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THE CONCEPT OF EMPLOYEE: THE POSITION IN DENMARK

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1. CONTRACT OF EMPLOYMENT AND EMPLOYMENT RELATIONSHIP

1.1 Contract of Employment: Basic Definition, Formal Requirements, Effects of Invalidity of Contract

Danish labour law does not apply a uniform code in the labour market. Hence, no uniform definition of the term 'employment contract' (*ansættelseskontrakt*) exists. No uniform definition has been developed in case law.

Employment legislation plays a minor role in regulating working conditions on the Danish labour market compared to collective agreements. The Danish Parliament has only enacted a limited number of employment laws. These laws primarily transpose EU directives. Furthermore, most of the legislation transposing EU directives expressly states that the respective Act does not apply if the employment relationship is covered by a collective agreement that implements the directive, see, for example, section 1 (3) of the Act on a Written Statement (*Ansættelsesbevisloven*),[1] which reads as follows:

> This Act does not apply where the employer has an obligation to provide employees with information about their employment relationship pursuant to a collective agreement that includes provisions which correspond to the provisions in Directive 91/533/EEC on the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

It follows from the cited paragraph that the Act only applies (1) to employees who are not covered by an implementing collective agreement; and (2) to employees who are covered by an implementing collective agreement which does not, however, correctly implement the respective provisions of the directive.

The legislation is—to a certain degree—based on a distinction between sub-groups of employees. For instance, some important features of white collar work (but not blue collar work) are regulated in legislation (White Collar Workers Act, *Funktionærloven*).[2] The working conditions of certain groups of agricultural and domestic workers are partly regulated by legislation.[3] This is also the case for seafarers (see section 3. below).[4]

The different subgroups of employees are covered by employment legislation of a general nature, eg, the Annual Holidays Act. There are, however, exceptions, eg, the rules laid

[1] Lbkg. nr. 240 af 17/3/2010 om arbejdsgiverens pligt til at underrette lønmodtageren om vilkårene for ansættelsesforholdet.
[2] Lbkg. nr. 81 af 3/2/2009 om retsforholdet mellem arbejdsgivere og funktionærer.
[3] Lbkg. Nr. 712 af 20/8/2002 om visse arbejdsforhold i landbruget m.v.
[4] Lbkg. nr. 73 af 17/1/2014 om Søfarendes ansættelsesforhold m.v.

down in the Holidays Act do not apply to seafarers due to the special circumstances of this type of employment relationship.

There are no formal requirements for concluding an employment contract. Like other contracts, an employment contract can be based on an oral or a written agreement between the parties (see section 1 of the Contract Act[5]). The employer, however, has the duty to inform the employee in writing on a number of essential working conditions in accordance with the Act on a Written Statement or a collective agreement transposing Directive 1991/533/EEC.[6]

A contract of employment is void or partly void if it is in breach of rules laid down in employment law, basic legal principles or a collective agreement. A contract might also be void if one of the parties' declaration of intent is flawed. If the contract or part of the contract is void, it is not enforceable by the courts. However, the parties to an employment contract may in some cases be allowed to deviate from the rules laid down in employment law or a collective agreement. For instance, parties to an employment contract are allowed to deviate from some of the rules laid down in the Annual Holidays Act.[7]

1.2 Employment Relationship: Basic Definition

Danish labour law does not entail a uniform statutory definition of the term 'employment relationship' (*ansættelsesforhold*). However, an employment relationship presupposes the existence of an employment contract.

In principle, the definition of an employment relationship—like the definition of an employment contract—is left to the specific statute or collective agreement in question. However, neither statutes nor collective agreements usually contain a formal definition of the employment relationship. This means that the definition of the employment relationship has to a wide extent been developed by case law. However, case law has not developed a uniform (formal) definition of an employment relationship.

An employment relationship is normally based on a mutual agreement between the parties. However, according to section 2 of the Danish Act on Transfers of Undertakings[8] (*Virksomhedsoverdragelsesloven*), a transferee of (part of an) undertaking automatically takes over the rights and duties of the transferor under the employment relationship with the transferred employees. Furthermore, the user undertaking might, on the basis of a collective agreement, be under an obligation to comply with a minimum rate of payment and other working conditions for temporary agency workers hired from a temporary work agency, even though the agency workers are formally considered to be employed by the temporary work agency.[9]

[5] Lbkg. nr. 781 af 26/8/1996 med senere ændringer om aftaler og andre retshandler på formuerettens område.
[6] Lbkg. nr. 240 af 17/3/2010 om arbejdsgiverens pligt til at underrette lønmodtageren om vilkårene for ansættelsesforholdet.
[7] Lbkg. nr. 1177 af 9/10/2015 om ferie.
[8] Lbkg. nr. 710 af 20/8/2002 om lønmodtageres retsstilling ved virksomhedsoverdragelse.
[9] See, eg Annex 17 of the Industrial Agreement (*Industriens Overenskomst*) between the Confederation of Danish Industry (DI) and the Central Organisation of Industrial Employees in Denmark (CO-Industry).

2. EMPLOYEE AND EMPLOYER

2.1 Employee: Basic Definition

Danish labour law does not have a uniform statutory definition of the term 'employee' (*lønmodtager*). However, the definition of the term 'employee' introduced in section 1 (2) of the Act on a Written Statement (*Ansættelsesbevisloven*) represents a *sui generis* benchmark in this regard. In accordance with the underlying Directive 533/1991/EEC on the employer's obligation to inform the employee of the working terms, an employee is defined as 'a person who receives remuneration for personal work in an employment relationship'.

From a narrow point of view, this definition is only applicable to the employer's obligation to inform the employee of the working conditions. However, according to the preparatory works of the Act,[10] the formal definition of employee laid down in section 1 (2) is intended to be a general guideline for the definition of employee within the scope of labour law. In line with this general intention, section 1 (2) of the Annual Holidays Act states that

> for the purpose of this Act, an employee shall be taken to mean a person who receives remuneration in exchange for personal work under an employment relationship.[11]

In principle, the definition of the term 'employee' in labour law, social security law and tax law is independent of each other. However, the definition contained in section 1 (2) of the Act on a Written Statement is more or less identical with the definition laid down in section 43 of the Income Tax Act.[12] Social security legislation does not contain a formal definition of employee, but the definition in practice is in line with those laid down in employment acts and the Income Tax Act.[13] Thus, from a practical point of view, there are no significant differences in the term 'employee' within the scope of labour law, social security law and tax law.

The interpretation of the term 'employee' is, however, still dependant on the specific act or collective agreement in question. For instance, an agency worker is considered an employee under the Act on a Written Statement.[14] However, he/she is not in an employment relationship with respect to the White Collar Workers Act. According to section 1 (2) of the White Collar Workers Act, the employee is under a duty to perform work upon the employer's request. The Supreme Court has concluded that this condition is (usually) not met in the case of temporary agency workers.[15]

The courts have not developed a uniform definition of 'employee' or 'employment relationship'. They have, however, developed a range of general criteria to determine whether specific work is carried out under an employment relationship or on a self-employed basis (see section 4. below). Still, the decision—at least in borderline cases—is also made with regard to the objectives of the act or collective agreement in question. For instance, case law

[10] FT 1992/93, A, sp. 6324ff.
[11] Lbkg. nr. 1177 af 9/10/2015 om ferie.
[12] Lbkg. nr. 117 af 29.1.2016 om kildeskat.
[13] See the Supreme Court of 30.3.2007 (U2007.1597H) and of 31.3.1999 (U1999.1050).
[14] See the Maritime and Commercial High Court of 3.8.1999 (U1999.1870S).
[15] See Supreme Court of 5.9.1997 (U1997.1495H).

has considered an agency worker to be an employee in accordance with the Act on a Written Statement, but not with the White Collar Workers Act.[16]

2.2 Employer: Basic Definition

Danish labour law does not have a uniform statutory definition of the term 'employer' (*arbejdsgiver*). The term is indirectly derived from the term 'employee'. Consequently, every natural or legal person who employs one (or more) employee(s) is considered to be an employer.

In practice, doubt may arise as to whether a natural person is always capable of being an employer. For instance, the Western High Court considered a disabled person, who had hired a personal assistant, to be an employer in relation to the employee. As a result, the disabled person was ordered to pay the employee compensation in the amount of six months' pay because of unlawful dismissal due to pregnancy.[17] In consideration of the difficulties related to being an employer, a disabled person is now entitled to transfer the status of employer (and a financial subsidy from the municipality) to a family member, an association or a private company.[18]

The formal employer is the natural or legal person who has signed the contract or entered into the relationship with the employee. Occasionally, there has been doubt as to whether the formal employer needs to also be considered the real employer. This, for instance, has been the case in situations where an employee is employed by a private 'independent institution' (*selvejende institution*), which is financed entirely by subsidies from a public institution. For example, in its decision, the Industrial Arbitrational Tribunal (*faglig voldgiftsret*) considered the private institution which had signed the employment contracts to be the employer, even though the institution's childcare activities were financed entirely by subsidies from a municipality, and was thus obliged to provide information on pay and working conditions in accordance with the collective agreement covering employees in public childcare institutions. The tribunal underlined that the independent institution and municipality were independent legal persons and that neither the collective agreement in question nor the concrete circumstances of the case gave reason to ignore the fact that the employment contract was concluded by the independent institution as the employer.[19]

In employment relationships with agency workers, the temporary agency is considered to be the employer. However, the user undertaking might be under an obligation based on a collective agreement to instruct the agency to comply with rules laid down in the collective agreement. If the agency does not comply, for instance, with the minimum wage laid down in the collective agreement, the user undertaking might be obliged to pay the difference between the wage actually paid and the minimum wage set in the collective agreement.[20]

[16] See the Maritime and Commercial High Court of 3.8.1999 (U1999.1870S) and Supreme Court of 5.9.1997 (U1997.1495H).
[17] The Western High Court of 20.12.2007 (U2008.844V).
[18] See s 95 and 96 of the Act on Social Service (lbkg. Nr. 1284 af 17.11.2015).
[19] Industrial Arbitrational Tribunal of 10.7.2010 (FV 2009.257).
[20] See Labour Court of 21.4.2015 (case No 2014.103).

3. SUB-TYPES OF EMPLOYEES AND WORKERS

3.1 Establishment of Sub-types of Employees

Danish labour law—to a certain degree—is based on a distinction between different subgroups of employees. Some subgroups are covered by a special legislation, others are not.

The main distinction is between blue collar workers (*arbejdere*) and white collar workers (*funktionærer*). White collar workers are covered by a specific statute, the White Collar Workers Act.[21] White collar workers are shop assistants, clerks, technical and clinical assistants and managerial staff, among other groups. Factory workers, craftsmen, artists and teachers, among others, are not considered to be white collar workers. The working conditions of those groups are in principle left to collective and individual agreements.

The White Collar Workers Act—dating back to 1938—covers more than 50 per cent of all employees in the Danish labour market. It only, however, covers some important aspects of white collar work, such as payment during sickness (section 5) and maternity leave (section 7) and termination of the employment relationship (section 2). It does not contain rules on minimum wages and working time. Those working conditions are left to collective and individual agreements.

The interpretation of the term 'employee' is somewhat narrower when it comes to the White Collar Workers Act. As already mentioned in section 2.1, agency workers are not considered to be employees in relation to the White Collar Workers Act since they are not under a duty to perform work on request of the employer, even though they are considered to be employees in relation to the Act on a Written Statement.

Specific rules apply to certain groups of agricultural and domestic workers (*medhjælpere*) and seafarers (*søfarende*).[22] This legislation originated as early as the last part of the nineteenth century and covers minor groups in the Danish labour market due to the special personal relationship between the parties in this type of employment. The legislation is restricted to a core group of working conditions.

Young people on training schemes (*elever*) are regulated by a special legislation due to the educative purpose of the scheme, which in essence revolves around combining periods of training in enterprises and vocational schools. The trainee is considered to be an employee. The employer is obliged to comply with the conditions on pay and working terms laid down in the collective agreement in the specific sector.[23]

Executives, who are entitled to enter into commitments at their own discretion, are usually not considered to be employees in relation to statutory rights, eg, the White Collar Workers Act and the Annual Holidays Act. The statutory prohibition against discrimination,

[21] Lbkg. nr. 81 af 3/2/2009 om retsforholdet mellem arbejdsgivere og funktionærer.
[22] Lbkg. nr. 712 af 20/8/2002 om visse arbejdsforhold i landbruget m.v. and lbkg. nr. 73 af 17/1/2014 om Søfarendes ansættelsesforhold m.v.
[23] See s 55 and 56 of the Act on Vocational Training (*Erhvervsuddannelsesloven*), lbkg. nr. 789 af 16.6.2016 om erhvervsuddannelser.

eg, on the grounds of sex and age, on the other hand, is considered to cover executives as well as other employees.[24]

In general, appointed or elected representatives (*valgte repræsentanter*) are not considered to be employees but rather bodies of the legal person. However, depending on the concrete circumstances, they may be considered employees. For instance, local union representatives (*tillidsrepræsentanter*) are elected by the employees in the enterprise. Hence, local representatives are considered to be both employees and representatives.

It depends on the concrete circumstances whether a shareholder working in the enterprise is considered an employee. As a general rule, if the shareholder influences how the enterprise is managed, eg, based on holding a great part of the shares or membership of the executive board, he/she is normally not considered to be an employee. On the other hand, if the shareholder does not influence how the enterprise is managed, which *nota bene* very often seems to be the case, he/she is considered to be an employee.[25]

Home workers and teleworkers are not considered special categories of employees according to Danish labour law. Thus, labour law is generally applicable to home workers and teleworkers. There may, however, be deviations from the general rules due to the special circumstances of this type of work, eg, in the area of the protection of the working environment.[26]

The particularities of specific sectors are primarily ensured through the comprehensive system of collective agreements that lay down different rules for different sectors. In many cases, customised collective agreements apply to a specific subgroup of employees defined by occupation and/or education. The collective agreement normally provides comprehensive coverage with regard to pay and working conditions. In some sectors, eg, the media and entertainment sector, there might be collective agreements for persons who perform work in a regular employment relationship and other collective agreements for persons performing 'freelance' work.[27]

The legal position of employees in the public sector does not, in principle, differ from that of employees in the private sector. However, civil servants (crown servants) are covered by a special statute, the Crown Servants Act (*Tjenestemandsloven*).[28] The Crown Servants Act only applies to persons employed by the State as 'crown servants'. As a general rule, the status of crown servant is only allocated to employees in special occupations, eg, judges and officers of the police and armed forces. Crown servants are denied the right to strike, on the one hand, and granted special rights, especially in the field of protection against dismissal and pension rights, on the other. Crown servants are not, as a rule, exempt from employment legislation.

[24] See Ministry of Employment, Guidance on Unequal Treatment, January 2006, p 9.
[25] See, eg Labour Court of 15.10.1987 (AT 1997/105) and of 17.5.1989 (AT 1989/93).
[26] See s 4 of the Working Environment Act (lbkg. 1072/2010) and secondary regulation 247/2003.
[27] See, eg collective agreements between the Danish Union of Journalists (*Dansk Journalistforbund*) and Danish Radio (*Danmarks Radio*).
[28] Lbkg. nr. 488 af 6.5.2010 om tjenestemænd.

3.2 Establishment of a Specific Category of 'Workers'

A separate category of 'workers'—which differs from the category of 'employees'—does not exist in Danish labour law.

4. SUBORDINATION: CRITERIA AND INDICATORS/ECONOMIC DEPENDENCE

4.1 Criteria: Work Instructions, Work Control and Integration

The main feature of an employment relationship in Danish labour law is personal subordination of the person who carries out the work. The decision of whether the 'worker' is personally subordinated to the 'employer' depends upon the concrete circumstances of the individual case. The courts do not apply a formal test or method, but base their decision on a concrete assessment of a range of different indicators. Hence, the determination of personal subordination can vary from one type of employment to another.

4.2 Indicators

As already mentioned, the decision of whether a person is personally subordinated to another is always based on the concrete circumstances of the individual case. As summarised in the legal literature, the decision is primarily based on the following criteria:[29]

(i) The degree of the employer's right to direct and control the work performed by the person in question (subordination);

(ii) The arrangement of the financial relationship between the parties (including tax law issues and the worker's entrepreneurial risk);

(iii) The obligation to carry out the work personally or the right to have someone else perform the tasks;

(iv) The personal relationship between the worker and the employer, including the place of the work; and

(v) The worker's social and occupational position, especially whether the worker is primarily considered to be comparable with an employee or a self-employed worker.

Subordination in the sense of being personally subordinated to the instructions and control of the employer is probably the most important criterion in determining whether a person is an employee.

In general, one important indicator of personal subordination is when the 'employee' is obliged to comply with the instructions of the 'employer', ie, to carry out the work in accordance with specific instructions given by the latter. Likewise, another important indicator of personal subordination is when the 'employer' is entitled to control the employee's work and behaviour. Consequently, if a person is not subordinated to the

[29] See O Hasselbalch, *Den Danske Arbejdsret*, vol 1, (Aarhus BSS,, 2009), pp 67 f.

instructions and control of another person, he or she will normally not be considered to be an employee.[30]

Nonetheless, a duty to comply with instructions and control does not in itself suffice to qualify a person as an employee. A self-employed person might also be under a duty to comply with (certain) instructions and control measures from an 'employer' depending on the parties' contract/contractual clauses. In this case it might be of some significance whether the 'employer' is entitled to determine the person's place and time of work. Accordingly, if the person is not under the instructions and control of another and is free to decide the place and time of work, this is a strong indicator of self-employed status.[31]

The financial relationship between the parties is also a highly relevant criterion. From a practical point of view, how the 'employer' deals with tax matters. If these issues are dealt with by the 'employer' as they are under an employment relationship, it will be difficult for the 'employer' to argue against the existence of an employment relationship with regard to labour law matters. However, the fact that the employer has dealt with tax issues as though the worker is self-employed does not preclude the relationship from being deemed one of employment with regard to labour law matters.[32]

In addition, if the person who carries out the work bears economic risks, it is an indicator of a self-employment relationship. Moreover, another important characteristic of an employment relationship is that the employee him-/herself performs the work or at least for the most part for the benefit of the employer. Normally, an employee does not bear any economic risk or profits with regard to the work. However, the fact that the 'employee' bears limited risk or does not fully profit from performing the work, eg, has to buy some of the work tools him-/herself or receives only part of the profit (profit sharing) does not preclude that he/she will be deemed an employee. [33]

An employee is at least in principle obliged to carry out the work personally. Accordingly, it is an indicator of self-employment if the person carrying out the work is free to delegate the work to another person. For instance, an independent consultant is usually entitled (and obliged) to substitute him-/herself, if it is not possible for him/her to carry out the work, eg, due to sickness. If the work is solely or partly carried out by persons employed by him/her, it is a strong indicator of self-employment.[34]

Finally, what might play a (minor) role in borderline cases is whether the terms and position of the worker is more comparable with an employment relationship than self-employment, or vice versa. This criterion seems especially significant in relation to employment legislation in borderline cases regarding social security legislation, eg, the Annual Holidays Act. For instance, a person who takes care of foster children on behalf of a municipality is generally not considered an employee, even though the person is working

[30] See, eg the Western High Court of 14.3.2007 (U2007.1731V) and the Western High Court of 17.9.2014 (U2015.197V).
[31] See, eg Western High Court of 17.9.2014 (U2015.197V).
[32] See, eg Western High Court of 17.9.2014 (U2015.197V).
[33] See, eg the Maritime and Commercial High Court of 9.5.2007 (U2007.2251S).
[34] See, eg Labour Court of 19.3.1997 (AT 1997/33) and of 15.10.1999 (AT 1999/5).

under some instructions and control from the municipality.[35] According to the preparatory works (*travaux préparatoires*) of the Annual Holidays Act, such a person is normally considered an employee in relation to that Act.[36]

4.3 Relevance of 'Economic Dependence'

The courts neither regard 'economic dependence' as required nor in itself sufficient when determining whether a person has employee status. For instance, in 2007, the Labour Court in deciding cases on breaches of collective agreements, among other cases in the field of collective labour law, ruled that a self-employed electrician was not considered an employee, even though he primarily worked for one 'employer'. The Court stressed that the electrician had been able to organise his working time and provided the necessary work tools himself.[37]

5. PRINCIPLE OF PRIMACY OF FACTS

According to long-standing practice, the parties to a contract for work are free to choose between a contract of employment (employment relationship) and a contract for services (self-employment). However, it follows from case law that the labelling of the contract is not in itself decisive for determining employee status in relation to neither employment legislation nor collective agreements. The parties concluded a contract for services—thereby setting aside protective rules established in labour law—only in so far as the work in question is not performed on an employment basis in accordance with the objective criteria mentioned in section 4.2.[38]

Whether a contract is in reality based on an employment relationship is subject to judicial control based on objective criteria. In principle, as established, for instance, by the Maritime and Commercial High Court in 2007, ordinary courts, the Labour Court and industrial arbitration tribunals have the power to conduct a full investigation of the nature of the relationship.[39] The Maritime and Commercial Court, for example, considered a dentist to be an employee even though the contract, among other things, stated that the dentist was not working as an employee and was not subject to instructions and control of the dentist clinic.

In the Danish labour market, the question of 'false labelling' of work contracts has played a significant role in case law, especially in relation to collective agreements. It has been frequent practice among some companies to try to avoid the rules laid down in collective agreements by labelling the relationship as a contract for services. The trade union that is party to the collective agreement is, however, entitled to make claims against the employer,

[35] See, eg the Western High Court of 14.3.2007 (U2007.1731V).
[36] See FT 1999-2000, tillæg A, sp. 4913ff.
[37] See, eg the Labour Court of 23.10.2007 (AT 2007/197).
[38] See, eg the Maritime and Commercial High Court of 9.5.2007 (U2007.2251S) qualifying a contract of independent work as an employment relationship covered by the White Collar Workers Act.
[39] See, eg the Maritime and Commercial High Court of 9.5.2007 (U2007.2251S).

even if the 'employee' does not want to make a claim him-/herself.[40] Hence, trade unions have often asked the Labour Court to examine a 'contract for services', claiming that the contract is in fact a 'contract of employment'. According to long-standing case law the decisive test is whether the work is carried out on a 'real self-employed basis'.[41] Notably, if the Labour Court reaches the decision that specific work is performed on an employment basis, the work will be covered by the collective agreement, which is binding upon the employer.

6. QUALIFICATION IN FULL

A contract between two parties can either only be a contract of employment or any other contract. There is no third option according to which only part of a contract can qualify as a contract of employment.

On the other hand, an employee and an employer are free to conclude an additional contract which as such does not qualify as a contract of employment. For instance, a person can work both as an employee and as a freelancer for the same employer. However, the work as a freelancer may not—in fact—lead to a circumvention of the protection offered to the individual as an employee.

It is, of course, also important for the parties themselves to be able to distinguish between the two types of work in practice. If that is not the case, the courts might consider the entire arrangement to be an employment relationship or a relationship of self-employment depending on the circumstances of the individual case.

Finally, apart from contractual relationships, non-contractual legal relationships may also exist between the parties. For instance, the parties may be liable under tort law in case of damages to the other party. Alleviation of liability of employees as developed by the courts is not restricted to liability arising from the contract but also applies to liability under tort law.[42] However, liability under tort law is restricted as far as the employee is concerned (see section 23 (3) of the Act on Tort (*Erstatningsansvarsloven*)).[43]

7. LIMITS TO THE FREEDOM OF CONTRACT

As already mentioned, the parties to a contract of work are free to choose between a contract of employment (employment relationship) and a contract for services (self-employment). The parties, however, have no freedom to decide whether the work is in fact based on an employment relationship or a relationship of self-employment.

[40] See Arts 13 and 22 of the Act on the Labour Court and Industrial Arbitrational Tribunals (lov nr. 106 af 26.2.2008 om Arbejdsretten og faglige voldgiftsretter).
[41] See, eg Industrial Arbitrational Tribunals of 2.5.2013 (FV 2013.36) and of 12.7.2013 (2013.58).
[42] Eastern High Court of 8.10.2007 (U2008.254Ø).
[43] Lbkg. Nr. 1266 af 21.3.2014 om erstatningsansvar.

The legal concept of 'employee' is mandatory and cannot be disposed of by the parties to the contract. Therefore, if a person qualifies as an 'employee' on the basis of an objective legal assessment based on the criteria mentioned in section 4, the parties are not allowed to set this qualification aside by insisting that their contract is not a contract of employment. For instance, the parties are not free to decide that their contract is a contract for services and that it thereby is not covered by a collective agreement the employer is obliged to comply with. The trade union, which is party to the collective agreement, is in any case entitled to question the arrangement before the Labour Court.

8. COLLECTIVE BARGAINING, ESTABLISHED CUSTOM AND PRACTICE

8.1 Social Partners

The legal concept of 'employee' in employment laws is mandatory in the sense that it cannot be disposed of by the parties to a collective bargaining agreement. For instance, the parties to a collective agreement are not entitled to derogate from the minimum protection laid down in the White Collar Workers Act.[44]. However, the Supreme Court has allowed the social partners a certain margin of appreciation in special circumstances.[45]

The social dialogue plays an important role in determining pay and working conditions in the Danish labour market. In principle, it is left to the parties to a collective agreement to define the concept of 'employee' or 'employment relationship' as far as the working conditions laid down in the agreement are concerned. However, collective agreements do no not, in practice, define the term 'employee'. Therefore, it is ultimately a question for the Labour Court or an industrial arbitration tribunal to decide whether a 'freelancer' is, for example, actually performing work as an 'employee' or a self-employed person.[46]

A collective agreement is mandatory as is an employment-related legal act. Therefore, the individual parties to a contract are not free to decide that the contract is a contract for services. The latter will be set aside if—on the basis of an objective assessment—the work is performed in a relationship of personal subordination of the 'worker'. In that case, the work is covered by the collective agreement.[47]

8.2 Custom and Practice

Deviations on the basis of custom and practice are not acknowledged in Denmark.

[44] See Art 21 of the White Collar Workers Act.
[45] See, eg Supreme Court of 12.11.2008 (U2009.406H).
[46] See, eg Labour Court of 24.8.2007 (AT 2007/165).
[47] See, eg Industrial Arbitrational Tribunals of 2.5.2013 (FV 2013.36) and of 12.7.2013 (2013.58).

9. LEGAL PRESUMPTIONS AND SHIFTING OF THE BURDEN OF PROOF

9.1 Presumptions

There are no formal presumptions on employee status in Danish law. Taxation for the work in question, though, is an important criterion in determining whether a person is to be considered an employee in terms of labour law. According to the preparatory work of the Act on a Written Statement, there seems to be a presumption in practice of a contract of employment in relation to labour law matters if the work is treated by the employer as an employment relationship in relation to tax matters.[48] However, it still depends on the concrete circumstances of the individual case whether the 'worker' performs work as an employee or a self-employed person. For instance, in a Western High Court ruling from 2014,[49] the Court did not consider a person working on a freelance basis as a contact person for refugees as an 'employee', even though the Danish Refugee Council had treated him as an employee with reference to tax matters. The Court stressed among other things that the freelancer was not working under the direction and control of the 'employer'.

9.2 Burden of Proof

There are no formal rules on burden of proof with regard to determining whether a person is an employee or a self-employed worker. It is entirely left to the court how to decide the issue in the individual case.

10. SPECIFIC PROCEDURES

Self-employed persons must enlist in a public commercial register according to the Danish Commercial Code (*Selskabsloven*).[50] However, the registration does not have constitutive effect in relation to specific work carried out by the registered self-employed person. Whether the registered person works as an employee or a self-employed person in relation to specific work is entirely dependent on whether the work in question is performed on the basis of an employment relationship or on a self-employed basis.

Danish labour law does not give the parties concerned the right to request a public authority to determine whether an employment contract or employment relationship exists in advance. Each of the parties are free to question the formal status of a contract by bringing a claim before the court, eg, that the party is entitled to paid annual leave due to the status of employee. It is for the court to decide whether the person is—based on an objective test—actually working as an employee.

[48] FT 1992/93, A, sp. 6324ff.
[49] See, eg Western High Court of 17.9.2014 (U2015.197V).
[50] Lbkg. Nr. 1089 af 14.9.2014 on Limited and Private Companies.

11. EXTENSION OF RIGHTS

11.1 'Employee-like' Persons

Danish labour law does not recognise a special category of 'employee-like' persons. Work is either performed on the basis of an employment relationship or a relationship of self-employment. If a person in fact carries out work on a self-employed basis, he/she is not considered to be an employee nor an employee-like person, although he/she might de facto be in a position similar to an employee.

In a similar vein, Danish labour law does not recognise a special category of 'economically dependent' working persons. If a person carries out work on a self-employed basis, he/she is not considered to be an employee even though he/she is economically dependent on the employer, eg, as a franchisee. Employment legislation and collective agreements do not apply (partly) to economically dependent workers (who are not employees).

The social security system does not recognise a special category of employee-like persons, either. However, the social security system does to a certain extent apply to self-employed persons, eg, in case of sickness, maternity leave and unemployment.

11.2 Equality and Anti-discrimination Law

The Equal Treatment in Employment Act (*Forskelsbehandlingsloven*) covers employees just like other employment laws.[51] The personal coverage of this Act is, however, somewhat more comprehensive than might be the case in relation to most employment laws.

A primary school pupil who participated in a work experience scheme at a private company was, for instance, considered to be covered by the Act. The Court ordered the 'employer' (a large retail store) to pay her compensation (*godtgørelse*) for unlawful 'dismissal' due to her reluctance to remove a religiously-related headscarf.[52]

[51] Lbkg. Nr. 1349 af 16.12.2008 on the prohibition of discrimination in the labour market.
[52] The Eastern High Court of 10.8.2000 (U2000.2350Ø).