SUPREME COURT OF NORWAY

J U D G M E N T

given on 26 June 2020 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Aage Thor Falkanger
Justice Wenche Elizabeth Arntzen
Justice Borgar Høgetveit Berg
Justice Erik Thyness

HR-2020-1339-A, case no. 19-152294SIV-HRET
Appeal against Borgarting Court of Appeal's judgment 11 June 2019

I.
ISS Facility Services AS
The Confederation of Norwegian Enterprise (NHO) (third-party intervener) (Counsel Kurt Weltzien)

The Employers' Association Spekter (third-party intervener) (Counsel Tarjei Thorkildsen)

v.

Oløf Gunnlaugsdottir
Hege Nesvold
Ann-Karin Opsett
Silje Berg Paulsen
Lisbeth Johnsen
Anne Lene Hovind
Jane Heidi Martinsen
Anne Lise Helgesen
Tone Bratterud
Linda Ripel
Dianne Johansen
Supmattra Holand
Bjørg Johanne Larssen
Inger Synnøve Bratt
Elisabeth Hansen
Hilde Beate Hansen
Anette Vareberg
Camilla Fossli Thomassen
Camilla Røkenes Johansen

Madeleine Norstad
Anette Lien
Marianne Lilleaas Valan
Gro Mari Kampevoll
Åse-Beate Fossli Thomassen
Wenche Rødsdalen Svendsberget
Aud Gudrun Gåre Pedersen
Inga Katharina Nilssen Rokstad
Kirsti Helen Andersen
Lisbet Berg Larsen
Berit Møller
Thornhild Kristin Barø Teigan
Mette Karin Tjølsen
Elisabeth Tangen
Mariann Berg Nymoen
Kjell Sverre Ottesen Skagtun
Klara Anna Pettersen
Elisabeth Haugen Johansen
Gunn Iren Møllerbakken
Barbro Hansen Engen
Kjell Inge Brekke
Vivi Maren Anna Jacobsen
Solveig Bakken
Stig Kristian Skjellhaug
Snorre Janssønn Strand
Merete Mikkelsen
Sonja Aune
Britt Schrøder
Turi Opheim Nilsen
Inger Moen Fiksdal
Hege Rønnevig
Tove Merete Andersen
Linda Helen Gjerde
Vera Bjerke
Elin Marie Reisænen Vorvik
Oddhild Rita Eilertsen
Mai-Britt Bråthen
Grethe Hansen
Bente Kaald Antonsen
Sissel Strandberg
Elisabeth Strengenes
Tone Robertsen (Counsel Alexander Salvatore Cascio)

NTL (third-party intervener) (Counsel Edvard Bakke)

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(1) Justice **Thyness:**

Issues and background

(2) The case concerns the transfer of rights and obligations between the employer and the employees during the transfer of part of an undertaking. The question is whether the employees, after having been transferred from the public to the private sector, retain the rights they enjoyed while employed in the public sector relating to periods of notice, special old-age pension and early retirement pension.

(3) Following a political decision in 2016, the Norwegian Defence Estates Agency stopped using its own staff for cleaning the buildings belonging to the Norwegian Armed Forces. The cleaning services were instead put out to tender. ISS Facility Services AS – ISS – was the successful bidder. It is undisputed that this was a transfer of an undertaking or business within the meaning of the Working Environment Act, and on 25 April 2016, 209 employees were transferred to ISS in accordance with the rules in chapter 16 of the Working Environment Act. Gro Mari Kampevoll and 60 other cleaners who were transferred from the Norwegian Defence Estates Agency to ISS – in the following mostly referred to as the employees – are parties to this case.

(4) The Norwegian Defence Estates Agency was established in 2002 as an administrative body under the Ministry of Defence having as its primary objective to manage real estate for the defence sector. Currently, the Defence Estates Agency manages in excess of 12 000 buildings and sites around the country, constituting a total of four million square meters.

(5) As employees of the Defence Estates Agency, the cleaners were state employees covered by the provisions of the former Civil Service Act 1983, including those concerning employment protection. They were members of the Norwegian Public Service Pension Fund, and their employment relationships were regulated by the Basic Agreement for the Civil Service as well as a number of special agreements entered into directly between the Defence Estates Agency and the trade organisations. The organised employees were mainly members of Norsk Tjenestemannslag – NTL – an affiliate of the Norwegian Confederation of Trade Unions – LO.

(6) Following the public announcement of the Armed Forces' decision to procure cleaning services based on competition in the open market, negotiations were held in November 2014 between the Ministry of Defence and the trade organisations, and a restructuring agreement was concluded in accordance with section 2 (2) of the Basic Agreement for the Civil Service.

(7) The consequences for the employees' pension rights were a key topic, and the Ministry of Defence commissioned the Defence Estates Agency to examine how a transfer would affect the employees and which alternatives existed. In a letter of 23 March 2015, the Agency outlined the consequences that a withdrawal from the Norwegian Public Service Pension Fund would have for the employees. Special emphasis was placed on the loss of entitlement to special old-age pension and early retirement pension – AFP – for employees over the age of 55, who would not be able to qualify for AFP in the private sector. In addition, the Agency referred to extended qualifying periods for maximum pension payment and reduced benefits. As possible remedies for the employees were mentioned the right to carry on a closed pension scheme in the Norwegian Public Service Pension Fund for certain age groups, a transitional

arrangement in the Armed Forces for certain groups, and an application for the transfer of seniority to a new AFP scheme.

(8) After NTL had commented on the proposition on 27 March 2015, the Ministry of Defence decided on 14 September 2015 that all employees born in 1956 or earlier with a minimum of 15 years of seniority would be offered to continue their employment in the Defence Estates Agency until retirement. The Ministry referred to the negative consequences that the change of employer late in working life would have for this group, with regard to both pension benefits and the short period remaining before they would have been able to retire with AFP or special old-age pension. The Ministry chose not to extend the scheme, arguing that societal development implied that employees were expected to work longer than before.

(9) On 17 December 2015, the Defence Estates Agency announced that ISS had been awarded the cleaning service contracts for the ten geographic areas covered by the tender. ISS Facility Services AS is part of the international ISS Group, with headquarters in Copenhagen. ISS provides services to the public and private sector within cleaning, catering, office support, security and property, and has some 11 000 employees in Norway.

(10) In January 2016, NTL approached the Norwegian Defence Estates Agency for clarification of which salary and employment conditions would be continued in ISS. Next, a discussion meeting was held at which ISS made it clear that they would not maintain the pension schemes of the Norwegian Defence Estates Agency, but enrol the transferred employees in their own existing defined contribution scheme. ISS also declared that they would opt out from the collective agreements applicable to the employees in the Defence Estates Agency.

(11) Following the Defence Estates Agency's letter to the employees in January 2016 containing information on individual employment terms, transfer of seniority from the Agency to ISS, pension and insurance schemes and salary, discussions were held between NTL and the Agency.

(12) The transfer was completed on 25 April 2016. Except for those who had exercised a right of reservation or a right to remain employed by the state, all cleaners were transferred to ISS. On the same day, ISS declared that they would not be bound by collective agreements or any special agreements, stating that the relevant group of workers would be covered by the standard agreement for cleaners, *Renholdsoverenskomsten*, with the organisation Norsk Arbeidsmandsforbund.

(13) The employees brought an action in Oslo District Court. Their request for relief in the District Court was slightly more extensive than that in the Supreme Court.

(14) On 12 June 2017, Oslo District Court ruled as follows:

> "1. Judgment is given in favour of ISS Facility Services AS.
>
> 2. The parties carry their own costs."

(15) The District Court's judgment was given with a partial dissent.

(16) The employees appealed to the Court of Appeal against those parts of the District Court's judgment that dealt with employment protection rights – now limited to periods of notice, special old-age pension and AFP. NTL declared third-party intervention.

(17) On 11 June 2019, Borgarting Court of Appeal ruled as follows:

> "1. The periods of notice applicable to the appellants in the Norwegian Defence Estates Agency are comprised by the transfer of rights to ISS Facility Services AS under section 16-2 of the Working Environment Act.
>
> 2. The pension rights relating to the special old-age limit of 65 applicable to the appellants in the Norwegian Defence Estates Agency are comprised by the transfer of rights to ISS Facility Services AS under section 16-2 of the Working Environment Act.
>
> 3. The appeal is dismissed with regard to the claim that the transfer of rights to ISS Facility Services AS includes entitlement to AFP.
>
> 4. The parties carry their own costs in the District Court and in the Court of Appeal."

(18) There was dissent with respect to items 1 and 2 of the judgment's conclusion. The majority consisted of two professional judges and one lay judge, while the minority consisted of one lay judge. As for items 3 and 4, the judgment was unanimous, but the Court was divided with regard to the reasoning behind item 4 –costs.

(19) ISS has appealed against items 1, 2 and 4 of the conclusion to the Supreme Court. The appeal challenges the application of the law. With regard to item 1, ISS has also appealed against the findings of fact.

(20) The employees have submitted a derivative appeal in respect of item 3 of the judgment's conclusion.

(21) NTL has declared third-party intervention for the employees. The Confederation of Norwegian Enterprise (NHO) and the Employers' Association Spekter have declared third-party intervention for ISS.

(22) The justice preparing the case in the Supreme Court decided on 20 March 2020 not to comply with ISS's request to ask the EFTA Court for an advisory opinion.

(23) By an order 28 May 2020, the Supreme Court decided not to disqualify Justice Indreberg from the case.

(24) The case has been conducted as a remote hearing in accordance with section 3 of Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak.

The parties' contentions

(25) The appellant and respondent in the derivative appeal – *ISS Facility Services AS* – contends:

(26) The periods of notice in force in the Norwegian Defence Estates Agency followed from the Civil Service Act 1983 and were not individual employee rights. The reference to the Civil Service Act 1983 in the contracts of employment was purely informational and did not reflect any special agreement with individual employees.

(27) The entitlement to pension upon reaching the special old-age limit in the Public Service Pension Fund Act does not constitute a right for the individual employee transferred in accordance with section 16-2 of the Working Environment Act. If the entitlement to pension from this age had been considered a right for each employee, it would have been comprised by the exception in section 16-2 subsection 3 of the Working Environment Act.

(28) Nor is the individual employee entitled to AFP. The entitlement to pension benefits is earned upon application for and granting of AFP. Prior to this, the employee may have an expectation of receiving AFP, but not a legal right. In the alternative, it is contended that the exception in section 16-2 subsection 3 second sentence of the Working Environment Act is applicable also here.

(29) ISS Facility Services AS invites the Supreme Court to pronounce this judgment:

> "In the main case:
>
> 1. Judgment is given in favour of ISS Facility Services AS.
>
> 2. ISS Facility Services AS is awarded costs in all instances.
>
> In the derivative appeal:
>
> 1. The derivative appeal is dismissed.
>
> 2. ISS is awarded costs for derivative appeal."

(30) One of ISS's third-party interveners – *The Confederation of Norwegian Enterprise (NHO)* – endorses ISS's contentions and stresses that the invitation to tender for the cleaning services in the Armed Forces was a political decision. NHO invites the Supreme Court to pronounce this judgment:

> "In the main case:
>
> The Confederation of Norwegian Enterprise (NHO) is awarded costs.
>
> In the derivative appeal:
>
> The Confederation of Norwegian Enterprise (NHO) is awarded costs."

(31) ISS's second third-party intervener – *The Employers' Association Spekter* – endorses ISS's contentions, emphasising that the statutory rights of state employees have traditionally not been part of a transfer to a new, private employer. Spekter has not submitted a request for relief or claimed compensation for costs.

(32) The respondents and the appellants in the derivative appeal – *Gro Mari Kampevoll and others* – contend:

(33) It follows from section 16-2 subsection 1 of the Working Environment Act that ISS has taken over the Defence Estates Agency's legal position towards the employees, which makes the employees entitled to the same protection in ISS as in the Agency. This applies to all types of rights in the employment relationship regardless of their legal basis, including statutory rights.

(34) The employees' periods of notice within the Defence Estates Agency, that were laid down by both law and contracts of employment, are covered by section 16-2 subsection 1 of the Working Environment Act.

(35) In addition, the entitlement to pension upon reaching the special old-age limit is a right for the employees laid down by both law and contracts of employment. The system does not fall within the exception in section 16-2 subsection 3 of the Working Environment Act. According to case law from the Court of Justice of the European Union (CJEU), this exception must be interpreted restrictively and does not cover early retirement pension paid before the ordinary age limit in the public sector.

(36) Public AFP is a right for the employees under section 16-2 subsections 1 and 2 of the Working Environment Act, which also includes conditional rights. The entitlement to public AFP ensues from the collective agreement and has been implemented in the employees' individual contracts of employment in accordance with general principles of collective bargaining law, see section 6 of the Labour Dispute Act. AFP is paid only until the employee reaches the ordinary pension age and is thus an early retirement pension not covered by the pension exception in section 16-2 subsection 3 of the Working Environment Act.

(37) Gro Mari Kampevoll and others invite the Supreme Court to pronounce this judgment

> "In the main appeal:
>
> The appeal is dismissed.
>
> In the derivative appeal:
>
> 2. The pension rights relating to the special old-age limit of 65 applicable to the appellants in the Norwegian Defence Estates Agency are included in the transfer of rights to ISS Facility Services AS under section 16-2 of the Working Environment Act.
>
> In both:
>
> ISS Facility Service AS will pay costs in all instances."

(38) The employees' third-party intervener – *Norsk Tjenestemannslag (NTL)* – endorses the employees' contentions, emphasising that the case does not involve a new political round on the competitive tendering for the cleaning services in the Armed Forces, but on the correct protection of the members' rights. NTL invites the Supreme Court to pronounce this judgment

> "NTL is awarded costs in the Supreme Court."

My opinion

Starting points

(39) Chapter 16 of the Working Environment Act applies to "transfer of an undertaking or part of an undertaking to another employer. For the purposes of this Act, transfer shall mean transfer of an autonomous unit that retains its identity after the transfer", see section 16-1. It is undisputed that our case deals with a transfer of undertaking or part of an undertaking within the meaning of the Working Environment Act.

(40) Section 16-2 of the Working Environment Act reads:

> "(1) The rights and obligations of the former employer ensuing from the contract of employment or employment relationships in force on the date of transfer shall be transferred to the new employer. Claims pursuant to the first paragraph may still be raised against the former employer.
>
> (2) The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer within three weeks after the date of transfer at the latest declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.
>
> (3) The employees' right to earn further entitlement to retirement pension, survivor's pension and disability pension in accordance with a collective service pension scheme shall be transferred to the new employer pursuant to the provisions of the first and second paragraph. The new employer may elect to make existing pension schemes applicable to the transferred employees. If the employees' previous pension schemes cannot be maintained after the transfer, the new employer shall ensure the transferred employees the right to further earning of pension entitlement through another collective pension scheme."

(41) Subsection 1 lays down the main rule that the former employer's rights and obligations ensuing from contacts of employment or employment relationships are transferred to the new employer. In other words, individual rights and obligations in the employment relationship are transferred unchanged in the event of a transfer of undertaking.

(42) This main principle is modified in subsections 2 and 3 on the rights and obligations ensuing from collective agreements and collective pension schemes. The issues at hand relate to what constitutes "rights" within the meaning of the provision, which rights "are ensued in the contract of employment or employment relationship", and how the exceptions from the main principles should be interpreted.

(43) The provisions in section 16-2 implement Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses – the Directive. This replaces the previous Council Directive 77/187/EEC, as amended by Council Directive 98/50/EC. The parts of the Directive that are relevant to our

case match the corresponding provisions in Council Directive 77/187/EEC, and sources of law relating to the interpretation of that Directive are therefore still relevant.

(44) As set out in the Directive's title and preamble, the purpose of the Directive is to safeguard the interests of the employees during transfers of undertakings, and Article 8 provides that the Directive does not affect the right of member states to implement regulations that are more favourable to employees.

The periods of notice

(45) Special statutory periods of notice apply to employees in the public sector. Until 30 June 2017, these periods were prescribed in sections 9 to 11 of the former Civil Service Act, and are today found in section 22 of the current Civil Service Act. The period of notice in the event of dismissal is generally six months, which for the majority of the employees is considerably longer than the periods of notice in section 15-3 of the Working Environment Act. The contract of employment presented to the Supreme Court, and which the parties agree is representative of the contracts of all employees, sets out the following under "Time span, trial period and termination of employment relationship":

> "The period of notice is determined in accordance with sections 8, 9, 10 and 11 of the Civil Service Act."

(46) *The employees* contend that the periods of notice have two independent legal bases: the contracts of employment and law, and that, regardless of which, the periods of notice follow the "contract of employment or employment relationships" and are therefore transferred to the new employer in accordance with section 16-2 subsection 1 of the Working Environment Act. *ISS,* in turn, contends that the periods of notice are merely included to comply with the directive-based information requirement in the Working Environment Act and do not imply any contractual obligation assumed by the employer. The obligation is therefore purely statutory, and thus not covered by section 16-2 subsection 1.

(47) I will first address the question of whether the periods of notice were included in the contracts of employment.

(48) In my opinion, whether or not a statutory right or obligation must be considered included in the contract of employment depends on the individual employment relationship. Here, as is the case for contractual interpretation and implication in general, the wording is the point of departure. However, the assessment must also include other interpretive factors, and there will be more room for supplementary interpretive factors here than in respect of the interpretation of contracts between equal parties in business relationships. This is partly related to – as in the case at hand – differences in the relative strength of the parties to a contract.

(49) What I have now said is illustrated in Supreme Court case law dealing with limitations on the employer's management prerogative based on the individual contracts of employment. The Supreme Court judgment Rt-2000-1602 *Nøkk*, which has been referred to in subsequent rulings, sets out:

> "When interpreting and supplementing the contracts of employment one must consider the employee's position, the circumstances of the employment, industry custom, practice in the relevant employment relationship and what is considered reasonable in the light of societal development."

(50) In other words, rather broad assessments are permitted when determining the content of contracts of employment.

(51) In the case at hand, it has been held that some terms have, or have not, been "genuinely" agreed or "especially" agreed. In my opinion, such terms do not clarify the issue, which is simply to determine what the parties have contracted based on the principles applied for the purpose of interpreting and supplementing contracts of employment.

(52) The question we are dealing with in the case at hand is whether the reference in the contracts of employment to periods of notice prescribed in sections 9 to 11 of the Civil Service Act implies a contractual obligation or whether it is included for information purposes only. Both options are possible under the Working Environment Act. The requirement in section 14-6 subsection 1 is that the contract of employment "shall state factors of major significance for the employment relationship, including … the periods of notice applicable to the employee and the employer". The provision is based on an expectation that the periods of notice are part of "the employment relationship", but this does not necessarily imply that the length of these periods *must* be agreed. On the other hand, the periods of notice certainly *may* be agreed within the limits imposed by mandatory provisions of law applicable from time to time.

(53) In continuing contractual relationships, the periods of notice are essential factors for the parties to consider. It is therefore unlikely that the contract regulating an employment relationship like the one at hand does not regulate the periods of notice. As it is not clearly stated in the contracts that the reference to the periods of notice in the Civil Service Act is included for information purposes only, I believe that the starting point must be that the periods of notice are part of the contractual terms. As I cannot see that anything suggests the opposite in our case, I find that the reference in the contracts of employment to the periods of notice in sections 9 to 11 of the Civil Service Act are legally binding contractual terms.

(54) As mentioned, the former Civil Service Act has been replaced by the current Civil Service Act 16 June 2017 no. 67 after the transfer of undertaking was completed. The periods of notice prescribed in the former Act mainly match those prescribed in the current Civil Service Act. It is therefore unnecessary for me to examine whether the contracts of employment refer to the periods of notice in the former or the current Civil Service Act.

(55) It has not been clarified whether rights that are *purely* statutory fall within the scope section 16-2 subsection 1 of the Working Environment Act, see the wording "ensuing from … employment relationship". However, it must be clear that it is does not limit a right based on contract of employment that the right *also* follows from a statutory rule. Here, I confine myself to referring to the CJEU judgment 6 November 2003 in Case C-4/01 *Martin*, see item 2 second paragraph of its conclusion. Since I have found that the provisions on periods of notice are part of the contracts of employment, I do not need to consider how the situation would have been if the periods of notice had been purely statutory.

(56) Against this background, I find that the employees' periods of notice are comprised by the transfer of rights and obligations to ISS Facility Services AS under section 16-2 of the Working Environment Act.

Special old-age pension

(57) The term "special old-age pension" is not used in legislation, but it is used in everyday speech to describe old-age pension from the Norwegian Public Service Pension Fund to persons who retire at an age lower than the general age for retirement in the public sector.

(58) The most important rules on special old-age pension, insofar as they are relevant to our case, may be summarised as follows:

(59) The age limits for members of the Norwegian Public Service Pension Fund, as the employees were before the transfer of undertaking, are set out in the Act on age limits for state employees 21 December 1956 no. 1 – the Age Limit Act. According to section 2 subsection 1 first sentence of the Act, the general age limit is 70. However, the second sentence of the provision prescribes lower age limits for positions where "the service involves an extraordinary physical or mental strain on the employees, with the general implication that they are incapable of performing their tasks satisfactorily up until the age of 70." As for the positions of the employees in the case at hand, there was a special old-age limit of 65 years. There are even positions in the public sector with special old-age limits as low as 60 years. It follows from section 2 last subsection that employees have a duty to retire when reaching the special old-age limit.

(60) According to section 20 (a) of the Norwegian Public Service Pension Fund Act 28 July 1949 no. 26, a member is entitled to old-age pension when resigning from his or her position upon reaching the age limit.

(61) According to section 21 of the same Act, a member retiring at the earliest three years before the age limit is entitled to old-age pension, as long as the length of service and age total at least 85 years or the person has reached the age of 67 when retiring. For many of the employees, this implied that they could retire at the age of 62.

(62) *The employees* contend that their entitlement to special old-age pension were rooted in law as well as in contracts of employment, and that it was continued after the transfer of undertaking under section 16-2 subsection 1 of the Working Environment Act. Further, the scheme does not fall within the exception set out in section 16-2 subsection 3, which must be interpreted restrictively according to CJEU case law, and does not include early retirement pension schemes. *ISS*, in turn, contends that the employees do not have a contractual right to earn further entitlement to special old-age pension. They are only entitled to benefits already accrued in the form of so-called "established rights" under section 23 of the Norwegian Public Service Pension Fund Act. In any case, a possible right will fall within the exception in section 16-2 subsection 3 of the Working Environment Act.

(63) Whether or not a pension scheme is part of the contract of employment must be determined based on the principles for establishing the content of contracts of employment which I have already addressed. In two private sector cases, the Supreme Court has found, based on an individual assessment of each case, that the pension schemes in dispute could not be considered part of the contracts of employment, see Rt-2002-1576 *Hakon* and Rt-2010-412 *Fokus Bank.* However, when it comes to state employees, the Supreme Court has assumed – without controversy in the relevant cases – that the pension schemes are so closely linked to the employment relationship that they must be considered part of the contracts of employment, see Rt-1996-1415 *Borthen* and Rt-1996-1440 *Thunheim.* The difference

between cases involving state pension schemes and those involving private pension schemes does not rely on a principled distinction, but on whether the schemes under the relevant circumstances fall within the contracts of employment.

(64) As mentioned, ISS contends that the employees are not entitled to any pension benefits beyond those accrued from time to time. In my view, there can be no doubt that the employees *may* be entitled to further pension accrual under the contracts of employment. This is illustrated by the *Hakon* and *Fokus Bank* cases that dealt with the possibility of terminating the schemes, i.e. whether the employees could demand that the employer continue to pay premiums, thus building up further pension benefits for the employees. It was clear that the employees would in any event keep their accrued benefits.

(65) I do not need to elaborate further on this or on the possible significance of the obligation to retire at the special old-age limit, as I have arrived at the conclusion that the exception in section 16-2 subsection 3 of the Working Environment Act is applicable. It follows from the first sentence of the provision that "the employees' right to earn further entitlement to retirement pension, survivor's pension and disability pension in accordance with a collective service pension scheme" is in principle transferred to the employer. According to the provision's second sentence, however, a new employer may choose to make its already existing pension schemes applicable to the transferred employees. This is what ISS has done, contending that the employees now only earn further pension under this scheme, which is a defined contribution scheme that does not give a right to special old-age pension. The employees argue that special old-age pension falls outside the exception in section 16-2 subsection 3 because it is an *early retirement pension*, and not an *old-age pension*.

(66) The CJEU judgment 4 June 2002 in Case C-164/00 *Beckmann* and its judgment in the *Martin* case, which I have already mentioned, are central rulings on this issue.

(67) *Beckmann* concerned an employee who after a transfer of undertaking was dismissed byreason of redundancy. She claimed early retirement pension and a lump sum payment based on the terms of employment in force at the previous employer. The new employer claimed that the benefits fell within the exception provided for by the Directive and referred to the benefits being calculated exactly like the usual old-age benefits with a supplement to compensate for a shorter contribution period. The CJEU maintained that given the Directive's general objective of safeguarding the rights of the employees, the exception to certain collective pensions in the Directive had to be interpreted "strictly", and the exhaustively listed benefits had to be construed in "a narrow sense", and concluded that the benefits did not fall within the exception. The CJEU stated the following in paragraph 31:

> "In that connection, it is only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question, and not benefits paid in circumstances such as those in point in the main proceedings (dismissal for redundancy) that can be classified as old-age benefits, even if they are calculated by reference to the rules for calculating normal pension benefits."

(68) *Martin* concerned a similar claim after a different transfer of undertaking from the same employer as in *Beckmann*, but this time in connection with the employer's offer of early retirement for efficiency improvement purposes. The CJEU stated the following in paragraph 34:

> "In the light of the grounds of the judgment in *Beckmann* set out at paragraph 5 of the present judgment, there is no reason to treat benefits applied for upon dismissal by reason of redundancy any differently from those applied for upon early retirement agreed between the employer and the employee which does not correspond to the departure of an employee at the end of his or her normal working life as laid down by the general structure of the pension scheme of which he or she is a member."

(69) Against this background, whether or not a pension scheme falls within the exception has to do with the relevant retirement and whether it reflects the employee ending his or her working life in a normal manner in accordance with the general structure of the relevant pension scheme. The fact that the compensation had the form of pension benefits was not decisive in *Beckmann* and *Martin*. As mentioned, the benefits in those cases were paid in connection with a dismissal and an offer of early retirement pension, respectively, as part of efficiency improvement processes. The cases illustrate an issue that is probably rather common, namely that the distinction between pension as a form of redundancy allowance – i.e. cases where the employees receive compensation for leaving as part of a workforce reduction process – and ordinary old-age pension from the time an employee ends his or her working life.

(70) As may be read from the account I have already given of special old-age pension, the public sector does not operate with one given pension age. The age at which the employees' duty to retire occurs varies between 60 and 70, and many employees are entitled to old-age pension before they reach the age limit. This system is set up to cater for varying degrees of ability and desire on the part of the employees to remain in service at an advanced age depending on the nature of the work and individual circumstances. Irrespective of when an employee retires within the scope of old-age pension regulations in the public sector, it is clear that this – in contrast to a departure during an efficiency improvement or redundancy process, as was the case in *Beckmann* and *Martin* – is a normal termination of a person's working life in accordance with what is "laid down by the general structure of the pension scheme of which he or she is a member".

(71) Against this background, I conclude that the entitlement to special old-age pension was lost under section 16-2 subsection 3 second sentence of the Working Environment Act when ISS made its already existing collective pension scheme applicable to the employees.

Early retirement pension – AFP – in the public sector

(72) AFP in the public sector was introduced in 1988 as a pension scheme for persons under the age of 67, which was the then age limit for receiving old-age pension from the National Insurance. The scheme was modelled on AFP in the private sector, which was introduced the same year. The minimum age for receiving AFP was initially 66. The limit has been gradually lowered, and it has been 62 since 1998. At that time, one had to stop working to be entitled to AFP. The argument for introducing the scheme was – similar to what applies to the special old-age pension for the employees in the case at hand – that many employees in physically demanding jobs needed to stop working before turning 67. The scheme is regulated partially in the Act on early retirement pension for members of the Norwegian Public Service Pension Fund and partially in the Norwegian Public Service Pension Fund Act. More detailed provision are included in collective agreements between the State and the central organisations in the State – LO in our case. The scheme is financed over the state budget.

(73) The pension reform, which entered into force in 2011, made it possible to receive old-age pension from the National Insurance from the age of 62 in return for reduced annual benefits. In this connection, AFP in the private sector was restructured into a supplementary pension to the old-age pension from the National Insurance. For AFP in the public sector, a similar restructuring was first agreed in 2018 and is phased in over time for employees born in 1963 or later.

(74) AFP is often referred to as a qualification scheme, which means that the employees must meet all applicable requirements to be entitled to it from the time it is taken. Moreover, to earn the right to AFP, the employee must be working at the time the pension is taken and be subject to a collective agreement providing for AFP. It is required that the employee's income at the time the pension is taken and during the preceding year at least equals the basic amount. No minimum length of service is required to be entitled to AFP in the public sector.

(75) AFP in the public sector before the age of 65 is often referred to as "national insurance-based AFP" because it is calculated based on what the recipient would have received in old-age pension with a separate supplement laid down by a collective agreement. For persons between 65 and 67, AFP is calculated based on the rules on old-age pension from the Norwegian Public Service Pension Fund if that gives higher benefits. Under the current rules, AFP in the public sector may not be taken together with national insurance, and is paid until the age of retirement, at which point it is replaced by civil service pension. If the retired person has a substantial working income, the AFP benefits are reduced in proportion to the reduction of the previous working income.

(76) In summary, AFP in the public sector is today mainly "national insurance-based" old-age pension for persons between 62 and 67. It is possible to combine the benefits with working income, but that results in a proportionate reduction of the benefits unless the working income is very modest.

(77) New AFP in the public sector will be a lifelong pension that may be taken from the age of 62 and be combined with working income. As mentioned, this follows from the structure of the new AFP in the private sector, which in turn is a consequence of the restructuring to flexible old-age pension from the National Insurance from the age of 62. These restructurings allow individuals to choose, within certain limits, when to start receiving pension. At the same time, it provides an incentive to remaining in employment because the benefits are unaffected by working income, and because one continues to earn entitlement to benefits based on working income after taking old-age pension.

(78) AFP raises complex issues in connection with transfers of undertakings. *The employees* claim to be entitled to AFP under the contracts of employment that fall within section 16-2 subsection 1 of the Working Environment Act. The entitlement also arises from the AFP provisions in the collective agreement. These are so-called normative provisions, i.e. provisions that under general principles pertaining to collective agreements automatically become part of the contracts of employment and that are not necessarily lost if the collective agreement expires. The exception in section 16-2 subsection 3 of the Working Environment Act is not applicable because AFP is paid before the employees would normally end their working life. *ISS,* in turn, holds that the employees do not have an individual right to AFP, neither directly under the contracts of employment nor under provisions in the collective agreements. Under any circumstance, it is only the rights remaining at the time of the transfer that are continued, and a right for the individual employee occurs at the earliest when the AFP

application has been sent. Alternatively, AFP is covered by the pension exception, and a possible transferred right was in any case lost under section 16-2 subsection 2 of the Working Environment Act when ISS opted out of the Norwegian Defence Estates Agency's collective agreement and declared effective a different collective agreement to which ISS was already a party.

(79) I have arrived at the conclusion that the pension exception in section 16-2 subsection 3 of the Working Environment Act is applicable. It is therefore unnecessary for me to consider the contentions relating to individual rights, whether any rights have been lost under section 16-2 subsection 2 of the Working Environment Act and whether a right to AFP only occurs when AFP is taken.

(80) As for the exception in section 16-2 subsection 3 of the Working Environment Act, I start with what I have already said with regard to old-age pension, and repeat that the question according to the CJEU's premises in *Martin* is whether the relevant departure reflects the employee ending his or her working life in a normal manner in accordance with the general structure of the relevant pension scheme. The question here is whether there are differences between special old-age pension and AFP in the public sector that give a basis for treating them differently in relation to the exception.

(81) Both schemes generally allow the employee to retire from the age of 62 and are particularly justified by the need to retire relatively early from jobs involving large physical and mental strains. Their common basic function is to give the employees a dignified termination of their working life. Neither of the schemes is intended to serve as a tool in workforce reduction processes.

(82) It may be argued that, while special old-age pension is an ordinary old-age pension from the Norwegian Public Service Pension Fund – only paid at a lower pension age than what follows from the main rule – AFP is a separate benefit calculated on different terms. However, I cannot see that this is decisive in relation to the assessment criterion laid down by the CJEU. It is true that the pension benefits are calculated differently, so that it may vary whether a person qualifying for both will benefit more from one or the other. However, this does not change the fact that the purpose and the function of the schemes are the same.

(83) It has been held that the current public AFP, paid only to persons in the age group 62–67, must be considered to fall outside the exception since it is an early retirement scheme, while private AFP falls within the exception since it has been reformed into a lifelong supplement to old-age pension from the National Insurance and civil service pension schemes. In the future, this will also be the case for AFP in the public sector. I cannot follow this reasoning. In my opinion, one must consider the public pension schemes in context, and it then becomes clear that the age of retirement is generally flexible. Whether one receives AFP first and old-age pension next – or receives both at the same time, but with reduced benefits for both – cannot be significant with regard to the assessment pointed out by the CJEU.

(84) In summary, my opinion is that AFP and old-age pension are factors in a total collective old-age pension system in the public sector. Whether the pensioner will formally receive the same benefits throughout his or her period of retirement, or receive one form of benefits followed by another, is irrelevant as long as the person's departure under this system reflects a normal ending of his or her working life in accordance with the general structure of the pension schemes for civil servants.

Conclusion and costs

(85) I have arrived at the result that the periods of notice in force in the Norwegian Defence Estates Agency are comprised by the transfer of rights to ISS under section 16-2 subsection 1 of the Working Environment Act, while special old-age pension such as AFP in the public sector is excluded from the transfer in accordance with the special rules for collective service pension schemes in section 16-2 subsection 3 of the Working Environment Act.

(86) This implies that ISS has partially succeeded in the main appeal, while the employees have not succeeded in the derivative appeal. Although ISS has prevailed to a greater extent than the employees, both parties have been heard on significant points. Costs may thus only be awarded if there are compelling grounds for doing so, see section 20-3 of the Dispute Act. The case has raised issues of principle that there was good reason to try in court. It has also been of great significance to the welfare of the employees, who experience a highly noticeable weakening of their employment terms as a result of the transfer of undertaking. Against this background, I find no reason to award costs in any instance.

(87) I vote for the following

J U D G M E N T :

1. The pension rights pertaining to special old-age limit applicable to the respondents in the Norwegian Defence Estates Agency, are not continued after ISS Facility Services AS has enrolled the transferred employees in the already existing pension scheme.

2. Apart from that, the appeal is dismissed.

3. The derivative appeal is dismissed.

4. Costs are not awarded.

(88) Justice **Høgetveit Berg:** I agree with Justice Thyness in all material respects and with his conclusion.

(89) Justice **Falkanger:** Likewise.

(90) Justice **Arntzen:** Likewise.

(91) Justice **Indreberg:** Likewise.

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

J U D G M E N T :

1. The pension rights pertaining to special old-age limit applicable to the respondents in the Norwegian Defence Estates Agency, are not continued after ISS Facility Services AS has enrolled the transferred employees in the already existing pension scheme.

2. Apart from that, the appeal is dismissed.

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4. Costs are not awarded.