RONNIE EKLUND

A Look at Contract Labour in the Nordic Countries

JURIDISK TIDSKRIFT JT VID STOCKHOLMS UNIVERSITET

SÄRTRYCK UR JURIDISK TIDSKRIFT

1995-96 NR 3

A Look at Contract Labour in the Nordic Countries

RONNIE EKLUND*

1. Terminology and definitions

In this article, the term "Nordic countries" refers to Denmark, Finland, Norway and Sweden. The term "contract labour" is an ambiguous one. Contract labour is an expression often used to denote different ways of employing workers otherwise than under a normal employment contract. In this context, I also refer to "labour-only contracting" (supply of labour) and "job contracting" (supply of goods or services).

Labour-only contracting implies the emergence of triangular relationships based on contractual relationships other than regular contracts of employment, in which employees may find themselves under the authority of a principal (user) employer with whom they have never signed a contract of employment. In those cases, the employees' regular employer acts as a temporary employment agency. In the Nordic countries, labour-only contracting is most often referred to as the *contracting out or hiring-out of manpower.* The concepts will be used interchangeably.

Job contracting implies that the supply of goods and services is contracted out to a subcontractor who usually undertakes to carry out the work at his own risk, supplying his own staff, premises, tools and equipment. The phenomenon may also be called subcontracting.

A third category of work-performing actors consists of the *self-employed persons*. They may formally enter into contracts as independent contractors, but remain in fact so dependent upon the supply of work from the principal employer that their status is more like that of an employee.

In the main, *contracting out of manpower* in the Nordic countries will be dealt with in this article.[1] Contracting out of manpower refers here to the practice of *hiring manpower* from a temporary employment agency.

In all the four Nordic countries similar sources of law in regulating contract

* Professor of private law, in particular labour law, at Stockholm University.

[1] At the end of 1993, I delivered a report, "In- och uthyrning av arbetskraft i de nordiska länderna" (September 1993) before the Expert Committee of the Nordic Council. This report is both a descriptive study of the legal framework of contracting out of manpower in the respective coun-

labour are found. The sources include: statutes, regulations, case law, collective agreements and ethical codes. Statutes and regulations are applied in Finland, Norway and Sweden whereas collective agreements are used in all the four countries. Ethical codes with regard to the hiring-out of manpower in the commercial and office sectors are used in Denmark and Norway.

2. The Scope of Contract Labour

Contract labour is a rather widespread phenomenon on the labour markets of all the four countries. In general, no legal intervention is made as regards job contracting. With regard to self-employed persons, some protective provisions can be found, but these are scattered throughout the countries' labour legislation.

On the other hand, labour-only contracting has been an area of vivid interest, showing remarkable differences of legal approach in the four Nordic countries. This is somewhat surprising when considering the otherwise high uniformity of law in other fields.

2.1 The Legal Views on Contract Labour

The legal approach to the contracting out of manpower shows differences in the four Nordic countries. At the beginning of the 1990's, only Norway was still bound by the relevant I.L.O. Convention No. 96/1949 (Revised) on Fee-Charging Employment Agencies. Norway is still the only country applying and enforcing a system based on the legal ban on the use of contracted out manpower. Some suggestions were made in 1989-90 about the ways in which to liberalise the Norwegian legal framework, even though they were never implemented.[2]

Denmark has never ratified Convention No. 96/1949. When Denmark deregulated the market for the contracting out of manpower in 1990, there were no social aspects left that would be of benefit to the affected employees.[3] The simultaneous deregulation of the public employment exchange monopoly created a situation in which more actors than ever before were found on the labour exchange market. According to a 1992 Danish survey, temporary employment agencies were faced with increased competition.[4]

Finland and Sweden had at one time ratified Convention No. 96/1949, but both

tries, as well as a field study, and includes semi-standardised interviews with prominent officials and other persons from various organisations as well as a few of the major, temporary employment agencies in the four countries. I owe my gratitude to three former law students of the School of Law, Stockholm University, Annika Blekemo, Sara Luthander and Martin Wästfelt who carried out the bulk of the research work. The report has not been published before.

[2] See NOU 1992:26. *En nasjonal strategi for økt sysselsetting i 1990-årene*, pp. 30, 199 and Hege Torp & Stig H. Pettersen, *Markedet for korttidsarbeid. En utredning om utleije og formidling av arbeidskraft* (1989).

[3] FT 1989-90. Tillæg A sp. 1447.

[4] Agi Csonka, *Fri Formidling – Om Liberaliseringen af Arbejdsformidlingen* (1992).

countries denounced the Convention in the early 1990's.[5]

The partial deregulation with respect to the contracting out of manpower that came about in Sweden in 1991 was seen as an adjustment to the new requirements of flexibility and as a corrective measure of the ineffectiveness of the former legislative regime spanning from 1935 to 1942.[6] It may be worthwhile mentioning that it was the Social Democratic Government that started the liberalisation process concerning the contracting out of manpower. Further steps taken by the non-socialist Government in 1993 implied complete abolition of the Swedish state monopoly of employment exchange. Private employment agencies were hence permitted to act on the market with a view to profit. Competition aspects were thus decisive when the deregulation was first suggested.[7]

When Finland partly deregulated the practice of the hiring-out of manpower in 1994, this was partly done in view of the forthcoming association with the European Union.[8]

2.2 The Affected Sectors

The hiring-out of manpower practice occurs predominantly in the commercial and office sectors in all the four Nordic countries – in particular in the service business sector (formerly typewriting agencies). It is also common in the spheres of consulting agencies and entertainment businesses (especially with relation to musicians), in the building and engineering industries, nursing, and, in Norway, in the offshore industry. More often than not it is women who are involved in labour-only contracting, especially as regards the office and service sectors.

No particular differences as regards the use of contract labour in user enterprises of different sizes are discernible. The hiring-out of manpower occurs in both small and large enterprises, as well as within the public sector. Job contracting is prevalent everywhere.

2.3 Employer and Union Attitudes Towards Contract Labour

Generally, employers and employer organisations are in favour of contract labour, whereas unions are its ardent opponents, in particular as regards the hiring-out of manpower. This is the prevailing view when looking at all the four Nordic countries.

Despite the employer side's general attitude towards the above, some employer organisations may hold that some kind of legislation regulating the hiring-out of manpower is necessary in order to eliminate dishonest entrepreneurs and legitimise

[5] RP (Finnish bill) 1993 No. 102 and prop. (Swedish bill) 1991/92:89.

[6] Prop. 1990/91:124.

[7] Prop. 1992/93:218. Fahlbeck speaks of a "shift of paradigm" in Sweden as regards these issues, see Reinold Fahlbeck, *"Employment Exchange and Hiring Out of Employees in Sweden"*, in TfR (1995), pp. 589-622.

[8] See RP 1993 Nos 102, 103 and 239.

the honest ones. If, at the same time, the principal employer (as is the case in Norway) would be subject to penal sanctions in the case of law violation, this would constitute an invaluable competition tool for those firms that hire out manpower in strict accordance with the rules.

On the other hand, one may also find trade unions organising contract workers, which are in favour of the regulation of wages and other working conditions by means of collective agreement, accepting, in a way, the phenomenon of the hiring-out of manpower. Such unions are found in Denmark, Finland and Sweden. In Sweden, a collective agreement concerning temporary employment agencies conducting business in the service and office sectors was concluded in 1988.

Similar views may also be found with regard to job contracting. Yet, job contracting (as a societal phenomenon) has been never stigmatised in the same way as labour-only contracting in the Nordic countries.

2.4 Views Expressed by the Political Parties With Respect to the Contracting Out of Manpower

In all the Nordic countries, with the exception of some minor differences noted in Finland, the views expressed by their *political parties* with regard to labour-only contracting show striking similarities. The left has in general adopted a restrictive approach towards the hiring-out of manpower, while the right wing, including the Liberal and Centre parties, has adopted a more lenient approach.

3. External Circumstances and Reasons for Resorting to Contract Labour

3.1 Internal Reasons

It can be said that the use of contract labour is simply a reflection of the need for a *temporary substitute,* which is often due to the fact that some of the regular employees are on leave or that they are temporarily sick, or else in cases when there is a sudden increase of the work load or in times when business reaches a peak. In some instances, the use of contract labour is dictated by the *need for a specialised workforce.*

In some instances the use of external manpower may *enhance the job security of the regular workforce.* Contract labour may be therefore looked upon as a kind of "buffer" workforce which is more easily dispensed with when the demand for such work decreases. This can be compared with the more meticulous procedure that must be followed if employees are to be dismissed for lack of work. It would be, however, too optimistic to believe that employers are altruistic, i.e. that they intentionally create a "buffer" workforce in order to add to the job security of the regular staff.

Another reason for the use of contract labour may be to *reduce the production*

costs or to concentrate on the main business activities in order to *increase flexibility and improve productivity.* It is also obvious that employers make use of contract labour, in particular as regards job contracting, in order to *increase their competitiveness*. This fact is part and parcel of the general trend towards increased specialisation and higher efficiency in working life.[9] All sectors of the labour market show a tendency in which the principal employer reduces, or cuts down on the so-called satellite activities or peripheral functions. This means that the employer concentrates on the principal business activities of the enterprise. This is a clearly discernible organisational trend found in all the four Nordic countries, as regards both private enterprises and public authorities.

By necessity, this means that part of the labour force will be *externalized*. The development may be described in terms of a paradigmatic shift as far as the production of goods and services in modern society is concerned. Classical industrialism meant that the entire production chain was *internalized* in order to make the company be able to control and co-ordinate the whole production process, from bringing forth of the raw-material to the final product. This phenomenon is now quickly disappearing. Instead, some sort of "flexible specialisation" is taking place.[10] Hence, the traditional use of temporary manpower, on the one hand, and the more extensive use of job contracting proper, on the other, tends to be getting blurred. Satellite production and more peripheral tasks are thus performed by external providers, with employers discarding the traditional preference for concluding contracts of employment – the regular means of providing work or services in order to control the entire chain of transactions. Consequently, the borderline between the organisation (hierarchy), on the one hand, and the market, on the other, becomes cless clear.

From the theoretical point of view of economics, this is only a variant of the old theme from Ronald Coase's classical article *"The Nature of the Firm"*, appearing in ECONOMICA in 1937. According to Coase, it was *transaction costs* which determined whether work was to be performed inside or outside a firm. Coase writes: "A firm will tend to expand until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or to the costs of organizing another firm."[11] The essence of this idea is that transactions will be performed within a firm ("in-house") as long as this is the most profitable arrangement. When this no longer applies, the transactions will be externalised and passed along onto the market. Following this theme, we now find a more "loosely" connected structure used for the production of goods or services than the one familiar to us from the

[9] See, e.g., statements of that kind made by the Swedish Minister of Labour in connection with the introduction of the Joint Regulation Act of 1976, prop. 1975/76:105. App. 1, p. 171.

[10] See a Swedish Government Report, SOU 1993:32. *Ny anställningsskyddslag*, p. 143.

[11] Ronald Coase, *"The Nature of the Firm"*, in ECONOMICA (1937), p. 392. The major recent work in the economics-organisational area is Oliver Williamson, *Markets and Hierarchies. Analysis and Antitrust Implications. A Study in the Economics of Internal Organzation* (1975).

past. The previously monolithic production units are being fragmented.[12]

If we look at it this way, it becomes obvious why contract labour of various kinds is flooding the market. It remains an open question, however, whether this development actually reduces the costs of manpower. It is probably true that the recruitment costs of engaging new manpower will be reduced, but, on the other hand, the price of buying external manpower may be actually higher than those of paying wages to the personnel employed. The use of external manpower may very well prove more expensive with regard to the marginal costs. I know of no comprehensive Nordic study highlighting this specific issue.[13]

Today, it is common practice even for the *public sector* to make frequent use of job contracting. This development is partly due to political reasons, and partly to economic considerations. To some extent, it can be seen as a regular rationalisation process which did not affect the public sector to the same degree in the past. Until recently, much of the public sector's work was performed in monopolistic structures which were, partly or wholly, shielded from the external forces and competition. A plethora of actions have been taken, particularly in Sweden, during the last few years, to infuse new models of providing services into the public sector – models similar to those commonly present since decades in the private sector. This has meant, *inter alia,* the privatisation of the former public utilities, the hiving-off of the former municipal units and setting them up as separate enterprises or joint ventures, the increase in the number of job contractors in, e.g., the health sector, and, further, the closing down of the former public agencies and setting up new ones in their stead – with the new unit taking over only a part of the former agencies' activities at times.[14]

The contracting out of former public functions is a controversial matter, and as such it has been much discussed in Sweden, in particular in connection with – to give just one example – the bidding on transportation services in the Stockholm region. For some years now, the county council-owned joint stock parent company (Storstockholms Lokaltrafik AB) has been acting as a regular user-enterprise, while the subsidiary companies of the group have gone into competition with external providers of the same services, tendering for contracts for general public transportation services. This kind of development has brought to light another feature of Swedish labour law, i.e. the status of law in view of the E.C. Directive 77/187

[12] Modern companies tend to organise the production and services along the lines of networks, see Bo Hedberg et al., *Imaginära organisationer* (1994).

[13] A general inventory of arguments pro and con is found in a Norwegian study, see Torp & Pettersen, op. cit. note 2, pp. 141-142.

[14] See, e.g., the Swedish Labour Court judgment, AD 1994 No. 61 where the former agricultural agencies were merged into one and the question was raised as to whether there was a transfer of the business from the former agencies to the new one by means of secs 3 and 25 of the Employment Protection Act. The Labour Court answered the question in the affirmative.

relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts thereof.[15]

In the 1980's it was also common, and indeed fashionable, for large and middle-sized enterprises in Sweden to *hive-off divisions and departments, and set them up as separate corporate entities*, still controlled, however, by the parent company. This process concerned functions which were both vital to the survival and the total running of the enterprise, as well as its side-line activities which were more dispensable. The outcome of the process was an increase in the number of employees working in groups of companies. This development was dictated by organisational, economic, psychological and legal reasons.[16] This organisational restructuring had also a great impact on the application of the Swedish labour legislation. The labour statutes are generally based on a twopartite dimension and, from a strict legal point of view, require a typical employer-employee relationship in order to be applicable. This two-dimensional structure came under fire when the large enterprises were fragmented into several separate legal entities, each taking over part of the business and scattering the employees. This process could be controlled, however, to a large extent, by the ingenious use of local collective agreements as a means of regulating the internal relationships between the various social partners within the groups of companies.[17]

Those changes also brought to light another rather frequent practice of permanent *borrowing of manpower* between the affected companies. Often enough, it was found that the employees employed by the parent company performed work on a regular basis in the respective subsidiary companies. In these cases, it was usual that both the employer and the unions were in favour of such a solution, albeit for different reasons. A situation like this requires a rather advanced legal model of employment contracts. In particular, the question of the *duty to perform work* in a group of companies had to be resolved. Usually, a worker is obliged to perform work solely for his own employer and not any other employer.[18] The model requires that, unless the employee gives his or her consent, contractual solutions between the concerned employers and the affected trade unions across the borderlines of the companies in the group must be found. Such solutions were also quite frequently applied in those groups of companies.

[15] With effect from 1 January, 1995, the Swedish law concerning transfers of undertakings has been amended and the E.C. Directive 77/187 has been implemented into Swedish law, see prop. 1994/95:102. The Labour Court has already had an opportunity of dealing with such issues, see the Labour Court decisions, AD 1995 Nos 60, 96–97, 134 and judgment 1995 No. 163.

[16] See on a more extensive basis, Ronnie Eklund, *Bolagisering – ett mode eller ett måste? Arbetsrättsliga lösningar i 21 koncerner* (1992), pp. 45-105.

[17] See Eklund, op.cit. note 16, *passim*.

[18] Swedish Labour Court judgment AD 1929 No. 29.

3.2 External Pressures

In some instances, the practice of the hiring-out of manpower mirrors the *shortcomings of the public employment exchange* to provide employers with short-term employment. In all the four Nordic countries it has also been common practice for professional employee organisations to organise internal employment job exchanges for the benefit of their members. In Sweden, some 20 organisations were permitted to act as such agents before the deregulation of the public employment exchange in 1993. Such permits were given by administrative decision, based on an Act from 1935. In Finland, some 65 organisations were granted such licenses.

I have found no evidence to support the fact that the employer's primary reason for using contract labour was that of *avoiding the labour legislation obligations or the collective agreements in force*. On the other hand, it was apparent that employers occasionally used temporary employment agencies as a recruitment tool, especially when the principal employer was looking for personnel to employ on a regular basis. This is commonly referred to as "try-and-hire" employment form.[19] Such a system works as if the principal employer had entered into "trial employment" with the person placed at the disposal by the supplier of manpower. On the other hand, such a trial period may mature into regular employment. This system offers both the affected employee and the principal employer an opportunity for a probation period before permanent employment is eventually taken up. In almost all the Nordic countries, the hired-out employee would tend to take up employment with the principal employer after a certain period of time.

Restrictions in the statutory framework related to the conclusion of short-term employment contracts may have caused the emergence of this form of employment. At any rate, it would seem that employers are more careful in choosing who to employ on a regular basis, which has doubtlessly been one of the most cogent aspects of the Swedish debate during the past few years as regards access to short-term employment.[20] In Denmark, before the total deregulation in 1990, the principal employer would often favour the use of contract labour as compared to that of temporary staff, due to the fact that the White-Collar Workers Act (Funktionærloven) laid restrictions on the employment of the latter.[21] In Norway, temporary work on a general basis is also being encouraged by and constitutes the major objective of the Association of Temporary Employment Agencies (Vikarbyråforen-

[19] The phenomenon seems to have first sprung up in Norway. See an article by Henning Jakhelln, *"Try and Hire" – arbeidsformidling eller vikarbyråvirksomhet?*, in Lov, dom og bok. Festskrift til Sjur Brækhus (1988). The Norwegian Government Municipal and Labour Ministry has held (in a letter to Attorneys-at-Law de Besche & Co, 12.10.1992) that "try-and-hire" is in violation of sec. 26 of the Norwegian Act on the Promotion of Employment, outlawing private employment exchange agencies.

[20] Prop. 1993/94:67.

[21] Sec. 2(4) of the Act permits temporary ("midlertidig") employment for no more than three months.

ingen, VBF). The association holds the view that, in general, enterprises should size their manpower according to their regular course of activities, while extra work loads and other production peaks should be performed by contract labour.[22]

4. Definition of Contract Labour in the Nordic Countries

4.1 Denmark

In Denmark, no definition of contract labour can be found today. It is, however, tempting to explain the distinction between the contracting out of manpower, on the one hand, and job contracting, on the other, which was applicable in Denmark before the deregulation took place in 1990.

In the Danish regulations from 1970, a legal definition of the activities of a temporary employment agency was provided. Such activities were described as "activities for the purposes of the contracting out of manpower if the employment entered into with the temporary employment agency relates solely to the hiring-out assignment in question".[23] If, however, the contracted out manpower was employed on a permanent basis by a temporary employment agency, such an arrangement was looked upon – in Denmark – as another kind of job contracting. Arrangements of this kind were considered rare.

The rationale behind the above-mentioned distinction seems to have been that in the latter case the employment agency would assume the entrepreneurial risk of employing regular employees, in contrast to temporary workers who would be engaged separately for each assignment.[24]

What has been said now with regard to Denmark constitutes a legal exception when compared to the other three Nordic countries. In the remaining countries, a strict division between labour-only contracting and job contracting was more difficult to find.

4.2 Finland

In Finland, the basic regulations concerning the hiring-out of manpower, in force from 1986 until the end of 1993, as well as the new provisions in force, with effect from 1994, assume that the person who is hiring out employees is their employer. The hired-out employee is only temporarily employed. It is equally clear that the principal employer is the one who directs and allots work. For this reason, the hiring-out of manpower in Finland is more akin to job contracting than to the

[22] See a booklet from VBF, *Vikarutleie – En Samfunnsnyttig Tjeneste* (1989).

[23] Sec. 3(2) of Act No. 249/1968, later sec. 27 of Act No. 114/1970. Subsequently, regulations on temporary employment activities within the commercial and office sectors were issued, see Bekendtgørelse No. 163/1970.

[24] See in particular a Danish report from 1980 on considerations of the problems which may come about in the context of temporary employment within the technical fields, bordering on the commercial and office sectors, Vikarbureau-udvalget p. 4.

exchange of jobs, such as is performed by an employment exchange agency.

A general view held in Finland is that job contracting requires that the work be both directed and supervised by the contractor and not by any other person. Usually, the contractor uses his own material and equipment, and has committed himself to perform a specific job (services) at a fixed price set before he has agreed to take up the job. However, the borderline between job contracting and the contracting out of manpower may be blurred in cases of job subcontracting, i.e. where several contractors are involved, e.g., on building sites.[25]

4.3 Norway

In Norway, the only Nordic country which is still in the process of regulating the practice of contracting out manpower, sec. 27 of the Act on the Promotion of Employment provides:

"It is not permitted to conduct a business with the purpose of placing employees at the disposal of another principal employer, if the employees are directed by the principal employer and the principal employer has employees of his own who perform work of the same kind, or if the principal employer is running a business of which such work forms a natural part.

The Ministry of Labour, or the party which is empowered thereto, may make exceptions to the first paragraph. The Ministry may issue such regulations.

It is also forbidden to make use of manpower from a business indicated in the first paragraph, unless an exception has been made in accordance with the second paragraph."

From this it is clear that certain aspects appear as crucial. First, there is a question of *who directs the work*. The user-enterprise must supervise and control the work.[26] From this follows that, at least in theory, a strict borderline between the hiring-out of manpower and job contracting can be drawn; if the provider of manpower directs and allots work, it is assumed that he is a regular contractor. Secondly, there is the question of whether the principal employer has *employees of his own* who can perform *the same kind of work*, or whether the work is deemed to form *a natural part* of the principal employer's business. This is a restriction of substance that has been laid upon the use of contracted out manpower. Thirdly, the affected employee *shall be employed by the provider* of the personnel.

In Norway, a typical contractor has the entire disposal of the material and equipment. But, similarly to Finland, the distinction becomes blurred in the case of job subcontracting. Lately, it has been suggested that the distinction in these cases should be based upon considerations of legal responsibility and the risks involved with regard to such aspects as the execution of work and the quality of work being

[25] See RP 1984 No. 125, which amended the Act of Employment Exhange in connection with the introduction of the 1986 regulations related to the hiring-out of manpower.

[26] See Ot. prp. (Norwegian bill) No. 53 (1970-71), pp. 23-24, as regards the 1971 amendments to the Act on the Promotion of Employment in relation to the introduction of the ban on hiring out manpower without a license.

performed by the subcontractor.[27] In a 1987 Norwegian survey it was found that some 20 % of the workforce in the building and construction industry was contracted out from firms possessing no license.[28]

4.4 Sweden

In Sweden, three provisions highlighting the status of contract labour are found in the statutes.

Firstly, sec. 1(2) of the Joint Regulation Act of 1976 provides that the so-called *"dependent contractors"* should be treated in the same way as other employees, if the contractor "has a position which is essentially of the same kind as an employee".[29] This provision is of relevance mainly in cases when a group of dependent contractors go together and demand that the principal employer negotiate with their organisation, and with respect to their right to organise. It is immaterial whether the "dependent contractor" has employees of his own in his employ, thus acting as a regular employer.

An earlier provision to sec. 1(2) of the 1976 Act was found in the former Collective Agreements Act from 1928, amended in 1945. The amendment came about as a result of the Labour Court's refusal to classify gasoline-dealers and sewing-machine agents as "employees" with respect to the Collective Agreements Act. In the Labour Court judgment, AD 1969 No. 31, the Court found that some gasoline-dealers had the right to negotiate with Exxon Co. in the light of the "dependent contractor" provision of the 1945 amendments. However, an exception was found in the case of one dealer who had set up a joint-stock company to run the business. In short, the joint stock company could not be regarded as an "employee" in the view of the Court. Neither was the Court able to establish that it was a phony arrangement.[30]

As regards the *contract of employment*, no corresponding provisions are found in the Swedish Employment Protection Act of 1982. On the other hand, case law applying to the interpretation of the *"employee"* concept is largely protective. The concept is – time and again – highlighted by court practice and seems to be under continuous development. Many self-employed persons or job contractors have

[27] See Dag Stokland, *Over stokk og stein. Arbeidsleie i bygg og anlægg* (1989), p. 44.

[28] Stokland, op.cit. note 27, pp. 71, 77-78.

[29] Similar provisions have not been found in Denmark, Finland or Norway. See the volume, *Arbetsrätten i Norden*. Ed. Tore Sigeman et al (1990), pp. 12, 91 and 233.

[30] In the subsequent case law, see the Labour Court judgments, AD 1975 No. 43 and 1983 No. 101, the 1969 proviso is weakened, though not expressly overruled. The corporate veil can be lifted, if the purpose of the arrangement is to evade the mandatory law or to utilise the inferior person's status. The arrangement will hence be "seen through", as was held in a recent Swedish Government Report, SOU 1994:141 *Arbetsrättsliga utredningar*, p. 73. Such a point of view was also explicitly stated in a more recent case, the Labour Court judgment, AD 1995 No. 26.

therefore been finally deemed to be "employees".[31] When deciding upon such issues, the Swedish Labour Court takes into consideration all the presented facts, with no single specific aspect considered as crucial.[32]

Secondly, the Act on Private Employment Exchange and the Hiring-out of Manpower of 1993 (formerly 1991) provides a *definition of contracted-out labour.* Sec. 2 says that "the hiring-out of manpower implies a legal relationship between a principal employer and another employer, the purpose of which is that the latter employer places the employees at the principal employer's disposal at an agreed price and in order to let the employees perform work in the principal employer's business".

The above stipulated definition has made that any discussion as to who may be regarded as an employer is superfluous.[33] From sec. 2 follows instead that it has been made unequivocally clear that the provider of personnel is to be regarded as an employer. At the same time it follows that the principal employer must direct and allot work. However, due to the divided employer relationship, other practical problems may ensue. For example, it seems unclear as to whether the user-enterprise, or provider (or both?) should be held legally responsible for the violations of law, if such violations occur in the user-enterprise while the employees are performing work there.

Thirdly, the Working Environment Act of 1977, amended in 1994, provides that the principal employer is responsible for the health and safety of the "hired-out" employees at their actual workplace.[34] No definition is stipulated on the basis of the concept of "hired-out manpower" in this Act.

4.5 A Divided Employer Relationship – Summary

In all the four Nordic countries, the general view with regard to contracted out manpower is that the provider offers two kinds of services: recruitment services and legal responsibility as an employer. This clarifies one vital point, i.e. the establishment of *who the employer is*. In the capacity of an employer, the provider tells the employee where to work, informs her or him of the conditions of work, and also pays the employee's wages and other benefits. Such services have a price. Consequently, the user-enterprise buys some sort of a service.

The standard also implies that the user-enterprise exercises the exclusive *right to direct and allot work*. In fact the provider of work has no practical possibility of

[31] See, e.g., the Labour Court judgments, AD 1981 No. 18 (sales & public relations man with a firm of his own, but who was treated as an employee for all other purposes) and 1981 No. 58 (a self employed painter who was continuously furnished with paint work by a local municipality held to be an employee).

[32] See, e.g., Folke Schmidt, *Löntagarrätt* (Rev. ed. by Tore Sigeman et al 1994), ch. 2.

[33] Formerly, according to an old Swedish Act of 1935, amended in 1942, the contracting-out of manpower was deemed to constitute a kind of employment exchange and, as such, was prohibited, see *infra* at 5.1

[34] See ch. 3 sec. 12(2) of the said Act, see also prop. 1993/94:186.

directing the work. This is explicitly stated in the Swedish Statute Book (1993 Act, above) and follows also from sec. 27 of the Norwegian Act on the Promotion of Employment. In Denmark, where no statute is applicable any longer, it is generally held that the right to direct and allot work is delegated to the user-enterprise. It is a condition of the contract of employment that the temporary employee shall be placed at the disposal of another user-enterprise. A similar view prevails in Finland, where it is also supported by sec. 8(1) of the 1970 Employment Contracts Acts, which provides that "the employer may place somebody else in his capacity to direct and supervise the work."

It is not entirely clear whether such a divided employer relationship brings clarity in the context of contracting out manpower. The following questions may be raised: Does the user-enterprise direct and allot work on the grounds that this right has been *delegated* to him by the provider? Or is the right to direct and allot work exercised *by implication?* What happens, for example, if a violation of law occurs when the user-enterprise exercises the right to direct and allot work?

To state without reservation that the right to direct and allot work has been delegated to the principal employer might not be a tenable proposition at close scrutiny. The reason for this is that the entire rationale behind a short-term employment of this kind is that the provider is not supposed to exercise the right to direct and allot work at all, if the practicalities of labour-only contracting are to be fully observed. *One might say instead that it is an implied and necessary condition for the contract of employment that the employee will be placed at the disposal of another principal employer.* At any rate, one might argue that the provider would not wish to be held responsible for any violations occurring at the workplace of the user-enterprise. The only effective remedy for the provider seems to be here to cancel the commercial contract with the user-enterprise. The user-enterprise may also argue that it cannot be held legally responsible for any violations, since no contractual employment relationship has been established between the user-enterprise and the employee in question.

What course of action may then the affected employee take in order to receive fully compensation? This legal issue is not easy to solve as a matter of principle.[35] Some light has been shed upon the issue of joint legal responsibility in the Swedish Labour Court judgment, AD 1990 No. 87.

In this case, company A borrowed electricians from company B. Both companies were bound by the same collective agreement and acted as units of the same group of companies. Company A did not follow the payment provisions of the agreement, which affected employees from both A and B. The union asked for general damages from both companies for the violation of the contract. Company B stated that it

[35] Cf. Fahlbeck, op.cit. note 7, p. 618. Fahlbeck states: "So far no court has been confronted with the issue of the obligations of users in this respect but there can be little doubt that users have the same obligations as employers." This may be a good statement *de lege ferenda*. I suggested, similarly, in the 1993 Report before the Expert Committee of the Nordic Council, that such contractual labour relationships may be contracts *sui generis*.

could not be held responsible for something that was the responsibility of company A. The Labour Court found, however, that company B could not be absolved from responsibility due to the fact that it had handed over the right to direct the work of its employees to company A. Both companies were obliged to pay general damages. The Court did not voice an opinion, however, on the matter as to whether company A should also be held responsible for the violation of contract in relation to the electricians borrowed from company B.

The Swedish Labour Court case has made it clear that company B could not be absolved from the responsibility when the collective agreement had been violated by another employer directing the work of the hired-out employees.[36] In such cases, the supplier of manpower may be perhaps reimbursed by the offender on the basis of the general principles of law.

In *job contracting*, the normal course of events is that in which the job contractor supervises the work and manages the workforce. This seems to be the common denominator for all the four Nordic countries. The fact that the principal employer is also in charge of the contracted out labour workforce seems to be also acceptable. Another Swedish Labour Court judgment, AD 1980 No. 54, illustrates the point. A company went into bankruptcy, but was soon taken over by another enterprise. All the former employees, with the exception of two, were re-employed by the new owner. The new employer needed more manpower due to an unexpected sales peak and three workers were therefore borrowed from an outside job contractor. A dispute was brought before the Labour Court which had to decide as to whether the external workers should be considered as having been actually employed by the new employer (the union's view), or whether the work as such had been contracted out (the employer's view). The facts indicated strongly that the borrowed workforce had been directed by the principal employer, but the Labour Court did not find this fact conclusive. The job contractor had been paying the workers' wages and charging the borrowing company for the work in question. The Court found that the affected workers had not taken up employment with the new employer.[37]

[36] On the whole, arrangements of that kind are not easily squared with the fundamentals of the labour law rules which presuppose a strict employer-employee relationship to apply. The same rationale applies to groups of companies where the employees may be found to be formally employed by the parent company but perform work in the subsidary company. The issue is extensively discussed in Eklund, op.cit. note 16, *passim*.

[37] There are other similar cases in the Swedish Labour Court in which the employer's functions have been divided between several employers, see, e.g., the Labour Court judgments, AD 1980 No. 51, 1983 No. 156, 1986 No. 1.

5. Legal Treatment of Contract Labour

5.1 Bans on Contract Labour

Formerly, according to an old Swedish Act of 1935, amended in 1942, the contracting out of manpower was prohibited in cases where the major objective of the arrangement was to procure work for a job-seeking person. The purpose of the 1942 amendment was to bring to an end the impresario activities in the entertainment business, by means of a penal sanction.[38] The Swedish point of view indicated that labour-only contracting should be treated as yet another kind of employment exchange. The prohibition was not very successful. After repeated attempts during the 1960's and 1970's to lay down more effective rules,[39] the prohibition was finally lifted in 1991.[40] The requirements of real life and the quest for flexibility had finally defeated this lame-duck legislation. The fine penalties handed down by the courts in the few cases in which the supplier of temporary personnel had been found responsible for a violation of law were extremely low. In a 1989 Supreme Court case, the fine penalty was set to some 100 U.S. dollars.[41] No user of temporary workers was ever held responsible for any violations of law. In many instances it was a well-known fact that such users could be found in the public sector as well.

In contrast to Sweden, however, in Finland and Norway the use of contracted out manpower has never been considered to constitute any kind of employment exchange.[42] In Denmark, the distinction between labour-only contracting and employment exchange has never become a burning issue, since Denmark never ratified the I.L.O. Convention No. 96/1949.

5.2 Registration and Licensing of Contract Labour Activities

No specific licensing regulations concerning *job contracting* or *self-employed persons* exist in the Nordic countries. The following applies solely to *labour-only contracting*. During a certain period of time, the registration procedure for labour-only contracting was governed by a number of regulations in both Denmark and Finland.

In *Denmark,* the regulations were in force between the years of 1968-1990, and were applicable to the commercial and office sector only. The hiring-out of manpower in industry was forbidden. The regulations also provided that the

[38] Prop. 1942:123.

[39] The issue was meticulously discussed in prop. 1970:166 with respect to further amendments of the 1935 Act.

[40] Prop. 1990/91:124.

[41] NJA 1989 p. 629. See also the Swedish Supreme Court cases NJA 1962 p. 680 and 1973 p. 562 (as regards the application of the 1935 Act) and the Labour Court judgments, AD 1979 No. 31, 1987 No. 154 and 1990 No. 67 (as regards the application of the trade union veto right in sec. 39 of the Joint Regulation Act of 1976 in relation to contract labour).

[42] See RP 1984 No. 125 and Ot. prp. No. 53 (1970-71), p. 27.

contract of employment could not exceed three months.[43]

In *Finland*, the corresponding period of time fell between the years of 1986-1993. Here the regulations were applicable to all the sectors of the labour market.[44] The 1986 Finnish regulations provided that a *permit* to run a labour-only contracting agency had to be granted by the Labour Market Department of the Ministry of Labour when the contracting activities were performed at a "reasonably large scale".[45] The requirement of the "reasonably large scale" implied that the hiring-out activities should apply to more than 10-15 % of the entire workforce. A permit was granted only if the hiring-out of manpower was deemed to satisfy the short-term or temporary need of manpower.[46] As a rule, a single employee could not be hired out for a period longer than six months.[47]

With the effect from 1994, the former Finnish regulations were abolished.[48] Henceforth, only a *notification* procedure has been set forth in sec. 21a of the Workers' Protection Act. The Labour Protecting Authority may prohibit, however, in certain circumstances, the hiring-out of Finnish manpower abroad and the open advertising related thereto.

As mentioned before, a *registration and licensing* procedure, being based on the general ban in sec. 27 of the Act on the Promotion of Employment, in force since 1971 concerning the use of contracted out manpower, is still applicable in *Norway*. Regulations providing for a licensing procedure have been issued. Several amendments, as well as further refinements of the issued regulations, have been made since 1971.[49] Exceptions from the main rule in sec. 27 may be made if a specific permit is applied for at the Labour Market Board. The procedure is meticulous, its precise details depending on the particular sector involved. In general, different procedures apply to a) the commercial and office sector, and b) the industrial sector.[50]

In the *commercial and office sector* the procedure presupposes that the enterprise

[43] Bekendtgørelse No. 163/1970.

[44] Before that period, contract labour activities in the private industry were governed by a collective agreement dating back to 1969.

[45] See sec. 2a of the Finnish Act on Employment Exchange. The subsequent regulations were found in the Regulations on the Contracting Out of Manpower (908/85).

[46] Sec. 2a(3) of the Act on Employment Exchange.

[47] Sec. 11 of the Regulations (908/85).

[48] RP 1993 No. 103.

[49] See Forskrifter om unntak fra forbudet mot utleie av arbeidskraft jf lov av 27. juni 1947 Nr. 9 om tiltak å fremme sysselsetting § 27, amended as of December 1992. See on the restrictions laid down in sec. 27, *supra* at 4.3.

[50] In fact, the Norwegian regulations are more detailed. A distinction is also made between *general exemptions* and *special exemptions*. The contracting out of manpower in the commercial and office sector is generally exempt from the ban in sec. 27. Some other activities are also excluded. Those are: repair & maintenance work onboard the sea-going ships, loading and unloading activities in the maritime transportation industry, the referral of persons in shielded work to rehab activities and the referral of substitutes to farmers in the agricultural business. The industry sector is, however, subject to the special exemptions.

in question has registered with the Labour Market Board.[51] In this sector, temporary employment agencies predominate. For example, the assignment of employees to a principal employer must not in general exceed 12 months.[52] There are no geographical restrictions in this sector. The licensed enterprise shall report on its activities to the Labour Market Board.

In *industry* a permit is required, either for each single instance of the contracting out of manpower, or it may be granted for a period of up to five years.[53] In considering such instances, the Labour Market Authorities accord particular weight, *inter alia*, to such aspects as the need for hiring-out the manpower, to the question of whether the employment exchange can satisfy that need, whether the general employment situation will be affected and whether the hired-out employees are vocationally trained to take up such assignments.[54] Geographical restrictions usually apply. Activity reports must be also submitted to the Labor Market Board. Licenses have been granted most frequently in the oil- and offshore trade, but quite many of the licenses affect groups of companies.

In 1992, a specific procedure applying to the building and construction industry was introduced as a provisional arrangement. It states that the application must be submitted by the affected employer organisation, not a single enterprise. The hiring-out may only affect the member-enterprises of the organisation. The enterprises may set up a pool for the exchange of manpower in between them. The purpose of such a pool would be to prevent dismissals and lay-offs for lack of work and to reduce overtime work.

6. A Few Typical Features and Dissimilarities of the Status of Contracted Out Manpower in the Nordic Countries

6.1 Duty to Inform About the Conditions of Work?

In all the four countries, it is clear that the E.C. Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship applies.[55] Because of this, the relevant information which is to be given to the employees within a certain period of time after the commencement of their employment applies to all employers, irrespective of whether they employ contract workers or not. In practice, the E.C. Directive tends to imply that

[51] Sec. 14, Forskrifter.
[52] Sec. 8, Forskrifter.
[53] Sec. 5, Forskrifter.
[54] Sec. 3, Forskrifter.
[55] See prop. 1993/94:67, the Danish Lov No. 392/1993, RP 1993 No. 239 and Ot. prp. No. 78 (93-94). The Norwegian implementation goes even further than the E.C. Directive. Sec. 55 B of the Worker Protection and Working Environment Act provides for a *written* contract of employment as regards (i) employments lasting for more than one month and (ii) for *all* contracts of employment, irrespective of the duration, in connection with labour-only contracting.

the contract of employment ought to be drawn up *in writing*, though this is not a requirement.[56] Formerly, such a requirement was provided for by both the 1991 and 1993 statutes as regards contracted out manpower in Sweden,[57] by regulations in Norway[58] and by regulations and the ethical code of the Danish Association of Temporary Employment Agencies.[59] In Finland, no similar requirement has been found.

6.2 Form of Employment

It is clear that in the commercial and office sector of Denmark, Finland and Norway a contract of employment is entered into *for each separate assignment* in temporary employment. This means that a temporary employee takes up new employment each time he or she accepts a new assignment.

In view of the provisions concerning short-term employment stipulated in sec. 58 A of the Norwegian Worker Protection and Working Environment Act, the extent to which such practice is considered as legally acceptable is debatable. According to sec. 58 A, short-term employment may be entered into "when the nature of work so requires and the work in question differs from that which is ordinarily performed in the enterprice".[60] Some support for the legality of the said practice is no doubt found in the fact that the Norwegian Labor Market Authorities used to give their approval in the past to the temporary employment agencies' standardised contracts of employment. The contracts would specify that new employment is entered into with each new assignment.[61] In industry, short-term employment like this does not exist, or, at least, the authorities will be more reluctant, not to say unwilling, to accept such employment and to grant a licence for the contracted out employees.

In *Sweden*, the legal position with respect to "temps" is somewhat unclear in the light of the restrictive provisions concerning permissible types of short-term employment, as stipulated in sec. 5 of the Employment Protection Act.[62] Short term employment is permitted, e.g., in cases of a "temporary work load". In such cases, employment may not last for more than six months. Short-term employment is also

[56] See the analysis of sec. 6a of the Swedish Employment Protection Act and the E.C. Directive, Tore Sigeman, *"Informationsplikt rörande anställningsvillkor. Aspekter på en EU-reglering"*, in Festskrift till Anders Agell (1994), pp. 581-604.

[57] Prop. 1990/91:124, prop. 1992/93:218. See also prop. 1993/94:67 wherein it was suggested that the separate provision in the 1993 Act should be abolished in the light of the implementation of the E.C. Directive 91/533.

[58] Sec. 9, Forskrifter.

[59] Bekendtgørelse No. 163/1970 and Foreningen af vikarbureauer i Danmark (FVD), Ethical code, point 2.1.

[60] Sec. 58A of the Act was amended by means of Ot. prp. No. 50 (93-94), see also Report from the Parliamentary Committee No. 2 (94-95).

[61] In April 1995, I was told, however, that the Norwegian Labor Market Authorities will not approve of such contracts in the future. Source: Arne Raade, Chief of the Labour Department of the Norwegian Government Municipal and Labour Ministry.

[62] See prop. 1992/93:218, p. 34.

permitted when the work in question is of "specific nature". The latter exception can hardly be applicable in the context of contracted out manpower. It is further a contradiction to rely upon the "temporary work load" exception in this context, when the business concept of a provider of personnel is based on having a permanent "stock" of employees to contract out. A very sudden rise in demand for such personnel may perhaps call for the opposite conclusion. A third restriction laid down in case law, following sec. 5 of the Swedish Employment Protection Act, is that repeated instances of temporary employment may violate the law.[63] This flies in the face of the idea to permit the conclusion of employment contracts for each separate assignment.[64]

In Sweden, a collective agreement referring to labour-only contracting in the service and office sector was concluded between the relevant employer organisation, HAO, and the Commercial Employees' Union, HTF, in 1988.[65] Everything indicates that the agreement could be concluded due to the fact that the conditions for the conclusion of short-term employment contracts are rather restrictive, as set out in the Swedish Employment Protection Act. Sec. 5 of the Swedish Act is a quasi-mandatory provision which may be derogated from by means of a collective agreement. Thus, the employers had something to gain by opting for a contractual solution. The agreement stipulates, *inter alia,* that an employee is guaranteed an average of 20 hours of paid work per week, during a 4-week period.

The actual collective agreement pertaining to the service and office sector presupposes, as a rule, that a contract of employment *is entered into until further notice*, unless otherwise agreed. However, employment of this kind is more akin to employment "out of necessity". This is a form of employment in which an employment contract usually exists, but where the employee performs gainful work occasionally and only when the employer has such work to offer.[66] In Sweden, the employer's organisation (HAO) has argued that the contract of employment entered into until further notice may entail that no job whatsoever will be offered to the affected employee. If this is correct, such type of employment is no better than employment entered into for each separate assignment. However, this view is contradictory of another fact of the relevant collective agreement, i.e. that 20 hours of pay per week is guaranteed, irrespective of the fact as to whether any offer of work has been made or not.

[63] See on case law, Lars Lunning, *Anställningsskydd. Kommentar till anställningsskyddslagen* (7 rev. ed. 1989), pp. 156-164.

[64] Similarly, Fahlbeck, op. cit. note 7, pp. 608-610.

[65] The agreement is called: "Special provisions as regards certain salaried employees in the office, service and type-writing enterprises".

[66] See Ann Henning, *Tidsbegränsad anställning. En studie av anställningsformsregleringen och dess funktioner* (1984), pp. 212 et seq.

6.3 Right to Reject an Offer of Temporary Work

There is a general *right to reject* any offer of temporary work in all the four Nordic countries. In Denmark, the right to reject a single assignment forms part of each employment contract. In Finland, this point of view is generally supported. In Norway, this right is provided for in the ethical code of the Association of Temporary Employment Agencies, and in the standard employment contract used by the major temporary employment agencies.[67] In Norway, this has also been a well established principle of labour law since long.[68] In Sweden, the right to reject an offer of temporary work ensues from the relevant collective agreement in the service and office sector, and elsewhere, from the general principles of labour law.

6.4 Ban on the Hiring-Out of Employees to Former Employers

In both Norway and Sweden it has been found that an employee who has left the principal employer to take up employment with a temporary employment agency could *not be hired-out* to his former employer earlier than six months after the expiry of his former employment.

In *Sweden,* this restriction is motivated by the fact that employees must not be subjected to unfair recruitment procedures by temporary employment agencies.[69] It is an open question, however, whether this restriction applies to cases in which the employee has been made redundant, and subsequently taken up employment with a temporary employment agency. It is obvious that the restriction cannot apply, if, for instance, a job contractor or a temporary employment agency has taken over certain functions of the principal employer, and therefore even the employees of the principal. This is a typical transfer of a part of an undertaking or business. Both the E.C. Directive 77/187 concerning the safeguarding of the employees' rights in relation to transfers of undertakings and parts thereof, as well as the Swedish Employment Protection Act, as amended in 1994, provide for the automatic transfer of the said contracts of employment to the successor-employer.[70]

In *Norway,* the above-mentioned restriction, which is laid down in the regulations,[71] is based on the view that after having received the "in-house training" by the principal employer, an employee shall not have the right to make a windfall profit by taking up another employment which is better paid with a temporary employment agency, which would immediately place the affected employee at the principal employer's disposal.

[67] Vikarbyråforeningen i Norge, Ethical code, point 7.
[68] See case law, ARD 1945-48 pp. 46, 48-49.
[69] See prop. 1990/91:124, p. 55 and sec. 4 of the 1993 Act.
[70] Prop. 1994/95:102 and sec. 6b of the Employment Protection Act.
[71] Sec. 11, Forskrifter.

6.5 Right to Take Up Employment With the Principal Employer

In both Norway[72] and Sweden,[73] the hired-out employee is guaranteed the *right to take up employment* with the principal employer after having fulfilled his or her former assignment. It is obvious that permanent employment of this kind is favoured by the legislative systems of the two countries. This right was also provided for in Finland before the abolishment of the former regulatory regime, spanning from 1986 to 1994.[74] The same principle is included in the ethical code of the Danish Association of Temporary Employment Agencies. The ethical code states that the agency is not permitted to incorporate no-competition clauses into their contracts of employment.[75] This principle obviously aimes at counterbalancing all kinds of inequalities in the contractual context between the temporary employment agency and the employee, if the latter should wish to accept a clause inhibiting his or her freedom to take up such employment.

6.6 Termination of Temporary Contracts

Since in Denmark, Finland and Norway a contract of employment is entered into for each separate assignment, *termination* of such a contract does not constitute a problem. Job security is therefore extremely fragile for temporary employees.

In Denmark a special difficulty arose after the handing down of the 1991 arbitration award in a dispute between the leading employer organisation (DA/BKA) and the counter-party trade union (HK). When two temporary employment agencies seeked to be bound by the relevant collective agreement, HK refused to consider these agencies as being bound. The union argued that special provisions were necessary in order to make the general collective agreement apply to temporary employment agencies. The union won.[76] According to the arbitration award, the hired-out manpower employed by a temporary employment agency is not even considered to be covered by the White Collar Servants Act (Funktionærloven). It would seem that this is a reflection of the fact that a "temp" is not obliged to perform continuous service, which seems to correspond to the employees' simul-

[72] Sec. 10, Forskrifter.

[73] Sec. 4 of the 1993 Act.

[74] Sec. 11 of the Regulations (908/85).

[75] FVD, Ethical code, point 2.4.

[76] When the Nordic Council Report was delivered in late 1993, negotiations on a special collective agreement related to the temporary employment agencies in the office and service sector were pending. However, no collective agreement with respect to the temporary work agency's employees has yet been concluded (April 1995). Source: Trine Espersen, the Danish Ministry of Labour. In spite of this, there are, however, temporary employment agencies in Denmark having concluded collective agreements, but these agreements have contained conditions satisfactory to the counter-party trade union (HK).

taneous right to bluntly reject an offer of continued employment from a temporary employment agency.[77] The 1991 case makes the position of a temporary employee in this sector especially vulnerable.

6.7 Is the User-Enterprise Entitled to Dismiss Employees in Order to Engage Contract Labour?

Another important aspect of job security related to the use of contract labour must be highlighted here. It concerns the question of whether the user-enterprise may dismiss employees of its own in order to engage contract labour.

In *Finland*, the answer would be probably negative. This conclusion is supported by sec. 37a of the Employment Contracts Act, which provides, *inter alia*, that a just cause for dismissal exists only if the amount of work has decreased more than insignificantly. However, no such just cause will be found if another employee has been engaged to perform similar work, or if the employer's reorganisation of the working tasks has not in fact decreased the amount of work.

In *Denmark*, the status of the applicable law is more uncertain as no generally applicable statutory provision can be found. However, sec. 2b(1) of the White Collar Servants Act (Funktionærloven) requires that a dismissal must be "reasonably founded in the activities of the business", so the answer to the above question would be probably in the negative.[78]

In *Norway*, the position as regards the same issue is much clearer. The Norwegian courts are assumed to balance the interests of the employer against those of the employee in the assessment of the justifiability of the dismissal in accordance with sec. 60(2) of the Worker Protection and Working Environment Act. This conclusion is also corroborated by the subsequent statutory development, inasmuch as the Act provides, with effect from 1995, that no cause for dismissal exists if a redundancy related to the main activities of the employer is the result of a contracting-out scheme.[79]

In *Sweden*, however, the answer to the question raised above would be probably to the opposite. The Swedish position is distinguished from that of the other Nordic countries insofar as the Swedish Labour Court is not charged to pay any regard at all to the employer's alleged economic and organisational considerations when assessing the grounds for dismissal in accordance with sec. 7 of the Employment Protection Act, unless these grounds are just a pretext for getting rid of specific employees on personal grounds.[80]

[77] See H.G., Carlsen, *Dansk Funktionærret* (4 ed. 1990), pp. 50-52.

[78] See, in particular, U 1974/812. An employee was dismissed while another employee was engaged to take on the same job at a lower salary. The Danish Court dismissed the employer's view. See Carlsen, op.cit. note 77, pp. 304-306.

[79] See Ot. prp. No. 50 (93-94).

[80] See, for example, the Labour Court judgment, AD 1993 No. 61, and further Lunning, op. cit. note 63, pp. 251-254, 258-259.

6.8 May the User-Enterprise Engage Contract Labour Instead of Re-Engaging Former Redundant Employees?

The next question that might be brought up is whether it is legally acceptable for the principal employer to engage contract labour, instead of recalling his former employees if the latter have been previously dismissed for lack of work and when the right to re-employment exists.

In *Denmark*, there is no right to re-employment in such cases by statute, which is why the answer to the question would be in the affirmative.

In *Finland*, the opposite would be applicable with reference to sec. 42a of the Employment Contracts Act. Sec. 42a provides that an employer should enquire at the local Labour Market Authorities whether the employee that was previously made redundant is seeking employment. The right to re-employment exists for nine months from the date the former employment ceased to have effect.

In *Norway*, where the right to re-employment is provided for in sec. 67 of the Worker Protection and Working Environment Act, the legal situation is highly unclear. No cases taking up this issue have been dealt with in case law or the legal literature.

In *Sweden*, however, the answer to the same question would probably be in the affirmative. The right to re-employment, as laid down in sec. 25 of the Employment Protection Act, does not apply to such cases. The right to re-employment exists for one year from the date the former employment ceased to have effect. To engage a job contractor to perform work of the same kind as the former employees were doing is not considered to constitute a violation of the Act. The essence of this is that the courts have nothing to say as regards judgments related to the way in which the business is organised. The latter question is the employer's prerogative to decide upon, unless otherwise agreed. On the other hand, if the principal employer is deemed to have acted in a disloyal way or against accepted practice on the labour market, the answer would be in the negative.[81]

6.9 Health and Safety of Contract Workers

As regards the protection of contract workers with respect to *health and safety* at the workplace, the rules in the Nordic countries are pretty much the same, although a few small differences exist.

In *Denmark*, contract workers performing work at another principal employer's site are protected by the statute.[82] Case law is also in favour of the principal's liability as regards both penal law and tort law aspects if the contract worker performs work as part of the user-enterprise's business.[83] The occupational safety representative of the user-enterprise may also stop the work if he judges it to be

[81] See the Labour Court judgments, AD 1980 No. 54, 1986 No. 50, 144.
[82] The Danish Working Environment Act No. 646/1985, secs 20(1) and 29(2).
[83] U 1970, 483 (tort), U 1990, 619 (penal law).

imminently dangerous to the contract worker, in spite of the fact that the contract worker has another employer.[84] The E.C. Directive 91/383 to encourage improvements in the safety and health at work of workers with a fixed-term duration employment relationship or a temporary employment relationship has also been implemented into Danish law.[85]

In *Finland*, the principal employer also assumes responsibility for the health and safety of contract labour, since the employer is deemed to be the legal representative of the supplier of labour according to sec. 49 of the Finnish Worker's Protection Act. The principal employer's safety representative may also stop the work of contract workers, if serious and immediate danger to both life and health is discovered under secs 10 and 11a of the said Act.

In *Norway*, it follows from the Worker Protection and Working Environment Act that the principal employer is responsible for the health and safety of contract labour. As regards manpower that has been contracted out, such manpower is deemed to form part of the health and safety organisation of the principal employer.[86] In such cases, it is assumed that the user-enterprise's safety representative may stop the work in connection with an immediate danger.[87] The principal employer is also held responsible from the point of view of both penal and tort law for accidents and other damages occurring at the work-site, provided that the contract worker has been integrated into the user-enterprise's organisation.[88]

In *Sweden*, the former legal position must be distinguished from that of the other Nordic countries. The principal employer used to have only a narrowly defined responsibility for the health and safety of the contract workers performing work at the workplace.[89] His basic obligation was the responsibility of *co-ordinating* health and safety measures at joint workplaces. With regard to penal and tort law aspects, a wider responsibility may ensue if the contract worker is deemed to have been totally integrated into the user-enterprise's organisation and activities.[90] However, the Swedish Act was amended in 1994 in order to make the Act conform with the E.C. Directive 91/383 as regards, *inter alia*, the status of contract labour, making the user-enterprise responsible for the working environment of the manpower from

[84] Bekendtgørelse No. 1181/1992.
[85] Bekendtgørelse No. 1182 /1992.
[86] See Odd Friberg, *Arbeidsmiljøloven med kommentarer* (5 rev. ed. 1993), p. 129.
[87] Sec. 27 of the Norwegian Act. It has been also suggested that the safety representative of the principal employer is assumed to have a special duty to care for the health and safety of the contracted out manpoweer, see Henning Jakhelln, *"New Forms and Aspects of Atypical Employment Relationships"*, in Congreso Internacionale de derecho del trabajo y la seguridad social. Vol II (Caracas, 1995), p. 161.
[88] Friberg, op. cit. note 86, p. 465, Henning Jakhelln, *Temporær arbeidsassistanse (Arbeidsutleie)* (1973), p. 38, Nils Nygaard, *Skade og ansvar* (4 ed. 1992), p. 237 and Peter Lødrup, *Lærebok i erstatningsrett* (2 ed. 1987), p. 192.
[89] Ch. 3 sec. 12 of the Swedish Working Environment Act.
[90] NJA 1974 p. 392 (penal law) and NJA 1979 p. 773 (tort).

a temporary employment agency.[91] Former administrative practice shows, on the other hand, that the safety representative of the user-enterprise is not entitled to stop the work even in cases of serious and imminent danger to the life and health of contract labour.[92]

6.11 Social Security for Contract Workers

Since contract workers are not treated any differently by law than other types of employees in the Nordic countries, the contract worker is entitled to all the benefits ensuing from the statutes, regulations or collective agreements in force.

In Finland, specific legislation with regard to contract labour applies to musicians. The exception concerns pensions. The reason for this is, to put it shortly, that it is more common for musicians to be employed temporarily than it is for other groups. It is not uncommon for a musician to be employed for a single day or night. For this reason the musicians may encounter difficulties in being able to accrue pension rights according to the stipulated qualification period necesssary for the acquisition of such rights. A separate Pensions Act as regards artists (and other similar groups) has been therefore enacted.[93] Lately, however, the general rules of the Finnish pension legislation concerning the qualification period were made more flexible with regard to contract workers with short-term employment.[94]

7. Contract Workers in the Light of Collective Labour Law

Various measures apply in the Nordic countries in order to keep the counterparty trade union informed about actions contemplated by the principal-employer as regards the use of contract labour.

7.1 The Principal Employer's Duty to Inform and Negotiate

In *Denmark*, questions related to the engagement of contract workers are usually dealt with in the *works council* of the user-enterprise, in accordance with the widely applicable Co-Operation Collective Agreement, concluded on a national basis between the largest organisations in Denmark, DA (Danish Confederation of Employers) and LO (Danish Confederation of Trade Unions). It applies to the private sector. In broad terms, the agreement covers issues related to companies' activities, such as, *inter alia*, personnel policy and planning of the company's production. One may therefore assume that issues concerning the employment of

[91] See prop. 1993/94:186.

[92] See case law set forth in Eklund, op.cit. note 16, p. 310.

[93] Act on pensions to the benefit of certain artists and journalists (662/85).

[94] Act on pensions (395/61), as amended (38/87). Cf., however, an article in the Finnish daily, Hufvudstadsbladet Nov. 14, 1994, which highlights the practice to let "temps" move from one company to another in small groups of companies to make the employers avoid the application of the one month qualification period in the Pensions Act.

external personnel will be taken up by the employer for consultation with the works council, but the agreement does not contain any specific provisions related to contract labour.

In *Finland,* sec. 9 of the 1978 Act on Co-Operation Within Undertakings provides that the principal employer shall *inform* the representatives of the affected employees if any external manpower is about to be engaged. Negotiations with the legal representatives of the employees may follow. Negotiations are not mandatory, however, if the work is of short duration, if it needs to be done immediately, or requires special skills. The purpose of this provision is to prevent enterprises from taking in new labour that would take over work from the regular employees.

This is also the basis of the 1969 collective agreement on the use of contract labour in the Finnish industry, which is still in force in some branches of the industry. In 1969, the question was raised enquiring about the ways in which the use of contract labour may affect the regular workforce of the enterprise. The said collective agreement stipulated that the subcontracting of manpower was to be considered unfair if external manpower remained in the principal's business for a longer period of time, and in cases in which the contract workers were subject to the same control as the other "in-house" employees. The collective agreement served as a model for sec. 9 of the 1978 Act. Another purpose of sec. 9 was to prevent enterprises from excessive hiring of external manpower and thus causing redundancies.

In *Norway,* the industrial employers are required to *consult with* the trade union representatives as regards the use of contract labour.[95] No consultation requirement, however, is laid upon an employer if he engages temporary manpower from a temporary employment agency which is doing business in, e.g., the commercial and office sector. In the Norwegian Basic Agreement, which is entered into between the major social partners to the private industry, it is held, on the other hand, that employers shall both *inform and negotiate* with the local trade union representative before contract workers are engaged. It is also stated that contract labour should be engaged only within the legal framework, as set forth by statute or agreement.

In *Sweden,* a more elaborate and far-reaching procedure has been set forth in secs. 38-40 of the 1976 Joint Regulation Act.[96] The procedure applies if an employer intends to engage external manpower, irrespective of whether this is the case of labour-only contracting, job contracting, or whether a self-employed person is about to be engaged. These provisions were instituted at the time of a widespread union sentiment for creating a legal device that would subdue the growth of "grey-zone labour" (which is illegal) and prevent tax and social dues evasion and other economic fraud on the Swedish labour market.

Consequently, sec. 38 of the Act provides that "before an employer decides to

[95] Sec. 3 paras 5-6, Forskrifter.

[96] The general duty according to sec. 11 of the 1976 Act which is laid upon the employer to initiate negotiations before taking important decisions which affect the activities of the employer's business or the employees' working conditions may also apply when the employer is considering to take in contract labour.

allow anybody to perform work on his behalf or in his business, without that person being employed by him, he shall negotiate on his own initiative with an organization of employees to which he is bound by the collective agreement concerning such work". Some exceptions from the duty to negotiate are mentioned, such as when the actual work is of short duration and of a temporary character, or if the work requires special skills, or if the arrangement corresponds essentially to a previous one which has been approved of by the union in question. These exceptions do not apply to cases of labour-only contracting.

Furthermore, sec. 39 gives the central labour organisation the right to declare that the proposed arrangement for work implies "disregard of the law or of a collective agreement for work". This is what is generally referred to as a *"veto right"* in Swedish labour law. In several cases, the unions have vetoed arrangements involving former employees who have become self-employed contractors, but none of the cases has been won in the Labour Court.[97] The union's veto is set aside by the Court if, according to sec. 40, the union "lacks good reason for its point of view". However, the union is given some leeway in that it may question whether the arrangements proposed by the employer are improper. The union must substantiate its claims by concrete facts. Vague assumptions will not be sufficient to exercise the veto right.[98] The union may also be held liable for general damages if the veto has been wrongly exercised, sec. 57.

Secs 38-40 of the Swedish Joint Regulation Act were highly controversial, and as such were abolished by the non-socialist Government in 1993.[99] The same provisions, with slight modifications, were re-introduced, however, by the Social Democrats when they took over the national government in late 1994.[100]

In the Swedish building, electrical installation and engineering industries and the airline industry (SAS), provisions are also found in the respective collective agreements which are meant to both regulate and simplify the negotiation procedure between the employer and the union when contract workers are to be engaged.

7.2 The Right of Contract Workers to Bargain

The contract workers' right to bargain is exclusively attached to their "own" employer and not to the user-enterprise. Occasionally, this may seem to be an "upside down" point of departure, in which labour law obligations seem to be ascribed to each separate employer – this, in particular at workplaces where one can find different categories of employees, such as consultants, job contractors with their own employees, as well as contract labour. As hinted before, the responsibility of

[97] See, e.g., the Labour Court judgments, AD 1980 No. 24, 1981 No. 121, 1982 No. 104, 134, 1984 No. 110.

[98] See the Labour Court judgment, AD 1979 No. 31.

[99] Prop. 1993/94:67.

[100] Prop. 1994/95:76.

the principal employer in respect of health and safety aspects extends to cover other groups, such as, for example, contract labour (*supra* at 6.9). One may therefore ask why the principal employer should not be subject to some other kind of labour legislation obligations as regards these categories. Of course, the classical answer is that collective rights ensuing from labour legislation presuppose a strict employer-employee relationship, i.e. the existence of an employment contract. One might argue that no other solution will create law and order among the different actors. This aspect is also, in general, in the interests of the affected parties.

In a non-published Swedish Government Report from 1994, quite a different view has been, interestingly enough, advanced in a tentative way. The Report proposes that the traditional view may occasionally look both "artificial and not entirely satisfactory".[101] The Report discusses a case in which the principal employer, at his own initiative, intends to give essentially new working tasks to the contracted out employee that has been placed at his disposal. In such a case and in view of sec. 11 of the Swedish Joint Regulation Act, the supplier employer is assumed to initiate negotiations with the contracted out employee's trade union. However, such a procedure presupposes that the user-enterprise will give a notice to the agency about the change of the working tasks, in order to let the agency fulfill its primary duty to negotiate. It is easy to imagine that such a notice can be dispensed with. Nevertheless, the agency is held responsible for a violation of the law if the working tasks of its affected employees have been changed, in spite of the fact that it had no knowledge of the user-enterprise's action.

The Report argues that a situation like this must be looked upon as a legal detour. It is held that the involvement of the supplier employer may seem unnecessary and that the intermediary employer will in fact have no other bargain to offer except that of accepting the dictates of the user-enterprise. *The Report suggests therefore that the user-enterprise should both give notice to and take up consultations with the hired-out employee's trade union.* This duty applies, however, only in cases when the affected employee has worked at the user-enterprise for at least six months, and only if he is subject to that company's right to direct and allot work. From this follows that the responsibility of acting as the legal employer should be partially transferred from the "formal" to the "real" employer. Again, it must be emphasized that this discussion is taken from the non-published Government Report mentioned earlier.

[101] The Report is a product of the former Government Labour Law Commission, which handed down several other reports, such as SOU 1993:32, 1994:83 and 141. However, the Commission was suspended by the Social Democrats after the national elections in September 1994. Another Labour Law Commission was appointed. However, a draft of the Report of the former Labour Law Commission is in circulation. The discussion here is taken from a mimeographed copy of the Report, pp. 89-91.

7.3 Coverage of Contract Workers by Collective Agreements Concluded by the User- Enterprise

Usually, *national* collective agreements concluded between the national employer organisations and trade unions cover contract workers as well. Only in rare cases special collective agreements apply, especially as regards labour-only contracting. On the other hand, the union membership rate among contract workers is low. Furthermore, the character of the employment itself discourages union activity.

In the 1993 Nordic Council study, I found only one case (in Denmark) in which the affected employees had been thoroughly accomodated to the principal employer's collective agreement whose conditions had been tailored by the local trade union of the principal employer. This solution transgresses the borders of independent companies, and goes beyond the regular course of affairs, as has been found in other cases of labour-only contracting. Other Danish collective agreements also show a tendency towards partial accomodation of contract workers to the collective agreements which apply to the user-enterprise's employees as regards, e.g., benefits, such as transportation, cantine facilities, free days, safety, medicine etc.

In Finland, the generally applicable branch collective agreements usually apply in accordance with sec. 17 of the Employment Contracts Act, which may mean that if the user-enterprise and the provider of manpower are doing business in the same branch, the user-enterprise's collective agreement will apply to all employees at the workplace.

In Norway, a special situation prevails. A principal employer engaging contract labour may certainly employ such labour, but if the intention behind such an act has been to circumvent the pending collective agreement, the employer may be held liable for the violation of the contract.[102] In other contexts, however, it is self-evident that the supplier's own collective agreement applies to the contract labour. In Sweden, case law also speaks in favor of the latter solution,[103] which is also evident for another reason. Usually the same collective agreement applies to both the user-enterprise and the supplier of manpower (job contractor) as a result of the so-called industrial principle.

8. Conclusive remarks

The use of contract labour has been a highly sensitive matter in the Nordic context. It would seem that Sweden once tried to pave the way for a joint Nordic regulatory scheme by means of the issuing and promotion of Nordic Council Reports related

[102] This view was first stated in case law in Norway, ARD 1933 p. 63.
[103] See the Labour Court judgments, AD 1941 No. 49, 1990 No. 87.

to the use of contract labour.[104] To some extent, Sweden was successful for some time.

It is also remarkable that the four Nordic countries have adopted such different views as regards contract labour, in particular with respect to the use of temporary (contracted out) manpower. Sweden was the only country that for a long period of time looked upon the contracting out of manpower as if it was another kind of employment exchange. However, the late 1980's brought about new developments in the Nordic countries. Denmark was the first country to deregulate. Later on, Sweden and Finland followed suit. In all the three countries, the former state monopoly on employment exchange has been abolished. Today, only Norway applies and enforces a scheme based upon a ban on the contracting out of manpower and has retained the state monopoly on employment exchange.

The contracting out of manpower is not an easy device to deal with in legal terms inasmuch as its legal implications may be difficult to delineate. In particular, the traditional labour laws have not been adjusted to deal with tri-partite relationships. It is one thing to make clear by statue or elsewhere that the supplier of manpower is also held to be the employer of the said manpower. But it has not at the same time been made clear what the legal consequences will be if the user-enterprise violates the law in directing and alloting the work of the personnel placed at its disposal. So far, no major cases have been decided. A minor guideline was given in the Swedish Labour Court judgment, AD 1990 No. 87 which dealt with the breach of a collective agreement. The provider of personnel could not be absolved from the breach of the agreement even if it was the user-enterprise that directed the work in question. Furthermore, in the Danish 1991 arbitration award related to the lega status of temporary workers, the affected temporary employees were excluded from the protection of the pertinent Act.

It is my view, in this context, that a more steadfast platform for the use of contract labour must be developed in the future, and that this platform should be based on the idea that the principal employer must assume the major responsibilities for the affected employees. This is the basis of the Nordic workers' protection laws and I cannot see the reason why this should be a less good solution as regards other major aspects of the contractual (legal) tri-partite relationship which is inherent in between the acting parties with respect to the use of contract labour.[105]

[104] See NU 1978:5. *Uthyrnings- och entreprenadföretag i Norden – Grå arbetskraft* and NU 1983:7. *Grå verksamhet.*

[105] A recent case from the Japanese Supreme Court (Central Labor Commission v. Asahi Broadcasting Co.) highlights the issue. The dispatched workers were integrated into the organisation of the user-enterprise in a way which made the Court declare that the user-enterprise had a *duty to bargain* with the dispatched workers' union concerning the working conditions related to the dispatched work. The case is reported in Japan Labor Bulletin, December 1 (1995).