



BUYER FOUND LIABLE FOR SELLER'S NON-COMPLIANCE WITH COLLECTIVE BARGAINING AGREEMENT

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Introduction

One of the ground pillars of the Danish labour market model (in Danish: "*Den danske model*") is the possibility for trade unions and employers' organizations to enter into collective bargaining agreements which regulate the salary and working conditions for employees.

When a collective bargaining agreement applies, the employer must comply with the terms set out in the collective bargaining agreement. The employer's failure to comply with the collective bargaining agreement may have financial consequences, such as post-payment claims and penalties.

The financial consequences due to non-compliance of a collective bargaining agreement and the liability hereof in connection with taking on employees pursuant to the Danish Act on Employees' Rights in the event of Transfers of Undertakings (in Danish: "*virksomhedsoverdragelsesloven*") (the "Act"), has been considered in a recent decision from the Danish Labour Court.

The Danish Labour Court Ruling

In the case in question, a company (the “New Employer”) had taken over several employees from a seller (the “Previous Employer”) in accordance with the Act. After having taken over the employees, the New Employer became aware that the Previous Employer had mistakenly not paid out pension contributions of the holiday supplement in the period 1 March 2010 to 31 August 2015. The obligation to make such payments appeared from the collective bargaining agreement but was not complied with due to a flaw in the Previous Employer’s salary system.

The question presented to the Danish Labour Court was whether the New Employer was liable towards the transferred employees for the Previous Employer’s non-compliance with the applicable collective bargaining agreement.

The Danish Labour Court found that the New Employer was liable for the lack of pension contributions of the holiday supplement for the employees taken over by the New Employer, seeing as any acquirer assumes all rights and obligations towards the employees when they are transferred in connection with an asset purchase subject to the Act.

The Court also found that the Previous Employer was liable for the lack of pension contributions of the holiday supplement for those employees who had not been transferred as part of the acquisition and who therefore remained employees with the seller.

The New Employer was ordered to pay a total amount of DKK 399,228 to the transferred employees.

The Previous Employer was ordered to pay an amount of DKK 81,297 related to those employees who were still employed with the Previous Employer. In addition, the Previous Employer was imposed a penalty of DKK 50,000 due to non-compliance with the collective bargaining agreement.

The Court did not make any decision about whether the Previous Employer was obligated to reimburse the New Employer for the loss of DKK 399,228. Based on case law, however, the Previous Employer would most likely be obligated to reimburse the New Employer based on the principle of loyal disclosure, seeing as the Previous Employer should have been aware of the lack of pension contributions of holiday supplements and should have disclosed this information to the New Employer.

Our Comments

The Danish Labour Court’s decision underlines the principle that an acquirer assumes all rights and obligations towards employees, and it allows for employees to raise claims related to the employment against the current employer, irrespective of what actually led to the claim.

From an M&A transaction perspective, the potential buyer of a company subject to a collective bargaining agreement should, as part of their due diligence efforts, carefully assess whether the target company complies with the obligations pursuant to the collective bargaining agreements. The target's non-compliance with collective bargaining agreements would likely impact the valuation of the target company, seeing as such non-compliance could lead to potential post-payment claims and penalties. Further, any transfer agreement should include a mechanism for automatic compensation to the buyer for any payments and claims from employees relating to the time before the transaction.

Need Help with Collective Bargaining Agreements?

At Moalem Weitemeyer, we are experts in employment law, and we have set up teams that are ready to help our clients with the ongoing compliance of any collective bargaining agreement.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



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