SUPREME COURT OF NORWAY

On 12 December 2018, the Supreme Court composed of the justices Matningsdal, Noer, Bull, Ringnes and Høgetveit Berg gave judgment in

HR-2018-2371-A, (case no. 18-042829SIV-HRET), civil case, appeal against judgment:

Hans Joachim Strøm Berndt Anders Salmonsson Halvor Vatnar Kim Rossing Jensen Trude Mathisen Anita Johannessen Oddbjørn Ketil Holsether René-Charles Gustavsen Trond Erik Torgersen Alf Wilhelm Villum Hansen Anne Marit Breimyr Lindén	(Counsel Christen Horn Johannessen)
The Norwegian Confederation of Trade Unions (intervener) The Norwegian Pilots' Union (intervener)	(Counsel Håkon Angell)
The Confederation of Vocational Unions (intervener)	(Counsel Sigurd-Øyvind Kambestad)
v.	
Norwegian Air Norway AS	(Counsel Christian Backe)
Norwegian Air Shuttle ASA	(Counsel Tarjei Thorkildsen)
The Confederation of Norwegian Enterprise (intervener)	(Counsel Margrethe Meder)

(1) Justice **Bull:** The case concerns a claim for employment in group companies other than the formal employer. The claim is partially based on alleged unlawful hiring of labour, see section 14-12 subsection 1 of the Working Environment Act, and partially on the issue of being considered employer on special grounds, see section 1-8 subsection 2 of the same Act.

(2) The group, which is generally referred to as "the airline Norwegian", has been through an extensive and lengthy corporate restructuring process. With new group structure, the business has been divided into three areas: operations, personnel and services, and ownership rights to the aircraft fleet, with separate companies within each area. The parent company is *Norwegian Air Shuttle ASA*, from now on referred to as NAS. The operating companies, also referred to as the AOC companies, conduct the flying activities. Within the area personnel and services, the pilots and the cabin crew members are employed in separate companies. The case concerns the implications of this restructuring under the Working Employment Act.

(3) NAS was originally the sole company. The plan is for NAS to stop conducting flying activities in the future. However, during the period of relevance to the case at hand, the company has continued to do so. This is mainly due to problems with acquiring airline operator certificates, or AOCs, for the new operating companies.

(4) The central operating company in the case is *Norwegian Air Norway AS*, or *NAN*.

(5) The claimants are pilots and cabin crew members, originally employed in NAS, who through intra-group business transfers are now employed in *Norwegian Pilot Services Norway AS* and *Norwegian Cabin Services Norway AS*, respectively. The companies were originally called Pilot Services Norway AS and Cabin Services Norway AS, and the acronyms *PSN* and *CSN* will from now on be used for the companies both before and after the name change. NAS currently owns these companies through an Irish subsidiary, *Norwegian Air Resources Limited,* or *NAR*.

(6) The pilots were first transferred from NAS to NAN – and then on to PSN. The cabin crew members were transferred directly from NAS to CSN. The core issue at stake is whether the pilots and the cabin crew members are still entitled to employment in NAS, for the pilots' part also in NAN, in addition to being employed in PSN and CSN.

(7) I should first say something about the development of the airline Norwegian. NAS was established in 1993 to acquire the flying activities that had previously been conducted by the bankrupt airline Busy Bee with three propeller aircraft for Braathens SAFE. In 2001, Braathens SAFE was acquired by SAS. Shortly after the acquisition, SAS terminated the contract with NAS. NAS then decided to offer its own domestic routes as a low-cost carrier under the profile "Norwegian". These activities were implemented in 2002 with seven Boeing 737-300s. The following year, the company started operating international flights.

(8) In December 2003, NAS was listed on the Oslo Stock Exchange, and the company carried out a share issue adding NOK 250 million to its share capital. The Finish company FlyNordic was acquired in 2007, and in 2008, NAS announced that it would acquire parts of the routes of the bankrupt Sterling Airways. New bases were established in Stockholm

and Copenhagen in 2007 and 2008, respectively. In the autumn of 2009, NAS announced that it would invest in low-cost intercontinental routes, to New York and Bangkok to begin with.

(9) The growth lead to a large expansion of the aircraft fleet. In May 2007, NAS leased eleven Boeing 737-800s that were planned to be in operation from 2008. Later the same year, the company bought 42 Boeing 737-800s, with an option to buy another 42. The aircraft were to be delivered between 2009 and 2014, ten each year. In 2010 and 2011, another 30 Boeing 737-800s and six Boeing 787-8s were ordered. An even larger order was made in 2012, when NAS ordered 222 aircraft from Boeing and Airbus, with an option to buy another 150. In addition, NAS has acquired a number Boeing 787-8s and 787-9s, and more have been ordered.

(10) The aircraft belong to the Irish subsidiary Arctic Aviation Assets Ltd. (AAA) with underlying companies, and are at the disposal of other group companies by way of lease or sublease.

(11) Today, the group has 165 aircraft at its disposal and flies to 155 destinations. It has almost 12 000 employees worldwide. Around 2 700 are employed in Norway, of whom around 630 work in NAS, half of them in the technical division.

(12) The large expansion called for a restructuring. The rights to the aircraft had to be placed in separate companies for financing purposes. Moreover, the international system with bilateral and multilateral aviation agreements resulted in a need to obtain aviation operator certificates, or AOCs, from local aviation authorities in a number of countries. These certificates grant landing and overflight rights. In practice, several AOC companies had to be established. NAS also considered establishing one or more companies to deliver services to the AOC companies in the capacity of shared service centres.

(13) The parties disagree to some extent as to when the planning of a new organisational structure started. Their views also differ as to whether some of the restructuring measures primarily were manoeuvres in connection with ongoing labour disputes or whether the measures and disputes coincided in time by chance. However, the appellants do not contest that the expansion rendered the restructuring necessary, and the respondents admit that the timing of their actions has not always been optimal. I will revert to some of this.

(14) From 2012, a number of new AOC companies were established. NAN was established on 28 May 2013 and was granted a Norwegian AOC on 19 November 2013. AOC companies have also been established in Ireland, the United Kingdom, Argentina and Sweden, without it being necessary to go into detail on these companies.

(15) NAR was established in September 2013 to manage a large share of the group's workforce and to deliver other joint services. CSN was established on 25 March 2014, then as a subsidiary of NAS. PSN was established on 2 March 2015, originally as a subsidiary of NAN. Furthermore, in March 2015, Norwegian Air Resources Shared Services Center AS, or NAR SSC, was established as a Norwegian subsidiary of the Irish NAR. There are also other companies within the NAR structure, but they are not relevant to the case at hand.

(16) The employee representatives became involved in the restructuring process through an information and discussion meeting on 16 September 2013. It appeared from the

management's presentation at the meeting that "[i]n the future, it will not be natural that the parent company conducts operational activities. These activities are planned to be conducted by subsidiaries". A separate resource group – "Norwegian Resources", i.e. what was to become NAR with subsidiaries – was to be established to deliver services to the airlines in the group. Personnel employed in the group's foreign subsidiaries were to have salary and working conditions based on local conditions of the country in question. All pilots based in Norway were to be "moved by way of a business transfer in order to conduct their flying activities from Norwegian bases", while Norwegian pilots that wanted to be part of "Norwegian Resources" could apply for employment there. At the same time, it was held that "[c]abin crew members are not to be transferred for the time being".

(17) NAS has later regretted that the meeting was not held until 16 September 2013, as restructuring work had been in progress a while before that.

(18) On 20 September 2013, a follow-up meeting was held between NAS and Norwegian Pilot Union – NPU – and the trade union Parat. According to the minutes, NPU and Parat were concerned with the flexibility of the new organisational structure, as Norwegian pilots should be able to fly under both Norwegian AOCs and AOCs granted by EU countries. NPU held that Norwegian pilots should have the opportunity to have positions within a separate employment company.

(19) A final follow-up meeting was held on 10 October 2013. NAS then announced that the pilots were to be transferred to NAN, that in turn would enter into a collective agreement continuing the salary and working conditions in NAS. NAN would also establish a pension scheme in accordance with the applicable collective agreement. The transfer to the AOC company NAN rather than to a resources company was contrary to the strategy that had been previously presented to the pilots.

(20) The pilots' pension scheme had at this stage been subject to dispute. At a board meeting on 5 November 2012, NAS decided to convert the pension scheme from a defined benefit plan to a defined contribution plan. The latter was implemented on 1 December 2012, and paid-up policies were distributed in the course of March 2013. The pilots' union NPU and Parat considered this a breach of the applicable collective agreement for the pilots – the pilots' agreement – and instituted proceedings before the Employment Tribunal. In a judgment of 5 June 2013, the Employment Tribunal decided that NAS was obliged under the pilots' agreement to maintain a defined benefit plan. A pension scheme corresponding to the one the pilots had had, was to be restored within 1 September 2013, if necessary with a compensatory scheme. The judgment was appealed to the Supreme Court, but in an order of 23 November 2013, the appeal was closed after the parties reached an agreement.

(21) Simultaneously with the restructuring work in the autumn of 2013, mediation proceedings were held with regard to a revision of the pilots' agreement. NPU and Parat accused NAS of initiating the transfer to NAN to avoid a strike. NAS and NAN denied this and stated in a letter to the unions of 31 October 2013 that the timing of the business transfer would be chosen based on operating conditions. On the same day, NAS and NAN sent a letter to all pilots employed in NAS announcing that the flying activities conducted from bases in Scandinavia would be moved from NAS to NAN, and that the pilots, as a result, would be transferred in accordance with the Working Environment Act. The pilots were also informed of their right of reservation under the same Act. The transfer took place at midnight between 1 and 2 November 2013. No pilots exercised their right of reservation.

(22) The parties continued the collective bargaining process, with NAN replacing NAS at the employer's side of the table as of 1 November 2013. On 4 November, the parties managed to agree on a new one-year collective agreement. NAS, being the parent company, issued a one-year guarantee that NAN would maintain 687 pilot positions, together with a statement on employment and hiring of pilots to the resources companies destined to deliver pilot services to the group's EU AOC company.

(23) As set out the minutes of the board meeting in NAN on 1 November 2013, NAN would from the same date take over the operation of NAS's short-distance routes in Norway. NAN took over 687 pilots from NAS along with the obligation to offer a defined benefit pension scheme. Furthermore, NAN leased 36 Boeing 737 from NAS – the number of aircraft necessary to fly the short-distance routes in Norway. Since not all 687 pilots were required to serve these routes, some were to be hired back to NAS. Cabin crew members on the other hand, who had not been transferred, would be hired from NAS to NAN. Agreements would be entered into with NAS on the provision of other services, including technical maintenance and administrative services.

(24) As mentioned, NAN did not obtained its AOC from the Civil Aviation Authority of Norway (CAA Norway) until 19 November 2013. Thus, NAN had to start by leasing aircraft and personnel back to NAS, under a so-called wet-lease, so the aircraft could operate based on NAS's AOC. According to a written statement before the Supreme Court from Geir Magne Steiro, who has had several leading positions in NAS and NAN, CAA Norway needed more time than assumed to approve the maintenance program. This meant that the AOC was not in place by 1 November as NAN had counted on.

(25) The cabin crew members' trade union, Norwegian Kabinforening (NK), was also present at the information meeting on 16 September 2013 where, as mentioned, it was announced that the cabin crew members would not be transferred for the time being. However, the plans for the new organisational structure indicated a transfer from NAS to a different group company at a later stage. Meetings were held between NAS and NK on 10 February, 6 March and 11 March 2014. In a letter of 17 March 2014, all cabin crew members in NAS with a base in Norway were notified that they would be transferred to CSN, with planned takeover on 31 March 2014. They were informed that this was a business transfer within the meaning of the Working Environment Act and that they had a right of reservation under the same Act.

(26) Simultaneously with this process, there was a collective bargaining process for the cabin crew members. With regard to the restructuring, Parat stated in a letter of 20 March 2014 that the cabin crew members objected to the transfer to subsidiaries that, as opposed to NAN to which the pilots had been transferred, had neither their own AOCs nor their own aircraft:

> **"As we understand it, the cabin crew members will be hired out from these companies. This way of rigging the operation has not been approved by the unions, nor will it be… We consider NAS and its management still to be our real employer. The company's formal division into productions, production assets and personnel does not change the fact that the same business is still being run by the same employer. We will act based on this position."**

(27) The business transfer was advanced to 28 March 2014. No cabin crew members exercised their right of reservation. This was just before the parties were to meet to negotiate the collective agreement. The parties disagreed as to whether NAS should be a party to the new agreement. Following mediation proceedings and a strike among the cabin crew members, a new collective agreement was entered into on 19 May 2014. On the same day, CSN issued a guarantee that "the total number of full-time employed cabin crew members" in CSN and the corresponding Danish subsidiary would be a minimum of 893 until 31 March 2016. As the parent company, NAS guaranteed that CSN would be economically able to meet this obligation.

(28) In connection with the establishment of CSN, agreements were entered into on sale of cabin crew services to NAS and NAN. An agreement was also entered into on delivery of administrative services and management services from NAS to CSN.

(29) NAN sustained a loss in 2014. The parties disagree as to whether the loss was unavoidable under the contractual relationship between NAS and NAN, or whether it was due to unforeseeable events. The management in NAN found that without a capital contribution from NAS and a reduction in NAN's level of costs, there was a risk that the company early in 2015 would not meet the aviation authorities' capital requirements. If so, the company would lose its AOC, and aircraft that had been leased from NAS would be locked in a bankrupt NAN. Various measures were discussed with NPU and Parat at a meeting of 5 February 2015 without the parties reaching a solution.

(30) Simultaneously, collective agreements were being negotiated between NAN and the pilots. This resulted in a strike, lasting from 28 February to 10 March 2015. During the strike, the management in NAN continued to work on the restructuring of the company. Attempts were made to summon NPU to two discussion meetings on 1 and 2 March, but because of the strike, the union did not attend. In a letter of 3 March 2015, Parat announced that NPU's members would institute proceedings to obtain a judgment declaring that NAS was the pilots' real employer.

(31) On 5 March 2015, NAN decided to restructure the group by transferring the pilots in the three Scandinavian countries to three pilot services companies, including PSN that had been incorporated on 3 March 2015. On the same day, the pilots were notified of the transfer, and of the fact that it would take place with effect from 6 March 2015. No pilots exercised their right of reservation.

(32) When a new collective agreement was entered into on 10 March 2015, NAN countersigned the minutes upon request from NPU and Parat in case the transfer should not be valid due to having taken place during a strike. At the same time, NAS gave a statement on how it would exercise its authority as a parent company towards all pilots in Norwegian who served from the European bases. Group seniority was one of the concepts introduced. NAS also guaranteed to keep a minimum of 687 pilot positions comprised by the pilot agreements in Norway, Sweden and Denmark.

(33) NAS responded to Parat's notice of action in a letter of 25 March 2015, maintaining that the purchase of pilot services did not constitute unlawful hiring of labour since "NAS purchases a complete service from the subsidiaries".

(34) The pilots brought an action against NAS and NAN on 4 May 2015. The cabin crew members brought an action against NAS 24 on June 2015.

(35) On 3 June 2015, a meeting was held with CAA Norway on the newly established NAR SSC. From the presentation at the meeting, it appeared that the group wanted to establish joint services across all the AOC companies, so that the AOC companies would have "a minimum of required functions". A follow-up letter from NAS to CAA Norway of 7 July 2015, stated that "the AOC companies will thus in the future mainly consist of the functions that must be in place to meet the requirements of aviation authorities and maintain operational control in the AOC companies."

(36) NAS and NAN asked for a suspension of the action until the group structure was in place. The district court, which heard the actions of the pilots and the cabin crew members jointly, refused to suspend the action, and gave judgment on 30 June 2016 concluding as follows:

> **"1. Norwegian Air Shuttle ASA is the employer of Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen, Halvor Vatnar, Marit Lindén, René-Charles Gustavsen, Anita Johannessen, Trude Mathisen, Kim Rossing Jensen and Mette Aarkvisla.**
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> **2. Judgment is given for Norwegian Air Shuttle ASA with regard to A's and B's claim.**
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> **3. Judgment is given for Norwegian Air Norway AS.**
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> **4. Norwegian Air Shuttle ASA are to pay costs of NOK 346,452 – threehundredandfortysixthousandfourhundredandfiftytwo – to Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen, Halvor Vatnar, Marit Lindén, René-Charles Gustavsen, Anita Johannessen, Trude Mathisen, Kim Rossing Jensen and Mette Aarkvisla, within two weeks of service of this judgment.**
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> **5. Norwegian Air Shuttle ASA is not awarded costs from A and B.**
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> **6. Norwegian Air Norway AS is not awarded costs."**

(37) NAS and NAN appealed against the district court's judgment to the extent it was not given in their favour. The employees appealed against the part of the judgment given for NAN, see item 3, and the part given for NAS with regard to A and B, see item 2.

(38) While the case before the court of appeal was being prepared, the restructuring of Norwegian continued.

(39) On 1 September 2016, an agreement was entered into between NAR and the AOC companies, called "frame service agreement". This agreement regulates the supply of personnel from NAR to the AOC companies.

(40) An “agreement for contracted activities” was also entered into on 1 September between NAR and the AOC companies, under which the AOC companies still have operational control and responsibility for the flying activities, as the aviation authorities require. Hence, the AOC companies are responsible towards the regulatory authorities.

(41) During the spring and the summer of 2017, more personnel and functions were transferred to NAR SSC. Recruitment, HR, project management, HES and salary payment are thus currently administered by NAR SSC.

(42) During the autumn of 2017, CSN and PSN were transferred to NAR, which makes NAR the current parent company for all pilots and cabin crew members in Norway, Sweden and Denmark.

(43) Thus, the case heard by the court of appeal differed from the case heard by the district court.

(44) On 25 January 2018, Borgarting Court of Appeal gave judgment concluding as follows:

> **"1. Judgment is given for Norwegian Air Shuttle ASA.**
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> **2. The appeal against the district court's conclusion, item 2, is dismissed.**
>
> **3. The appeal against the district court's conclusion, item 3, is dismissed.**
>
> **4. Each party covers its own costs in the district court and the court of appeal."**

(45) The pilots and the cabin crew members have appealed to the Supreme Court against items 1, 3 and 4 of the court of appeal's conclusion. The appeal is against the application of the law and some of the findings of fact. The Norwegian Pilots' Union, the Norwegian Confederation of Trade Unions and the Confederation of Vocational Unions have declared intervention for the appellants. The Confederation of Norwegian Enterprise has declared intervention for the respondents. The trade union Unio has made a written submission in accordance with section 15-8 of the Dispute Act.

(46) The arguments before the Supreme Court are mainly the same as those before the court of appeal, but the contention that the transfer of pilots from NAN to PSN in March 2015 was invalid because it took place during a labour dispute has been withdrawn. Written submissions have been made by a number of persons who hold or who have held management positions in the group, and by present and former pilots or cabin crew members.

(47) The appellants – *Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen, Halvor Vatnar, Anne Marit Breimyr Lindén, René-Charles Gustavsen, Anita Johannessen, Trude Mathisen and Kim Rossing Jensen* – contend:

(48) NAS must be considered the employer on special grounds, see section 1-8 subsection 2 of the Working Environment Act. The Working Environment Act operates with a functional concept of employer, where the responsibility is placed with anyone who has actually acted as employer and exercised employer functions. Despite the formal structural changes in the group transferring pilots and cabin crew members out of NAS, NAS is still exercising central employer functions. NAS is the only company in the group with an independent economy, and the formal limitation of responsibility as an employer has no basis in labour law.

(49) Alternatively, NAS is the employer because it has engaged in unlawful hiring of pilots and cabin crew members to cover its daily need for such labour. The hiring is in conflict with section 14-12, cf. section 14-9 subsection 1 (a) of the Working Environment Act. This concerns primarily the period up to 1 September 2016, during which NAS has admitted that it hired pilots and cabin crew members. The hiring was unlawful because it is not covered by any of the conditions in section 14-9 subsection 1 of the Working Environment Act. NAS has had a permanent and foreseeable need for labour, thus there has never been a basis for temporary hiring. An intra-group restructuring is not a basis for temporary hiring.

(50) Secondly, no contracting of crew services (*bemanningsentreprise*) – rather than mere hiring of workers – has been practiced even after 1 September 2016. The conditions for services contracts going beyond mere hiring of labour, as they are set out in the judgment in Rt-2013-998 (*Quality People*), are not met. CAA Norway's de facto acceptance of the practice must be based on criteria that, within the meaning of the Working Environment Act, make it more similar to hiring of labour than contracting of crew services.

(51) Based on the unlawful hiring of labour, the pilots and the cabin crew members are entitled to permanent employment in NAS, see section 14-14 of the Working Environment Act. The pilot are in addition entitled to permanent employment in NAN. It is not "clearly unreasonable" that they succeed in their claim for permanent employment. If the cabin crew members have been unlawfully hired also after 1 September 2016, they are in any case entitled to permanent employment under the four-year rule in section 14-13 subsection 4, see section 14-9 subsection 6 of the Working Environment Act. A judgment for permanent employment in NAS and NAN does not entail that the pilots' and the cabin crew members' employment in PSN and CSN ceases.

(52) The appellants have submitted this prayer for relief:

> **"1. Norwegian Air Shuttle ASA is to be declared the employer of Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen, Halvor Vatnar, Marit Linden, René-Charles Gustavsen, Anita Johannessen, Trude Mathisen and Kim Rossing Jensen.**
>
> **2. Norwegian Air Shuttle ASA is to pay costs in the district court, the court of appeal and the Supreme Court to Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen, Halvor Vatnar, Marit Linden, René-Charles Gustavsen, Anita Johannessen, Trude Mathisen and Kim Rossing Jensen.**
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> **3. Norwegian Air Norway AS is to be declared the employer of Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen and Halvor Vatnar.**
>
> **4. Norwegian Air Norway AS is to pay costs in the district court, the court of appeal and the Supreme Court to Alf Wilhelm Villum Hansen, Oddbjørn Ketil Holsether, Berndt Anders Salmonsson, Hans Joachim Strøm, Trond Erik Torgersen and Halvor Vatnar."**

(53) The intervener *the Confederation of Vocational Unions* mainly endorses the appellants' contentions and emphasises that a correct understanding of Working Environment Act's concept of employer must imply that NAS is still the employer of the pilots and the cabin crew members. The fact that a business transfer has taken place does not change that.

Judgment may be given declaring that NAS is the employer without it being necessary to specify what this entails.

(54) The Confederation of Vocational Unions has submitted this prayer for relief:

> **"The respondents and the respondents' intervener are jointly and severally to pay costs in the Supreme Court to the Confederation of Vocational Unions (YS)."**

(55) The interveners *the Norwegian Confederation of Trade Unions* and *the Norwegian Pilots' Union* also mainly support the appellants' contentions. They emphasise that a corporate restructuring moving the employees downwards in the group structure while they continue to perform the same work under the parent company's control, in itself constitutes special grounds for declaring the persons concerned employed by both the parent company and the subsidiary to which the employees have been transferred. Such a restructuring diminishes the rights of the employees.

(56) The Norwegian Confederation of Trade Unions and the Norwegian Pilots' Union have submitted this prayer for relief:

> **"The respondents and the respondents' intervener are jointly and severally to pay costs in the Supreme Court to the Norwegian Confederation of Trade Unions and the Norwegian Pilots' Union."**

(57) The respondents – *Norwegian Air Shuttle ASA and Norwegian Air Norway AS* – contend:

(58) The corporate structure of Norwegian is necessary to ensure sustainable development in a market characterised by bilateral and multilateral aviation agreements regulating landing and overflight rights. The restructuring, including the transfer of the pilots and the cabin crew members, was required to handle the large aircraft purchases, the international growth in the group, the establishment of several AOC companies in various countries and the need for a cost-efficient operation without unnecessary duplication of resources and functions.

(59) Obtaining an unspecified judgment declaring that a company is the employer is not possible. Since the concept of employer is relative, one may only obtain a judgment for employer's responsibility with regard to defined functions.

(60) In any case, NAS cannot be regarded as an employer on special grounds. In a business transfer, the employment relationship is automatically transferred to the new owner. The employees did not exercise their right of reservation in connection with the transfers, and it has not been disputed that they are currently employed in PSN and CSN. Since the transfers, NAS has not acted as employer. It is PSA and CSN that, together with NAR SSC, exercise the central employer functions. Exercise of group management does not involve exercise of employer functions. Contracting of crew services precludes employer's responsibility on special grounds.

(61) It is not disputed that pilots and cabin crew members were hired out to NAS until 1 September 2016, but the hiring was temporary and thus lawful, see the Working Environment Act section 14-12, cf. section 14-9 subsection 1 (a). Contrary to NAS's original schedule, the system of contracting crew services was not implemented until 1 September 2016, but it was all along clear that the mere hiring of workers would be

replaced by such a system. It is undisputed that the contracting system was in place from 1 September 2016, as the conditions for this are summarised in the Supreme Court judgment Rt-2013-998 (*Quality People*). Contracting of crew services is compatible with the AOC companies' responsibility towards CAA Norway.

(62) If the Supreme Court should nevertheless find that the hiring was unlawful, a judgment declaring permanent employment would be clearly unreasonable, see the Working Environment Act section 14-14 subsection 1 second sentence. NAS will not be operating the flying activities in the future, and it is currently NAR and its subsidiaries that have the required labour to supply pilot and cabin crew services to Norwegian's AOC companies. NAS and NAN no longer have the required resources to conduct the flying activities with their own personnel. The hiring practice ended a long time ago. Also, a judgment declaring permanent employment with the hirer would entail that the employment with the supplier ceases.

(63) Norwegian Air Shuttle ASA has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. Alf Hansen, Oddbjørn Holsether, Anders Salomonsen, Joachim Strøm, Trond Torgersen, Halvor Vatnar, Marit Linden, René-Charles Gustavsen, Anita Johannessen, Trude Mathiesen, Kim Rossing Jensen, the Norwegian Confederation of Trade Unions (LO), the Norwegian Pilots' Union and the Confederation of Vocational Unions (YS) are jointly and severally to cover Norwegian Air Shuttle ASA's costs in the Supreme Court."**

(64) Norwegian Air Norway AS has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. Alf Hansen, Oddbjørn Holsether, Anders Salomonsen, Joachim Strøm, Trond Torgersen, Halvor Vatnar, the Norwegian Confederation of Trade Unions (LO), the Norwegian Pilots' Union and the Confederation of Vocational Unions (YS) are jointly and severally to cover Norwegian Air Norway AS's costs in the Supreme Court."**

(65) The intervener *the Confederation of Norwegian Enterprise* mainly supports the respondents' contentions and has emphasised that there is no basis for an extended interpretation of the concept of employer in group relationships. Such an extended interpretation has previously been rejected by the legislature.

(66) The Confederation of Norwegian Enterprise has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. Alf Hansen, Oddbjørn Holsether, Anders Salomonsen, Joachim Strøm, Trond Torgersen, Halvor Vatnar, Marit Linden, René-Charles Gustavsen, Anita Johannessen, Trude Mathiesen, Kim Rossing Jensen, the Norwegian Confederation of Trade Unions (LO), the Norwegian Pilots' Union and the Confederation of Vocational Unions (YS) are jointly and severally to cover the Confederation of Norwegian Enterprise's costs in the Supreme Court."**

(67) *My view on the case*

(68) As it will have appeared from my presentation of the development in Norwegian and of the court proceedings, the group has been through a lengthy restructuring process. The appellants claim that NAS – and for the pilots' part also NAN – "is" their employer. They have asked for a judgment clarifying the current employment relationship, and not the former.

(69) The central issue is then whether we are dealing with regular contracting in the form of supply of crew services, or whether we are still dealing with mere hiring of workers. Since the group intends to keep the current system permanent, the latter will be a breach of the provisions in the Working Environment Act on lawful hiring of workers. If contracting of crew services is being practiced, the next question is whether NAS is still the employer on "special grounds" alongside PSN and CSN since NAS is still exercising employer functions. In that case, yet another question arises as to whether a judgment can be given declaring in general terms that NAS is the employer.

(70) Furthermore, the pilots and the cabin crew members contend that also a previous period of hiring of workers from the subsidiaries to NAS entitles them to employment in NAS. On the same grounds, the pilots contend that they are also employed in NAN.

(71) Before the Supreme Court, the pilots and crew members have built their arguments in an almost opposite order. However, even if one starts by asking whether NAS, against the background of the situation before the restructuring, is still the employer alongside PSN and CSN, one must consider whether what is now being practiced is contracting of crew services rather than mere hiring of workers, and the implications thereof if it is. I will therefore start by examining this issue.

(72) The cabin crew members have not disputed the lawfulness of their transfer from NAS to CSN. Before the Supreme Court, the pilots have also accepted that their transfer from NAN to PSN was lawful. One must then, in accordance with section 16-2 of the Working Environment Act, bear in mind that former employers' rights and duties have been transferred to the new employers. For this reason also, I find it appropriate first to examine whether we are dealing with contracting of crew services or mere hiring of workers. Although the employees contend that the business transfers implied a disloyal evasion of NAS's employer's responsibility, neither the cabin crew members nor the pilots want a judgment entailing that they are not employed in CSN or PSN. The question of disloyalty thus only arises in the determination of whether NAS is still the employer in addition CSN and PSN.

(73) *Contracting of crew services or hiring of workers?*

(74) So, I will start by assessing whether we now – after 1 September 2016 – are dealing with contracting of crew services or mere hiring of workers, and make some general remarks on the hiring of workers and the demarcation against the provision of more structured services.

(75) Section 27 of the repealed Employment Act 27 June 1947 No. 9 contained after an amendment in 1971 a conditional prohibition against hiring out of labour, defined as "a practice of placing own employees at a principal's disposal when these are subject to the direction of the principal". I will not go further into the Act's conditions for the prohibition

to apply. The preparatory works to the provision, Proposition to the Odelsting No. 53 (1970–71), address the demarcation between hiring out of labour and regular contracting i.e. supply of services not covered by the provision. On page 3, the Proposition presents it as "[a] pronounced and completely decisive hallmark of regular contracting … that the contractor is actually directing the work, i.e. that he himself or through someone who is employed by him, manages, distributes and controls the work to be carried out". This is also what is stated more briefly in the provision itself. The Proposition also states that if an assignment is to be considered regular contracting, the assignment must be clearly defined in advance. It is not sufficient that new limited work tasks are decided from day to day.

(76) By an Act of 4 February 2000 No. 10, the conditional prohibition against hiring out of labour was continued in section 55 K of the Working Environment Act 1977, now linked to the prohibition against temporary employment in section 58 A of the same Act: Hiring of labour was permitted to the same extent as temporary employment. In Proposition to the Odelsting No. 70 (1998–1999) page 41, it is stated that the Ministry "concludes that although hiring of labour is a new concept in the Working Environment Act, it is, through its content, meant to cover the same situation as hiring out of labour, as the concept is generally described in section 27 of the current Employment Act", and that "[t]he proposed regulation of hiring of labour is also not meant to change the demarcation between hiring of labour and regular contracting".

(77) Proposition to the Odelsting No. 70 (1998–1999) is based on Norwegian Official Report 1998: 15 Employment exchange and hiring of labour, a report issued by the so-called Blaalid Committee. The Blaalid Committee states the following on page 46 on the demarcation between hiring of workers and regular contracting based on section 27 of the Employment Act:

> **"The Act describes the hiring out of labour as**
>
> > **'placing own employees at the disposal of a principal when these are subject to the principal's management direction'.**
>
> **In many cases, nevertheless, it may be difficult to distinguish between contracting of services falling outside the scope of section 27 of the Employment Act and mere hiring out of labour. Below are aspects in the assessment of whether one is dealing with such contracting or hiring out. As a starting point, it is contracting when**
>
> - **the management of the work lies with the contractor and not with the principal,**
> - **the number of workers used in the assignment is irrelevant to the principal,**
> - **a fixed price has been agreed,**
> - **the assignment is clearly limited,**
> - **the contractor has an independent responsibility for the result, and**
> - **the contractor uses its own materials and tools."**

(78) In the current Working Environment Act, hiring of workers is regulated in section 14-12. Subsection 1 is of relevance here:

> **"Hiring of workers from undertakings whose object is to hire out labour shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 14-9, subsection 1 (a) to (e).**

(79) In Proposition to the Odelsting No. 49 (2004–2005) page 334, it is set out that the

provision is a continuation of section 55 K in the Working Environment Act 1977. Before the current Act entered into force, there was a change of government, and the new government – Stoltenberg II – managed before the implementation to adopt certain amendments to the Act, see Proposition to the Odelsting No. 24 (2005–2006). These amendments, however, did not concern the content of the very concept of hiring of workers. Thus, the understanding of the demarcation between hiring and regular contracting that the preparatory works to previous Acts suggest, still applies. This was also the conclusion in the Supreme Court judgments Rt-2002-1469 (*Eksakt Regnskap*) on page 1475 and Rt-2013-998 (*Quality People*) in paragraph 50, which include the same extract from the Blaalid Committee's report. In the latter judgment, it is stressed that the list is not meant to be exhaustive, but that it presents the central aspects of the assessment. The following is stated in paragraphs 59 and 60:

> **"Although the demarcation – the application of the law to the specific facts – may be difficult in the individual case, the criteria that currently determine whether one is faced with regular contracting are well known in Norwegian case law. In the overall assessment to be made, the essential must be which of the parties is responsible for the management and the result of the work that is to be carried out. The distinction between regular contracting and mere hiring of workers cannot be determined by whether the assignment is to supply a product or a continuing service.**
>
> **I assume that the criteria that must otherwise be met before the supply of staff, after an overall assessment, can be regarded as regular contracting, may under the circumstances capture attempts of pure evasion."**

(80) This means that we are not facing multiple equal and cumulative conditions when establishing whether we are dealing with contracting of crew services, rather than mere hiring of labour. An overall assessment must be made where the central criteria are responsibility for the management and the result of the work that is being carried out. The other criteria mostly serve as a defence against evasion attempts.

(81) I will now consider whether the supply of crews from NAR to NAS and NAN constitutes hiring of workers or regular contracting in the current factual and contractual situation. The central question is as mentioned *who is responsible for managing the work*. To determine this, a natural starting point would be the description of the assignment found in the relevant agreements, although the performance of the agreements may of course lead to a different conclusion. The services are described in two frame service agreements entered into on 1 September 2016 between NAS and NAN on one side and NAR on the other. The two agreements are for all practical purposes identical for the parts that are of relevance to the case at hand. The assignment is described as follows in clause 3.1:

> **"Supplier [NAR] shall deliver Crew Services to Operator [NAS/NAN]. Crew Services is the provision of fully planned, trained and qualified Crew Members to operate on Operator's scheduled commercial flights. Supplier undertakes, at all times during the term of this Agreement, to support Operator's continuing flight operation by planning and providing a sufficient number of qualified Crew Members. To sustain its service, Supplier will ensure the availability of required number of Crew Members by recruiting and employing Crew Members in Supplier, or employing Crew Members in own affiliated resource companies, or by hiring Crew Members from third party agencies.**
>
> **Through its service, Supplier is responsible for advising Operator on required levels of Crew Members though forecasting and providing guidance on resource-related matters. Furthermore, Supplier is responsible for the legal and transparent planning of Crew Member duties onto rosters and, as required, re-plan duties to ensure all flights are**

covered in due time according to Operator's scheduled program.

Supplier is responsible for ensuring that Crew Members on duty are legal and qualified to operate in accordance with applicable legislation and Operator's specific requirements. Supplier shall ensure that incoming Crew Members are qualified to operate on commercial flights, and ready to undergo Operator's specific training.

The Crew Services shall be provided in accordance with EASA OPS ORO. GEN 105, and regulations from CAA, Operator's manual, company rules, other relevant crew agreements, and in relation to each service as further specified in Clause 3.2 to 3.10."

(82) Clause 3.1 of the agreements describes an obligation not only to supply a certain number of workers, but a more comprehensive service. NAR is to supply trained and qualified crew members at the right place at the right time for all flights in accordance with the scheduled flights. Hence, NAR is to ensure that the crew members are professionally qualified and adequately trained for the relevant aircraft. It also NAR that is to set up rosters, i.e. work schedules showing turns of duty for pilots and cabin crew members, and it is NAR that makes necessary adjustments for all flights to have the crew required. It is also expressly stated in clause 3.2.4 that NAR selects the pilots and cabin crew for each flight. All this clearly suggests that we are dealing with contracting of crew services, and not mere hiring of workers.

(83) However, under third paragraph of clause 3.1, NAS and NAN are responsible for "Operator's specific training". This is training and checkout according to AOC-specific requirements, which may vary to some extent depending on the AOC for the same type of aircraft. Clause 3.2.4 also gives NAS and NAN a right to have individual pilots and crew members replaced if they do not meet the companies' quality requirements or fail to comply with the companies' rules or instructions. Further rules on NAS's and NAN's control are provided in agreements for contracted activities, also entered into with NAR on 1 September 2016. Here, it is stated in clause 5 that the operator – NAS and NAN – at all times must keep active control of and responsibility for all contracted activities. Active control is defined as "being actively involved in the accomplishment of individual contracted activities to the level that the contracting organisation can satisfy itself that these contracted activities are carried out correctly".

(84) These provisions may suggest that we are dealing with hiring of labour. However, in my view, it would be more appropriate to consider them a reflection of the right of control that also a principal must have. Proposition to the Odelsting No. 53 (1970–71) states in an appendix that "[an] independent management by the contractor …. does not prevent the principal from controlling the work result in the usual manner, regardless of whether the control is exercised while the work is being carried out or after the work has been completed". In my view, controlling that personnel carry out their work according to regulatory requirements and with the quality towards the customers that the principal demands may in this case be characterised as controlling the "work result". The requirements are essential for the content of the service that NAS and NAN are to deliver to their customers – the passengers – and for the companies to keep their AOCs.

(85) The principal's control, although mandatory under CAA rules, may be so detailed and direct that one must conclude that it is the principal that manages the work in practice. Such an active and direct control may however not be derived from the contracts. Requirements to remove crew members must according to clause 3.2.4 of the agreements be presented to NAR, which will make the necessary arrangements. Under clause 3.2.3,

NAR makes all decisions on employments and dismissals and determines the salaries and terms of employment. It is true that NAS and NAN, through the requirement of completed AOC-specific training and checkout, indirectly influence who may be permanently employed, and clause 3.2.3 regulates to some extent the minimum requirements for pay and working conditions. The general impression is, nevertheless, that the agreements concern overall control rather than direct management of the day-to-day performance of the work.

(86) The agreements say little about the performance of the actual flights. Under sections 6-1 and 6-3 of the Aviation Act, the captain holds the highest authority on board. The appellants have emphasised that the captain represents the AOC company, and that he or she conducts the onboard management in that capacity. According to a written statement from Guro Poulsen, vice president, crew management in NAR, during flights, the pilots are subject to the chief pilot officer in the AOC companies. The chief pilot officer is in turn subject to the AOC companies' director of flight operations, who has the overall responsibility for safety on board. This follows naturally from the AOC companies' responsibility for safe flights. Furthermore, the companies' operational manual, part A clause 1.5.1, sets out that all flying personnel are subject to the company's orders and regulations and that they must act exemplary and remember that they represent the company towards the general public and the customers.

(87) This may also suggest that NAS and NAS manage the work during the flights. But as far as I can understand, no such management is normally conducted by the AOC companies – or NAR – during the individual flight. Then, the personnel are in practice left to themselves, while they, of course, must comply with the rules and guidelines drawn up in advance. This applies regardless of whether the guidelines are given by the AOC companies or by NAR.

(88) As mentioned, NAS and NAN are set up as "minimum AOCs". In NAS, there are allegedly 27 persons involved with the AOC work, of whom 22 are directly employed in the company. The regulatory minimum number of crew members is 25. Obviously, with the number of flights every day this is not sufficient for any work management worth mentioning to be conducted on each flight. It is primarily in unforeseen events that the captain's subordination to the chief pilot officer becomes relevant. In comparison, around 200 persons in the NAR structure work with planning and follow-up of crews.

(89) The pilots and the cabin crew members have emphasised that no application has been made for a regulatory approval of the employment of pilots and cabin crew members in separate companies rather than directly in the AOC companies responsible for the flights. However, it is clear that CAA Norway knows that the group is operated with "minimum AOCs" and with flying personnel employed in separate companies. It has not been contended that such an approval is required by law; the contention is rather that the silent acceptance must be due to an understanding of the AOC companies' control and influence over the crews that entails hiring of workers under the Working Environment Act, and not contracting of crew services. However, the Supreme Court must consider for itself the employment law issues of the case based on the evidence presented.

(90) Nor can I see that NAS and NAS on one side or NAR on the other in any other way actually act in a manner suggesting that the first-mentioned companies conduct the real work management. Under NAS and NAN, there is a "chief pilot watch" consisting of

experienced pilots appointed by the respective chief pilot officers. These groups are to give guidance to other pilots, but primarily in unusual situations. And it concerns guidance, and not operational management. PSN, on the other hand, has a pilot manager who is the contact point for pilots in personnel matters.

(91) A number of the NAR services under the two agreements, including most of the planning work, are delivered by NAR SSC, and not by PSN or CSN. This makes one question whether permanent hiring of workers exists between NAR on one side and PSN and CSN on the other in conflict with the Working Environment Act. However, this is not for the Supreme Court consider, and I cannot see that it helps determining whether contracting of crew services or hiring of labour is being practiced between NAS and NAN on one side and NAR on the other. The parties have both before the court of appeal and the Supreme Court stated that they wish to find a solution internally in the NAR part of the group once the present dispute has been resolved.

(92) Against this background, I conclude that NAR is conducting the day-to-day management of the work carried out by the pilots and the cabin crew. As already mentioned, this strongly suggests that we are dealing with contracting of crew services rather than mere hiring of workers.

(93) I find that this review also shows that the requirement that *the assignment must be clearly defined in advance* has been met. It is true that clause 4 of the agreements sets out that the agreements – orders – entered into on the personnel demand for each winter and summer program, can be updated in accordance with NAS's and NAN's needs during the relevant agreement term. The fact that the agreements allow certain adjustments along the way can however not disqualify them from being agreements on contracting of crew services rather than agreements on hiring of workers. Changes during the agreement term are usual also in other areas in connection with contracting.

(94) Another important criterion is *who is responsible for the result* of the work efforts. As I have mentioned, it follows from clause 3.1 of the agreements that NAR is responsible for ensuring qualified crews for all flights. This means that NAR must handle the situation and find a replacement if, for instance, a pilot or a cabin crew member declares "not fit for flight". In clause 5.1, it is set out that in the event of delays or cancellations "due to Crew Members within the control of Supplier"; i.e. NAR, then NAR is to compensate NAS or NAN for refund payable to the passengers. It is also set out that the parties agree that this is a fair price adjustment due the reduced quality of the delivery. Clause 11.6 sets out that neither NAS nor NAN is liable for any personal injury or death inflicted on NAR's employees. Moreover, NAR is to indemnify NAS and NAN against any claims made against them in connection with such loss, unless NAS or NAN has acted negligently. Hence, NAR has a clear responsibility for ensuring that the result of the work efforts is in accordance with the agreement.

(95) The central conditions for considering NAR's supply of crew to NAS and NAN as contracting of crew services rather than mere hiring of workers, are thus met. I cannot see that the other aspects emphasised in preparatory works and case law can give any other result.

(96) Most striking in this regard is that NAS and NAN *provide the vital equipment* used during the flights – the aircraft. In what I have quoted from the Blaalid report, it appears that in a regular contracting relationship, the contractor often provides its own materials and tools. Thus, it is not an essential condition. Passenger aircraft, which for financing purposes have been moved to separate companies, are rather atypical equipment. One must also take into account the infrastructure provided by NAR to plan and administer timely delivery of ready crews for all flights. Within the scope of the agreement entered into, it is more natural to consider this to be "the equipment". Thus, this cannot lead to a different conclusion.

(97) *The consideration for the services delivered* under the frame service agreement is fixed under clause 4.1 as part of negotiating the orders for pilots and crew for the individual summer and winter programs. Further guidelines on how to estimate the consideration are not given, but according to the judgment of the court of appeal, a "cost-plus model" has been used. If changes are made to the order, the consideration is adjusted accordingly. Hence, it is not so that the services are paid as billed, which would have suggested mere hiring of workers. As set out in the appendix to Proposition to the Odelsting No. 53 (1970–71) pages 23–24, payment as billed does not preclude regular contracting.

(98) *Who determines the number of personnel* on each assignment may also be relevant – in a contracting relationship, it is normally the service supplier. It is NAS and NAN that decide the number of pilots and cabin crew members required on each flight, and how many ready crews that are to be supplied. The size of the crew on each flight will however depend on the type of aircraft and regulatory requirements; in practice, the principal does not have much leeway. The number of ready crews is a point of negotiation, but also here, my understanding is that regulatory requirements for resting time etc. entails that the leeway is small once the routes have been scheduled.

(99) Against this background, I have concluded that the system being practiced between NAS and NAN on one side and NAR on the other is contracting of crew services rather than mere hiring of workers.

(100) *NAS as employer on "special grounds"?*

(101) Pilots and cabin crew members have also contended that even if a contracting relationship should be deemed to exist, NAS must be regarded as their employer, alongside PSN and CSN.

(102) Section 1-8 subsection 2 of the Working Environment Act defines "employer" as "anyone who has engaged an employee to perform work in his service". The following is stated regarding the concept in Proposition to the Odelsting No. 49 (2004–2005), on page 76:

> **"The Ministry proposes like the majority of the Employment Law Committee that the current concept of employer is continued. Although there has been a change in working life since the Act was adopted along with new ways of organising the work, this does not suggest a general extension of the concept of employer. The applicable definition of employer in section 4 of the Working Environment Act and related case law is in most cases good and to the point in terms of where the real decision-making authority lies in employment matters. The Ministry concludes that it, under applicable law, must be emphasised, among other things, who has acted as de facto employer and exercised employer functions. Also, under applicable law, the employer's responsibility may, after an individual assessment, be placed with several entities if special grounds so suggest, for**

instance that others have in fact acted as employer and exercised employer functions."

(103) Hence, the concept of employer is functional. It must "among other things" be emphasised "who has acted as de facto employer". The employer's responsibility "may" be placed with several entities if "special grounds so suggest", for instance if entities other than the formal employer have acted as employer and exercised employer functions. The possibility of having several employers on special grounds has emerged through case law and is summarised as follows in the Proposition, on pages 74–75:

> **"In case law, it has been concluded that several legal entities may have employer's responsibility if the employer functions have been divided between them. The cases on shared employer's responsibility have been connected to employment protection rights and the duty to offer other suitable work under section 60 (2). To the extent case law indicates divided employer's responsibility, there have been special grounds for that. Such special grounds have mainly been that several employers have been agreed, that several companies have acted as de facto employer and exercised employer functions, or that the employment relationship is contractually unclear."**

(104) In this case, it has clearly not been agreed to operate with several employers. The agreements' clause 3.2.2 sets out that "Supplier [NAR] or any contractors to Supplier shall be employer of the Crew Members and shall bear all responsibility of an employer". Clause 3.2.3 sets out that "Operator is hence not employer of any Crew Member, and consequently, not entitled to take decisions regarding employment or termination of any Crew member employment contracts". The formal and economic parts of the employer's responsibility are thus clearly NAR's.

(105) As previously mentioned, business transfers have been carried out whose lawfulness has not been disputed before the Supreme Court. The appellants have emphasised that a business transfer does not necessarily involve a complete transfer of the employer's responsibility. This is justified by the non-concurrence of the concept of 'undertaking' in the Working Environment Act's chapter on business transfers and the concept of 'employer' in section 1-8, although they often concur in practice. However, under section 16-2 subsection 1 of the Working Environment Act, a former employer's rights and duties under employment agreements or employment relationships at the time of the transfer are transferred to the new employer. Hence, in principle, an automatic and absolute change of debtors takes place, see Evju *Virksomhetsoverdragelse og rettsvirkninger* [Business transfer and legal effects] in *Arbeidsrett, utvalgte artikler* [Employment law, selected articles], page 451. If the transferring company after an individual assessment must be regarded as employer "on special grounds" after the transfer, it is more natural to consider it a reestablishment.

(106) I mention as a matter of form that a business transfer can also take place within a group, see the Supreme Court judgment Rt-2006-71.

(107) Thus, the question is first whether NAS in fact is still acting as employer for the pilots and cabin crew members.

(108) Central in case law referred to in the preparatory works to the Working Environment Act, is the Supreme Court judgment Rt-1990-1126 (*Wärtsilä*). That case concerned the dismissal of an employee who was formally employed in a subsidiary, while the parent company had kept central employer functions. The subsidiary paid his salary, and his pension rights were to equal those he had in the parent company. The employee's salary

and pension terms in the subsidiary were however regulated in an agreement between him and the parent company. It appeared from the agreement that he had to comply with the instructions by the parent company's management at all times. Indirectly, the parent company could dismiss him from the subsidiary by terminating this agreement, and it was the parent company that gave him the informal dismissal. After an overall assessment, the Supreme Court found that the parent and the subsidiary were "joint employers".

(109) Also in Rt-2012-983 (*Stena Drilling*), the Supreme Court found that the de facto employer was an undertaking other the formal employer, explaining in paragraph 104 that the employer functions "for all practical purposes" did not lie with the formal employer. The employees thus had a right to join the transfer from the company in which they were not formally employed to a new company.

(110) Generally, it appears that case law, and the quoting thereof in the preparatory works, assumes that joint employer's responsibility is a narrow exemption rule – it takes a lot before an undertaking other than the formal employer can be regarded as sharing the employer's responsibility.

(111) The parent company in the *Wärtsilä* case and the relevant company in the *Stena Drilling* case exercised considerably more employer functions than what NAS has exercised towards pilots and cabin crew members. I refer to my discussion whether we are dealing with contracting of crew services or mere hiring of workers and my conclusion that NAS's control over the pilots and the cabin crew members' work does not extend beyond what a principal may have in a contracting relationship. The same characteristics imply that NAS can also not be said to have exercised employer functions other than to a marginal extent. As the criteria for distinguishing between regular contracting and hiring of labour are formulated, it is difficult to imagine the co-existence of a contracting relationship and a joint employer's responsibility for the contractor and the principal.

(112) The appellants have pointed at the guarantees that NAS has issued as the parent company directly or indirectly in various collective bargaining processes on the number of employed pilots and cabin crew members, claiming that this means that NAS holds the central employer function of determining the number of employees. As I interpret the guarantees, they are guarantees for a minimum number of employees in the subsidiaries, and the group's strategy was an expansion of the business. I therefore find that they cannot be given much weight in this regard.

(113) Thus far, I do not see any basis for regarding NAS as employer alongside PSN and CSN on "special grounds".

(114) However, the Norwegian Confederation of Trade Unions in particular has argued that the case concerns intra-group restructuring. The Confederation argues that the moving of the employees downwards in the group structure while they continue to carry out the same work under the parent company's control must constitute special grounds for joint employer's responsibility. Also, NAS is the only company in the group with its own economy since it receives the income from the flying activities, while the other companies, including the companies in the NAR structure, are dependent on the consideration they receive from NAS.

(115) A part of the mandate of the Group Committee drafting Norwegian Official Report 1996:

6, Employees' position in a group structure etc., was to "consider whether and to which extent an adjustment of applicable law to various group models and organsations may be made so the parent company in certain situations becomes responsible for the subsidiaries' obligations towards the employees (shared employer's responsibility)". The majority of the Committee proposed a supplement to the definition of employer in section 4 of the then Working Environment Act. The supplement would entail that "also any other undertaking that may have a controlling interest in the employer", would be considered an employer by law. In the comments to the proposal, it was held that many groups are organised with a parent company that is not only a holding company, but also exercises general management functions for the group as a whole. That is the case for NAS.

(116) However, the majority's proposal was met with protest during the consultation round and was not implemented. I have already quoted from Proposition to the Odelsting No. 49 (2004–2005), stating on page 76 that although there has been a development in the ways of organising the work, one intended to continue the concept of employer in its current form, based on existing case law. Furthermore, the Ministry stated on the same page:

> **"A general and 'automatic' extension of the employer's responsibility to include entities other than the primary employer, which is conditional on 'controlling interest' or similar, would be a very difficult provision to handle in practice. There exists a vast variety of business structures, and the decision-making channels may be complex and not necessarily transparent. Thus, it may often be difficult to establish when, and by whom, controlling interest is being exercised over an undertaking."**

(117) It is true that the submission from the appellants and the Norwegian Confederation of Trade Unions is based on a somewhat narrower rule, as it concerns restructurings where the employees continue to carry out the same work as before, still under the parent company's control. But such a rule will also be captured by the arguments given in the Proposition for turning down the proposal of the majority of the Group Committee.

(118) Proposition to the Odelsting No. 49 (2004–2005) was made by the Bondevik II government. The amendments implemented by the Stoltenberg II government to the Working Environment Act before it entered into force, did not include the concept of employer. I refer to Proposition to the Odelsting No. 24 (2005–2006).

(119) As commented by the Supreme Court in Rt-2013-998 (*Quality People*) paragraph 63, new ways of organising business activities may challenge the objective of the Working Environment Act of securing safe employment conditions. Also, it is so that moving of employees to other companies within the group has consequences for their right to information, cooperation and codetermination under the Basic Agreement and the Working Environment Act. Given the clear legislative statements relating to the current concept of employer, it must however be up to the legislature to decide whether a rule should be given such as the one the appellants have promoted.

(120) Against this background, I maintain that the appellants cannot succeed with their contention that NAS is still their employer based on the principle of joint employer's responsibility in certain situations.

(121) The appellants have also argued in favour of joint employer's responsibility based on the non-statutory rules on *lifting of the corporate veil.* However, I have difficulties imagining how this may add anything to the rule on joint employer's responsibility on special

grounds, which I have just discussed. It is natural to consider this as a rule on lifting of the corporate veil based on employment concerns.

(122) Finally, the appellants have argued that NAS is employer based on *the duty of loyalty in contractual relationships.* In the appellants' view, the transfer of the pilots, first from NAS to NAS, and then on to PSN, and the transfer of cabin crew members from NAS to CSN, constitute disloyal conduct by NAS towards the employees as contractual counterparties. However, the parties agree that the strong growth in Norwegian called for a restructuring. Changing the existing organisation is thus not held to be disloyal in itself. The parties disagree as to whether the structure chosen was the best, and not least whether the timing was influenced by the dispute with the employees. My first comment to this is that the courts should be careful about reviewing what are basically commercial assessments of how the business is best structured. These considerations fall naturally under the employers' management prerogative. Secondly, I have difficulties seeing on what legal basis NAS today can be considered the employer based on what may have been a disloyal timing of the implementation of some parts of the restructuring.

(123) Consequently, it is not necessary for me to consider whether it would have been possible at all to obtain a judgment declaring that NAS generally "is the employer" – that is, alongside CSN and PSN. It is stated in Hotvedt, *Arbeidsgiverbegrepet* [the concept of employer] on page 403 that a "limited joint employer's responsibility" is the most accurate description of what in Proposition to the Odelsting No. 49 (2004–2005) is referred to as "shared" employer's responsibility and in the *Wärtsilä* judgment as "joint" employer's responsibility. Moreover, case law seems to be limited to cases where the question in practice only concerned certain parts of the employer's responsibility. A judgment stating that several undertakings may have the position of employer without a further specification of the matters this involves seems raise several questions as to the legal effects of such a judgment.

(124) *Employment based on unlawful hiring of workers during the period until 1 September 2016?*

(125) As previously mentioned, the cabin crew members were transferred from NAS to CSN with effect from 28 March 2014, and the pilots were transferred from NAN to PSN with effect from 6 March 2015. NAS and NAN have acknowledged that pilots and cabin crew members from these dates and until 1 September 2016 were hired from CSN to NAS and from PSN to NAS and NAN. The reason is that the agreements entered into on supply of pilot and cabin crew services in connection with the business transfers were not adequately implemented in practice. But NAS and NAN claim that the hiring was temporary and thus lawful, because the sole intention was to establish a contracting relationship. The companies also claim that if the hiring should be deemed unlawful, it would nevertheless be clearly unreasonable if pilots and cabin crew members were now to be entitled to permanent employment in NAS, and the pilots also in NAN.

(126) Section 14-12 subsection 1 of the Working Environment Act states, as mentioned, that hiring of workers from an enterprise whose object is to engage in the hiring out of workers, is permitted to the same extent as temporary employment can be agreed under section 14-9 subsection 1. In this case, the relevant provision is section 14-9 subsection 1 (a) – from 1 January 2019, section 14-9 subsection 2 (a) after the implementation of of Act 22 June 2018 No. 46 – on work "of a temporary character".

(127) Until the amendment by Act of 24 April 2015 No. 20, section 14-9 subsection 1 (a) read: "when the nature of the work so requires and the work differs from what is ordinarily carried out in the undertaking". The amendment was not meant to imply any substantive changes, thus earlier case law is still relevant, see Proposition to the Storting 39 (2014–2015), page118.

(128) Section 14-14 of the Working Environment Act sets out that in the event of a breach of section 14-12, the court shall, if so demanded by the hired employee, decide that the hired employee has a permanent employment relationship with the hirer. In "special cases" the court may nevertheless, if so demanded by the hirer, decide that the hired employee does not have a permanent employment relationship with the hirer if, after weighing the interests of the parties, it finds that this would be "clearly unreasonable".

(129) Before I continue, I note that section 27 of the Employment Market Act has a provision stating that an undertaking cannot hire out an employee to one of the employee's former employers before six months have passed since the employee left that former employer. However, this provision is directed towards the supplier. Norwegian Official Report 1998: 15 Employment exchange and hiring of workers, presents the historical background for the prohibition on pages 64–65: The intention was to prevent suppliers from recruiting employees by offering them better salaries, and then hire them out to their previous employer, that now was forced to pay more for the labour than before. In any case, it is stressed in the preparatory works to the Act, Proposition to the Odelsting No. 62 (2003–2004) page 40, that the Working Environment Act and the Employment Market Act are different regulatory regimes. The provision is thus not applicable to the question we are dealing with in the case at hand. As pointed out by Fougner et al. in *Omstilling og nedbemanning* [Restructuring and workforce reduction], 3rd edition, page 127, it can also be questioned whether the provision applies in intra-group restructurings, particularly in restructuring carried out under rules on transfer of undertakings.

(130) In the preparatory works to the provision in Working Environment Act 1977 corresponding to the current section 14-9, Proposition to the Odelsting No. 50 (1993–1994), it is stated on page 179 that "uncertainty relating to potential future reduction in workforce, restructuring or similar will [not] in itself provide basis for time-limited employment". The same perception of the law is presented in Proposition to the Odelsting No. 49 (2004–2005) page 202 and repeated word for word in Proposition to the Storting 39 (2014–2015) page 103. Here, it is held that "it will not be possible to temporarily employ … if there is a risk of a future reduction in the workload, with a view to restructuring or similar".

(131) If these statements are interpreted strictly according to their wording, they could suggest that section 14-9 subsection 1 (a) is meant to imply that a restructuring of an undertaking can never provide basis for work of a "temporary nature". However, I find that the statements have rather to do with the uncertainty relating to future workload that may arise also in connection with restructurings.

(132) It is difficult to see why there should be a total prohibition against temporary employment in connection with restructurings. In complex restructurings, such as in large companies with extensive activities, it may be difficult to make everything work as intended at once. Then, a practical need for intermediate stages with temporary employment or hiring of workers may arise. A more clearly expressed legislative will would have been required if

the intention was to block this opportunity completely. Here, I support the court of appeal quoting the following from the district court's judgment:

> **"As a clear starting point, a restructuring does not in itself provide basis for temporary employment or hiring of workers, see Proposition to the Odelsting No. 50 (1993–1994), page 179, and Fougner et al., *Arbeidsmiljøloven, Kommentarutgave* [Commentary to the Working Environment Act)] (2nd edition, 2013), page 613. However, the court does not preclude that an intra-group restructuring may be a factor that, after an individual assessment, may contribute to there being justifiable grounds for hiring of workers. The court assumes that the scope and complexity of the restructuring in that case may have an impact on the duration of the hiring of workers, but also on whether it is permissible to hire labour at all. Large restructuring processes may be resource-demanding and may affect the company's production for a limited period, which in turn may constitute reasonable grounds for hiring of workers, both from third parties and from other business units in the company…"**

(133) Also in these cases, one should make a further assessment of the individual circumstances. In Proposition to the Odelsting No. 50 (1993–1994), it is stated on page 165 that whether or not the nature of the work in each case is such that temporary employment agreements can be entered into, depends on an overall assessment where multiple considerations must be made. Among other things, it must be determined whether there are conditions or considerations that call for a time-limited employment agreement. The Supreme Court has endorsed this in its judgment Rt-2001-1413 (*Norsk Folkehjelp*) page 1420.

(134) In Proposition to the Storting 39 (2014–2015) page 103, it is stated that the provision on temporary employment must be interpreted strictly, and on page 118, it is stated that the current state of the law must be upheld. It is a conscious legislative choice to link the rules on hiring of workers to the rules on temporary employment, thus one must also apply a strict interpretation when it comes to the hiring of workers. However, the aim of protecting the employee is not as prominent in connection with breach of the rules on hiring of workers as in connection with breach of the rules on temporary employment. A hired worker is permanently employed in the supplier and thus enjoys protection that a temporarily employed person does not enjoy. In my view, this should be taken into account in the individual assessment.

(135) As I see it, it is of great significance that NAS's own intention was to convert directly to a the contracting system already at the dates of the transfers 28 March 2014 and 6 March 2015. The company has only later acknowledged that this first attempt did not succeed in practice. Hence, the companies themselves did not intend to establish a hiring situation, not even temporarily. In order to determine the necessity of the hiring until a contracting system had been established, it is crucial to ask whether one could have reasonably demanded from the companies that they had managed to establish a proper contracting system already from the start. I have difficulties seeing that one could not have demanded this. Despite being faced with a complex restructuring process involving a high level of uncertainty, the Norwegian group with its large resources should have managed already in 2014 and 2015 what it managed from 1 September 2016. It would have demanded a more thorough planning process, but I find that the companies have failed to present convincing arguments for why this would not have been possible; they could for instance have started the specific planning of the conversion much earlier than they did. As mentioned, NAS had already in the autumn of 2013 presented a new organisation model to the employees which entailed a transfer of pilots and cabin crew members to other companies in a separate "resources part" of the group, although the pilots were first transferred to the AOC

company NAN. NAS itself has emphasised that the planning of a new organisational structure started much earlier, and that one discussed the establishment of separate companies for cabin crew members and pilots already in 2011. Should it be that the labour disputes have affected the timing of the business transfers, the companies cannot point to this in their defence.

(136) I have therefore concluded that the hiring of workers from 28 March 2014 for the cabin crew members and from 6 March 2015 for the pilots, and until 1 September 2016 was unlawful.

(137) However, it would now be "clearly unreasonable" to give judgment for permanent employment for pilots and cabin crew members in NAS, and for the pilots also in NAN. It is set out in Proposition to the Odelsting No. 70 (1998–1999) page 48 that the threshold for making exceptions is somewhat lower than in the corresponding provision in section 14-11 concerning unlawful temporary employment. In connection with unlawful hiring of workers, it is sufficient that "clear fairness considerations" suggest that the main rule on permanent employment should not be applied.

(138) If the pilots and cabin crew members had now been directly employed in the parent company NAS or in the AOC companies, it would have created large problems for the group operation. Norwegian's new structure must be seen in light of the network of aviation agreements, many of them bilateral, with which the group must comply. This demands multiple AOC companies to ensure traffic rights. If these were to be operated as full-scale airlines employing their own pilots and cabin crew members, it would have resulted in a large over-capacity of personnel or a myriad of agreements between the AOC companies on the use of each other's crew members. It would also require employees in each company to follow up the crews. It would be more complex and cost-demanding than the model chosen. Furthermore, it is unclear whether aviation authorities in all countries would accept that crews employed in one AOC company were used by another AOC company.

(139) NAS and NAN currently also lack the necessary resources to follow up pilots and cabin crew members – those functions are now part of the NAR structure. The way NAS and NAN have now been structured with few other employees, it is also unlikely that pilots and cabin crew members would gain anything from being employed there compared to being employed in the NAR part of the group with regard to the rules on "other suitable work" in connection with a dismissal, see section 15-7 subsection 2 of the Working Environment Act, or adjustment of work in accordance with section 4-6 of the same Act in connection with reduced ability to work.

(140) As for NAS in particular, the company is about to be depleted of operational activities. This has taken more time than expected, but the process now seems to be completed by early 2019.

(141) The parties otherwise disagree as to which implications a judgment declaring employment in NAS and NAS will have for the appellants' employment in PSN and CSN. With the conclusion I have reached, it is unnecessary to go further into this.

(142) Against this background, I have concluded that the appeal must be dismissed.

(143) NAS and NAN have not demanded costs in the district court and the court of appeal, but they have demanded costs in the Supreme Court. The Confederation of Norwegian Enterprise has also demanded costs. Under section 20-2 of the Dispute Act, the winning party is as a main rule entitled to have its costs covered. However, exceptions can be made if weighty reasons so suggest. The case raises questions of principle with great impact for the parties, the interveners and for Norwegian employment life. I have therefore concluded that NAS and NAN should carry their own costs in the Supreme Court. For the same reasons, I find that also the Confederation of Norwegian Enterprise should carry its own costs.

(144) Consequently, I vote for the following

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.

(145) Justice **Høgetveit Berg:** In agree with the justice delivering the leading opinion in all material respects and with his conclusion.

(146) Justice **Ringnes:** Likewise.

(147) Justice **Noer:** Likewise.

(148) Justice **Matningsdal:** Likewise.

(149) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.