both the former and the latter kind, even though the court may have to examine the reasons more deeply in the latter case.

Regarding the question of whether an employer has a duty to try to avoid dismissal by means of transfer strict requirements are placed in Finnish, Norwegian and Swedish law. Particularly stringent requirements are stipulated by the provisions of Chapter 7, sections 3 - 4 of the Finnish Employment Contracts Act. The Act provides that an employee who can be transferred to or retrained for other working duties shall not be dismissed. An employee shall be offered other work which corresponds to her or his education, professional skills or experience, and the employer shall arrange for such training as is necessary for the new working duties, and which can be regarded as practical and reasonable for both parties. The obligation to transfer embraces not only the company in which the employee is employed but also other companies and associations of companies in which the employer actually exercises a controlling influence over personnel issues. The rules concerning the obligation to transfer

can be found in section 60.2 of the Norwegian Work Environment Act, and in Sweden in sections 7 and 22 of the Employment Protection Act. The latter, taken together with the preparatory materials and the judicial practice, demonstrate that the employer's obligation to transfer is quite extensive. In Denmark there are no similar statute provisions. In situations where employees' jobs disappear as a result of the introduction of new technology, a nation-wide co-operation agreement requires the employers to endeavour to redeploy the employees.

### **9.5 Procedural Requirements**

The fact that dismissals due to redundancy are often of importance to a collective of employees and that they may bring about various socio-economic consequences is reflected in the rules of procedure applying to them. The procedure forms essentially an integral part of the general rules on industrial democracy.<sup>7</sup> In all the four countries the rules on collective redundancies are based on the EC Directive 98/59.

Regarding the question of the employer's duty to negotiate before making a decision to dismiss by reason of redundancy section 29 of the Swedish Employment Protection Act refers to the general provisions on co-determination at work stipulated in sections 11-14 of the Co-Determination Act from 1976. The aforesaid provisions entail that before an employer decides on any important alteration to his activity he shall negotiate at his own initiative with a trade union with which he is bound by collective agreement. If the employer is not bound by collective agreement, he shall negotiate with all the organisations whose members are affected by the planned measures. There is no duty to consult with the individual employees, however, if the planned dismissals are based on redundancy.

Finland has rules on how an employer shall proceed before a decision on redundancy dismissal is taken, stipulated in the Cooperation within Undertakings Act, 1978, which is a general Act on industrial democracy concerning companies with at least 30 employees (in some cases 20).<sup>8</sup> The rules entail, *inter alia*, that an employer shall inform and consult with representatives of the employees concerned, before he makes a decision on redundancy dismissal. The Act contains special penalties for an employer who has neglected compliance with these rules before making such a decision. The employer shall have to pay compensation to the employee concerned, amounting to twenty-months' wages at most (section 15 a). If the provisions of the 1978 Act are not applicable, as when small companies are concerned, under Chapter 9 section 3 of the Employment Contracts Act the employer shall provide information about the planned dismissals to the employees concerned or their representatives at the earliest possible date.

Under section 9.4 of the Basic Agreement between the Norwegian labour market's central organisations the employees' representatives shall be given

<sup>7</sup> See further in this volume the article by Örjan Edström, *Co-determination in Private Enterprises in Four Nordic Countries*.

<sup>8</sup> See Suviranta, A. J., *Labour Law in Finland*, The Hague, 2000, at 157 ff.

information and an opportunity to present their views before a company makes a decision concerning the employees' employment. In the event of a breach of this provision the employees who have been given notice of dismissal shall be paid a two months' salary from the day on which the representatives were informed. In the event of dismissal of at least ten employees section 56A of the Work Environment Act contains special rules concerning information of and consultation with the employees' representatives.

In Denmark the obligations of an employer to inform and negotiate with the employee's representatives before a decision on redundancy dismissal is taken follows from the Advance Notification Act (1994) when dismissal of a large number of employees is concerned.

The EC Directive 98/59 on collective redundancies has been implemented in Denmark by means of the aforementioned Act from 1994. Implementation of the Directive has been carried out in Finland by means of amendments to the Cooperation within Undertakings Act, and in Norway by adding a new section, 56A, to the Work Environment Act. In Sweden implementation of the Directive has meant amendments to sections 13 and 15 of the Co-Determination Act, 1976, as regards information and negotiations with employees' organisations, and to the Employment Promotion Act, 1974, as regards advance notification of the Provincial Labour Board.

## **9.6 Consequences of Unlawful Dismissal for Economic Reasons**

Sanctions for unlawful dismissal in the Scandinavian countries are primarily, though not always, the same irrespective of whether dismissal has been caused by economic reasons or whether it has been based on personal grounds.<sup>9</sup> As shown in 9.1 it is relatively unusual that dismissals for economic reasons are proved to be unlawful, since normally the courts do not examine employers' business economic assessments used as a basis for their decision to terminate employment contracts.

Swedish law stipulates an important difference between cases when a dismissal is denounced because of the fact that the employer has contravened the rules on the order of selection for redundancy and other cases of unlawful dismissal. In case of a breach of rules on the order of selection for redundancy dismissal cannot be declared invalid. Instead damages will be paid in accordance with the relatively strict rules of sections 38-39 of the Employment Protection Act. In Denmark and Norway a court or an arbitration tribunal has a certain freedom to decide whether an unfounded dismissal shall be declared invalid or not (cf. above 8.5.). There is a certain reluctance to declare a dismissal invalid when only a breach against the order of selection has been made, since invalidation may mean that another employee has to quit the working place.

As has been seen above (9.5) in Finland financial compensation shall be awarded to an employee who has been given notice of dismissal by redundancy if the employer has breached the rules on information and consultation under the Cooperation within Undertakings Act, 1978.

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<sup>9</sup> Cf. above under 8.5.

### 9.7 *Severance Pay*

Some European countries have statutory provisions stipulating that an employer may be ordered to make severance payments to an employee who has been dismissed for economic reasons even if the dismissal has been based on objective grounds.<sup>10</sup> The amount of severance pay can be determined according to a so called social plan or special rates stipulated by law.<sup>11</sup> The primary aim of such provisions is to attenuate the economic consequences of an employee's dismissal, but they can also function as a deterrent to close down the business or restrict operations without proper consideration. If the total amount of compensation is high and the requirements placed on the companies are strict, regulations of this kind may counter-balance the companies' desire to move their business operations abroad.

Among the Scandinavian countries only Denmark has similar statutory provisions regarding severance pay. Under the White-Collar Workers Act (section 2a) employees who must terminate their employment after a long period of employment must receive so called severance pay, which amounts to a three-months' salary after eighteen years of employment.

In Finland, if an employee may find it difficult to obtain another work due to high age or for some other reason, he may be awarded severance allowance pursuant to the Act on Educational and Severance Allowance Fund (1990). The allowance system is financed from employer contributions. In Sweden the majority of the labour market sectors possess severance payment schemes drawn up in accordance with collective agreements. Similarly to Finland, it is the question of a kind of social security system. Such a system has in principle no effect on the employer as regards his refraining from decisions to close down or restrict the business activities.

## 10 **Concluding Remarks**

From the comparative point of view it may be said that the rules concerning employment protection provide strong protection to employees in Finland, Norway and Sweden as regards dismissal due to *personal reasons*. In Denmark employment protection concerning dismissal for personal reasons is more limited and not as extensive. As regards dismissal for *economic reasons* provisions on employment protection do exist in the Scandinavian countries, but the courts are reluctant to examine business assessments made by employers which lead to decisions to reduce their workforce. Since, in addition, legislation is lacking concerning so called social plans supervised by the authorities as well

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<sup>10</sup> Cf. references in footnotes 1 and 5.

<sup>11</sup> See e.g. the rules on the social plan in the German *Betriebsverfassungsgesetz*. In France the legislation concerning an employer's duty to draw up a social plan before collective dismissals was tightened up in 2001. In the Netherlands a court may order that compensation be paid if a contract of employment has been terminated on the grounds of a change in circumstances. In Italy there are rules containing rates of severance pay (*'trattamento di fine rapporto'*).

as severance pay, employment protection in this area must be regarded as relatively weak.

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