SUPREME COURT OF NORWAY

J U D G M E N T

given on 2 November 2020 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Jens Edvin A. Skoghøy
Justice Wilhelm Matheson
Justice Henrik Bull
Justice Kine Steinsvik

HR-2020-2109-A, (case no. 19-167507SIV-HRET)
Appeal against Gulating Court of Appeal's judgment 27 June 2019

A	
B	(Counsel Karianne Rettedal)
Norwegian Confederation of Trade Unions (LO Norway) (third-party intervener)	(Counsel Stig Åkenes Johnsen)
v.	
Semco Maritime AS	
The Confederation of Norwegian Enterprise (NHO) (third-party intervener)	(Counsel Margrethe Meder)

(1) Justice **Matheson:**

Background and issues

(2) The case questions whether workers hired from temporary work agencies, based on the equal treatment rule in section 14-12 a of the Working Environment Act are entitled to a bonus on equal terms as permanent employees and apprentices in the user undertaking.

(3) Semco Maritime AS (Semco) is a company whose business includes supply of professional personnel to the offshore industry.

(4) From 12 August 2011 to 31 December 2017, B was employed as a deck operator in Semco. During the period from 2013 to 31 December 2017, he was hired out to BP Norway AS (BP). In 2016, after a merger, the company changed names to Aker BP ASA (Aker BP). With effect from 1 January 2018, B became permanently employed in Aker BP.

(5) A was employed as a deck operator in Semco in 2001. Since 2016, he has been hired out to BP, later Aker BP.

(6) BP had a bonus scheme for its employees, which was later replaced by a bonus scheme for the merged Aker BP. Since 2013, the annual bonus payments have varied between NOK 45 000 and 75 000 for employees in the same category as B and A.

(7) In 2017, B and A filed a claim against Semco for back payment of bonus for the years 2013–2016 on equal terms as Aker BP's permanent employees. The claims were denied, and the two workers brought an action to Stavanger District Court. During the preparatory phase, the claims were instead linked to the years 2014–2017. On 2 July 2018, the District Court ruled as follows:

> "1. Semco Maritime AS is to pay NOK 217 758.90 – twohundredandseventeenthousandsevenhundredandfiftyeight 90/100 – to A with the addition of default interest from the due date until payment is made.
>
> 2. Semco Maritime AS is to pay costs to A in the amount of NOK 51 875.
>
> 3. Semco Maritime AS is to pay NOK 242 467 – twohundredandfortytwothousandfourhundredandsixtyseven – to B with the addition of default interest from the due date until payment is made.
>
> 4. Semco Maritime is to pay costs to B in the amount of NOK 51 875."

(8) Semco appealed to Gulating Court of Appeal, which, on 27 June 2019, ruled as follows:

> "1. The Court of Appeal finds in favour of Semco Maritime AS.
>
> 2. Costs are not awarded in any instance."

(9) B and A have appealed to the Supreme Court. The appeal concerns the findings of fact and the application of the law.

(10) In a pleading of 22 November 2019, Norwegian Confederation of Trade Unions (LO Norway) Norway declared third-party intervention for the appellants. In a pleading of 16 January 2020, the Confederation of Norwegian Enterprise (NHO) declared third-party intervention for the respondent.

(11) Although new evidence has been presented to the Supreme Court, the case stands as it did in the Court of Appeal.

The parties' contentions

(12) The appellants – *B and A* – contend:

(13) According to the equal treatment rule in section 14-12 a subsection 1 of the Working Environment Act, hired workers are entitled to a bonus on equal terms as the permanent employees in Aker BP.

(14) The preparatory works are essential to the interpretation of the law. They set out that bonuses are covered by "pay" in subsection 1 (f) and thus covered by the Act's equal treatment rule.

(15) The type of bonus in the case at hand is remuneration for work efforts and does not differ significantly from fixed remuneration. The way it is earned is irrelevant. General, unilaterally fixed benefits are also covered by the equal treatment principle.

(16) The purpose of the bonus scheme in Aker BP is to reward performance and profit created by the working community. It is also an incentive for increased performance to meet the company's commercial goals. Through their work for the company, B and A have contributed to this to the same extent as the permanent employees.

(17) The pay concept must be so wide reaching that the purpose of the equal treatment rule may be fulfilled. In the opposite case, the rule is easily evaded. No policy considerations suggest that "pay" should not cover bonuses.

(18) No deductions should be made from the bonus earned during the periods A was either on sick leave or laid off from Semco.

(19) As B was permanently employed in Aker BP from 1 January 2018, no deduction should be made from his bonus for 2017. In such a situation, it cannot be emphasised that he was not employed in Semco at the date of payment in March 2018.

(20) B and A invite the Supreme Court to pronounce the following judgment:

> "1. Semco Maritime AS is to pay NOK 242 467 – twohundredandfortytwothousandfourhundredandsixtyseven – to B with the addition of holiday allowance and default interest from the due date until payment is made.
>
> 2. Semco Maritime AS is to pay NOK 242 467 – twohundredandfortytwothousandfourhundredandsixtyseven – to A with the

addition of holiday allowance and default interest from the due date until payment is made.

3. B and A are awarded costs in all instances."

(21) The third-party intervener – *LO Norway* – endorses the appellants' submissions and stresses the goal of having a labour market where permanent employments are the main rule. The statement in the preparatory works that "pay" covers any remuneration for work, expresses that this is not a definition of – merely a starting point for – how the term is to be interpreted. Hence, the term covers more than remuneration for work. Statements made during the legislative process in the Storting[1] confirm this. Bonuses paid for the employees' contribution to the total creation of values in the undertaking, like in our case, constitute "pay" within the meaning of the law.

(22) LO Norway invites the Supreme Court to pronounce the following judgment:

"LO Norway is awarded costs in the Supreme Court."

(23) The respondent – *Semco Maritime AS* – contends:

(24) Aker BP's bonus scheme is not "pay" within the meaning of the equal treatment rule. The concept is national. However, there is no uniform pay concept in Norwegian law, and the interpretation must therefore be based on the implication of the relevant provision. It is clear from the preparatory works that "pay" in (f) was initially meant to signify "remuneration for work".

(25) Aker BP's bonus scheme is not associated with the individual employee's work efforts, but to the company's goal achievement and results. Anything else would conflict with the operator agreement's prohibition against linking bonus to individual performance. The scheme is to incite the employees' loyalty to Aker BP and is not part of the company's remuneration system. Such bonus schemes at company level do not meet the criterion of remuneration for work. The pay concept must be limited in line with this.

(26) Policy considerations also suggest that a company bonus scheme, like here, does not comprise hired personnel, with the extra calculation difficulties that would entail for the temporary work agency.

(27) In the alternative, it is disputed that A is entitled to a bonus for the periods in 2016 when he was on sick leave and laid off from Semco.

(28) B's eligibility for a bonus for 2017 is also disputed. The scheme applies only to personnel still employed in the company in March in the year after the bonus year. In March 2018, B had left Semco.

(29) Semco invites the Supreme Court to pronounce the following judgment:

"1. The Supreme Court finds in favour of Semco Maritime AS.

2. Semco Maritime AS is awarded costs in all instances."

[1] TN: The Norwegian parliament

(30) The third-party intervener – *the Confederation of Norwegian Enterprise (NHO)* – endorses the respondents' submissions and emphasises in particular:

(31) The equal treatment rules must be practicable. The pay concept must be clear to the undertakings and easy to control. It would cause major practical challenges during the offer phase and the termination phase of a hired labour relationship if performance-related bonuses calculated and paid in arrears were covered by the equal treatment rule. Moreover, an interpretation reaching beyond traditional remuneration for work will make the distinction towards gifts and incentive schemes etc. difficult. The risk of evasions of otherwise strict regulations on hiring of labour is low.

(32) NHO invites the Supreme Court to pronounce the following judgment:

> "1. The Supreme Court finds in favour of Semco Maritime AS.
>
> 2. The Confederation of Norwegian Enterprise (NHO) is awarded costs in the Supreme Court."

My opinion

Hiring out of workers – some legal starting points

(33) The main rule in section 14-9 subsection 1 of the Working Environment Act is that employees must be employed on a permanent basis. This is also an overall political goal. Yet, there are exceptions in section 14-9 subsection 2. An undertaking may also, on specific terms, hire a worker from an undertaking whose object is to hire out labour – a so-called temporary work agency – see section 14-12 subsection 1.

(34) The hiring of workers must take place according to a principle of equal treatment, see section 14-12 a subsection 1 of the Working Environment Act:

> "The temporary work agency shall ensure that the workers that it hires out are at least given the conditions that would have applied if the worker had been recruited directly by the user undertaking to perform the same work with regard to:
> a) the length and placement of working hours,
> b) overtime work,
> c) the length and placement of breaks and rest periods
> d) nightwork,
> e) holidays, holiday pay, days off and remuneration for such days, and
> f) pay and coverage of expenses."

(35) The temporary work agency is the formal employer of a hired-out worker and responsible for remuneration, holiday allowance etc. Moreover, it is clearly stated in section 14-12 a subsection 1 of the Working Environment Act that the temporary work agency must ensure that the workers it hires out are at least given the rights listed in (a)–(f), which they would have had if recruited directly by the user undertaking. The agreement with the user undertaking regulates the calculation of the hire. The user undertaking must provide the temporary work agency with the "the information necessary for compliance with the equal treatment requirement", see section 14-12 b subsection 1.

(36) According to section 14-12 c, a user undertaking is jointly and severally liable as an unconditional guarantor for payment of salary, holiday pay and any other remuneration pursuant to the principle of equal treatment laid down in section 14-12 a.

Bonus schemes in general

(37) Bonus schemes in employment relationships may differ in nature and have different objects.

(38) A bonus payment will often be linked to the reaching of certain goals or results and therefore serve as remuneration for performed work. Such schemes may be based on the achievements of the individual worker, groups of employees or the entire working collective – i.e. at company level. Bonus schemes that are not connected to specific goals also exist, often in the form of complete or partial profit sharing.

(39) While performance bonuses are connected to work that is already carried out, a bonus scheme may also have a more forward-looking perspective to inspire the employee's loyalty to the company or give an incentive to preserve the employment relationship. Such schemes may alternatively contain elements of both. For example, the scheme may be structured such that employees entitled to a bonus must stay in the enterprise for a certain length to receive it – a so-called "stay on"-bonus.

The bonus scheme in Aker BP

Description of the scheme

(40) For many years, Aker BP has had a bonus scheme applicable to permanent employees and apprentices.

(41) Before the merger in 2016, the BP conditions applied. They cover two of the years for which the appellants claim to be entitled to a bonus. In the company's employee handbook, it was stated that the bonus scheme rewards employees "for achievements contributing to BP's long-term success." It also stated that the scheme "is the annual incitement to meet individual priorities and vital milestones in connection with the business results that are to be delivered". Also, the bonus scheme "is an opportunity for extra reward for delivering the right results in the right manner".

(42) The bonus scheme used in BP was connected to the group's and the entity's goal achievement. On paper, it also contained an individual factor. However, under a local agreement between BP and the employees, this factor was not practiced, see for instance Protocol 18 September 2014. The protocol stated that "[a]ll employees who comply with the operator agreement are entitled to the same bonus percentage".

(43) The bonus was calculated from the basic salary per 31 December. As I understand it, this implies that employees in the same category and with the same length of service received the same bonus.

(44) The employees who had worked in the company for at least three months in the bonus year were entitled to a bonus. The bonus was paid pro rata based on the length of service in the entity in the course of that year. The employees who were dismissed or who handed in a notice and left before 31 December in the bonus year were not entitled to a bonus.

(45) In *Aker BP*, these guidelines are largely continued, but from 2017, the bonus has been measured against the company's goal achievement. The following is stated in this regard:

> "The object of the bonus scheme in Aker BP is to strengthen the Company's performance culture in accordance with the Company's values and One Team. The possibility of receiving a bonus depends on the Company's goal achievement in the bonus year, i.e. from 1 January to 31 December, with payment in the following year."

(46) In the new guidelines, the time for bonus payment is set to March in the year after the bonus year. Participation in the bonus scheme is conditional on "the employee not having handed in a notice of termination or been dismissed at the time of payment". This is a change from the previous scheme, where the corresponding cut-off date was 31 December in the bonus year.

(47) The guidelines also include a special section stating that the bonus scheme is "an administrative program subject to the company's management prerogative, and the Company will have an opportunity to make changes to the program".

(48) Above this, the bonus terms applicable in BP seem to have been continued in Aker BP.

(49) It may be mentioned that, based on the company's "One Team" philosophy, presentations are prepared emphasising that "we are still working actively to … facilitate flow across the company", that the employees "take personal responsibility for ensuring a well-functioning team", and that one does not use "'they only we'". It is also pointed out that the workers "have high ambitions – and we challenge our teams to draw the best out of each other", and that they "help each other perform".

(50) According to a presentation on how the bonus framework is fixed – "2019 KPI and Priorities" – project work is implemented to measure factors such as completion degree, quality degree, solution success and fulfilment of time schedule. Factors such as "Safety", "Production" and "Production Cost" are also measured. A comment relating to Production shows that the employee's contribution is key. The comment states that "[s]trong efforts by the organisation have improved this result".

(51) In addition, factors such as "Relative Shareholder Return" are measured. This is primarily a financial factor and less of a work-related factor.

(52) Finally, the presentation states that the calculation method "is based on Company results – applies to all Aker BP employees", and that indications and priorities "are visible to the organization, and given monthly updates".

Assessment of the nature of the bonus

(53) The review shows that the main factor in BP's and Aker BP's bonus schemes – jointly referred to as Aker BP's scheme – is to reward the employees' joint achievements as a group

during the bonus year. By emphasising the significance of a strong performance culture one is seeking through the One Team philosophy to reach the goals the Company sets.

(54) The scheme is therefore mainly a reward system at company level for the employees' total performance in the preceding year. The measure points that cannot be referred to parameters directly linked to performance, like Relative Shareholder Return, are few and do not change the main impression that the scheme is linked to the undertaking's aggregate performance.

(55) Semco contends that the bonus scheme is structured to strengthen the permanent employees' commitment to Aker BP and build a lasting loyalty to the undertaking. However, I cannot see that anything like this has been stated or otherwise reflected in the bonus scheme. Admittedly, the conditions for payment through the choice of payment date have a certain restraining effect for the workers who might wish to leave the company before this or shortly after. However, this commitment is rather limited in time. It also does not change the fact that the amount paid, as the scheme is described, is remuneration for already performed, day-to-day group efforts. This must be decisive for how the scheme should be judged.

Is a company bonus covered by the equal treatment rule; if so, to which extent?

Introduction

(56) The parties agree that B and A would have been entitled to a bonus if they had been employed on a permanent basis to do the work they have actually performed. They also agree on the size of the bonus in such a case. Whether B and A is entitled to a bonus as hired workers, depends, according to my conclusion on the nature of the bonus, on whether a company bonus in the form of remuneration for work already performed at group level falls within "pay" in section 14-12 a subsection 1 (f) of the Working Environment Act.

The wording of the provision

(57) It is evident from section 14-12 a subsection 1 (f) of the Working Environment Act that the equal treatment rule covers "pay". Neither this Act nor other Norwegian legislation contains a uniform, general definition of pay. There are indeed Acts with individual definitions of the term, see for instance section 34 of the Equality and Anti-Discrimination Act. But in want of a generally applicable term, one should be careful not to interpret the pay concept in the equal treatment rule based on other provisions relating to remuneration.

(58) On a purely linguistic level, "pay" is associated with remuneration paid by an employer to an employee for general personal performance. The term as such does not give a direct answer as to whether bonus is "pay". However, with the starting point that pay is remuneration for work, the term will naturally also include bonuses if they are meant to compensate work efforts.

The significance of the EU's Directive on temporary agency work

(59) Directive 2008/104/EC on temporary agency work is part of the EEA Agreement. The equal treatment rule in section 14-12 a of the Working Environment Act incorporates a part of the Directive into Norwegian law. Article 2 sets out that one of the purposes of the Directive is

"to ensure the protection of temporary agency workers". Article 5, headed "The principle of equal treatment" states the following in subsection 1:

> "The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."

(60) According to Article 3 (1) (f), "basic working and employment conditions" include "pay". However, the Directive itself contains no definition of the term. I am also unaware of case law from the European Court of Justice establishing the content of pay within the meaning of the Directive. Moreover, Article 3 (2) provides that the Directive "shall be without prejudice to national law as regards the definition of pay". In other words, it is up to the member states to define the term in relation to the Directive, see Proposition to the Storting 74 L (2011–2012) page 55 and HR-2018-1037-A *Manpower* paragraph 25.

(61) The pay concept in Article 157 of the Treaty on the Functioning of the European Union (TFEU) is also not instructive as to the interpretation of pay in the Directive, as the appellants contend. The provision – which has its equivalent in Article 69 of the EEA Agreement – concerns equal pay for men and women and contains a list of what is to be considered pay "in this Article".

(62) However, due to the specific instruction regarding a national pay concept and the absence of a uniform term in the EU, I see no reason, when determining what is meant by "pay", elaborate further on EU law in general and Article 157 in particular, nor on other states' law.

The purpose as an interpretation factor

(63) The Directive on temporary agency work has, according to its Article 2, a wider purpose than only the protection of substitutes, as I have already mentioned. It is also meant to secure the principle of equal treatment, recognise the temporary work agencies as employers and secure a framework that generates jobs and flexible ways of working. However, in connection with the implementation of the equal treatment rule in Norwegian law, the legislature had a national goal extending beyond this, see Proposition to the Storting 74 L (2011–2012) page 51. There, the Ministry points out that, *irrespective of the Directive on temporary agency work*

> "there is a need for regulation ensuring equal treatment of hired-in workers and permanent employees on vital areas, primarily to ensure that the scope and the employment terms in connection with hiring do not undermine the goals of a labour market mainly focused on permanent and direct employments".

(64) Furthermore, it is stated that an equal treatment principle will prevent that reduced salary costs serve as motivation for hiring labour, and that this will "contribute to preventing conditions that may be characterised as social dumping". In other words, the specific goal was to prevent undermining of the idea of a labour market with main focus on permanent and direct recruitment and to secure genuine equality between permanent employment and hired labour with respect to remuneration. When deciding whether a bonus is "pay" within the meaning of the law, these goals will be an important interpretation factor.

The preparatory works

(65) Against this background, the central source for further determining what is comprised by the equal treatment rule is the preparatory works, i.e. Proposition to the Storting 74 L (2011–2012). The significance of the preparatory works in the determination of these issues is already emphasised in the Supreme Court judgment-2018-1037-A *Manpowe*r paragraph 27. The judgment concerned the question whether hired workers are entitled to the same compensation for travel time as the permanent employees. In paragraph 29, Justice Kallerud gives a general presentation of statements in preparatory works regarding the pay concept and of which benefits it includes. Paragraph 33 reads:

> "The presentation of different types of benefits and ways of acquiring them is detailed. However, I do not perceive it as an exhaustive instruction as to what should be included. The natural understanding is that it discusses a number of practical examples, without necessarily precluding that other benefits may be covered by the equal treatment rule. The examples presented – considered against the addition of 'coverage of costs' – show that the rule is meant to comprise more than mere remuneration for work. The purpose – real equal treatment of temporary and permanent employees – seems to have determined the distinction and that the Ministry's therefore wanted a wide area of application."

(66) The following is taken from paragraph 37:

> "The choice of a legislative technique – a listing of which specified remuneration and working conditions the equal treatment is to cover – clearly demonstrates that the Ministry did not intend that all benefits from the employee should be included, see page 51 in Proposition to the Storting 74 L (2011–2012). Thus, it cannot have been a relevant option for the Ministry to use an approach such as that in the Equality and Anti-Discrimination Act, where all benefits from the employer are included".

(67) The appellants have advanced a legal principle that the pay concept covers all benefits that a permanent employee receives from the employer by virtue of the employment relationship, except for pension. However, in paragraph 37, which I just quoted, the Supreme Court clearly expressed that the *legislative intent* has not been a wide interpretation of the term.

(68) According to the preparatory works, the pay concept does not only cover benefits following from formally binding rules for the undertaking, see the Proposition side 53. It is also stated that the "inter-company and unilateral provisions in handbooks or fixed guidelines and routines for salary determination upon new employments" must have effect for the salary and working conditions for hired workers as long as they have not been changed.

(69) Furthermore, the Proposition states on page 55 that "*all remuneration for work* must be covered by the pay concept". This includes both fixed remuneration and irregular supplements, in whichever form. Next, it is set out that the manner in which the benefit is acquired is not decisive "as long as it is clear that it concerns remuneration for work", see page 56. Benefits based on result or performance by the employee will also be covered if this is a common form of compensation for the relevant work. As already mentioned, piecework pay and commission pay are examples of this in addition to the fixed remuneration.

(70) From performance-based remuneration, such as piecework pay and commission pay, there is a smooth transition to remuneration in the form of a *bonus* in addition to fixed remuneration. The consultation paper was silent as to whether bonus should be included in "pay". Some

consultation bodies addressed the issue nonetheless. From the Norwegian Bar Association's statement in this regard, the following is quoted in the Proposition page 50–51:

> "Individual bonuses will often be paid based on a number of criteria connected to an incentive system where, presumably, bonuses are assessed on a regular basis and closely followed up by the management. This is often a demanding process based on the undertaking's internal management systems, of which hired workers, whose employment is of a more limited duration, are not a natural part. Consequently, both for principal and practical reasons, it will be wrong to include bonus in "pay".

(71) It appears from the quote that the statement concerns in particular individual bonus schemes for each employee, and not schemes with bonus payments at group or company level. Against this background, the Ministry comments as follows on page 56:

> "When it comes to whether or not equal treatment should include pay in accordance with bonus schemes and similar applicable in the user undertaking, it is difficult to give an absolute answer. Here, too, it depends on whether the relevant worker would have been entitled to the relevant bonus if recruited directly to the user undertaking, based on the type of work, duration of the assignment/work and similar. The following is set out in the report from the Commission's Expert Group on Implementation of the Directive from 2011, page 21 third paragraph, last sentence:
>
> > 'Nevertheless, bonuses, even performance-related ones, which would have been paid to a worker recruited directly for the same duration should in principle be taken into account when applying equal treatment, without prejudice to possible derogations.'"

(72) It is not automatically clear how this statement should be interpreted. However, what it does say is that the Ministry finds that certain bonus types are comprised by the pay concept. In addition, the reference to "pay" in accordance with "bonus schemes" suggests that the Ministry responds to the view expressed by the Bar Association, that *individual bonuses* should not be covered by the equal treatment rule. The statement in the Proposition shows that the Ministry had a different opinion, as it found that individual bonuses should also be included to the extent the nature and the duration of the hired worker's efforts fulfil the criteria in the user undertaking's bonus scheme.

(73) The appellants have pointed out that the criterion "remuneration for work" is not mentioned in the Proposition on this point, and that this must imply that the right to equal treatment only requires that the hired worker would have been entitled to a bonus if he or she had been permanently employed in the user undertaking. I do not agree with this conclusion. In light of what I have just discussed, it is natural that the Ministry does not repeat the starting point that pay is "remuneration for work" in its statement on bonuses. In an individual remuneration system based on "regular bonus assessments and special follow-up", which the Norwegian Bar Association had presented as a challenge with temporary labour, the work criterion will be met.

(74) Much suggests that the Ministry did not have bonus schemes at group or company level in mind. However, its statement does not preclude that such bonuses, too, may be covered by the equal treatment rule if they are remuneration for work. I cannot see why this general starting point should not also apply to such schemes.

Other case law as an interpretation factor

(75) It should be noted that the Labour Court's ruling in ARD 1998-14 reflects a perception that a system with company bonuses that were considered a form of performance-based pay, was "clearly similar to a system for remuneration for work performed". Although the key issue of that case differed from ours, the Labour Court's approach confirms that even bonuses at company level may count as remuneration for work.

Policy considerations

(76) When deciding whether bonus is "pay" within the meaning of the law, the goal of obtaining genuine equality between the remuneration of permanent employees and hired workers, which I have already pointed out, be significant as an interpretation factor. This applies both to the interpretation of the law and the individual application of the law.

(77) Semco contends that the risk of evasion is low if performance-related bonuses at company level are excluded from the equal treatment rule. Among other things, the company has referred to "substance over form" considerations and the statutory rights of employee representatives and trade union in this field according to section 14-12, cf. section 14-9, of the Working Environment Act. Nonetheless, I cannot see that such precautions and rights may compensate for the negative effect a narrow definition of "pay" may have on main rule on permanent and direct employment in Norwegian working life. The hired worker's right to equal treatment when it comes to performance-related bonuses at company level, will secure that hired labour is only used where the flexibility of such an organisation of the workforce is truly required. A pay concept implying that performance-related bonuses are only paid to parts of the workforce for the same efforts will give an economic incitement to hire labour and depart from the equal treatment principle. On this point, the consideration of a clear and controllable pay concept also justifies the non-distinction between individual and more community-oriented bonus schemes.

(78) Furthermore, Semco contends that a pay concept that also includes bonuses will cause large practical problems, considerable costs and administrative burdens. Such factors have justified the presumption in preparatory works that pension is excluded from the requirement of equal treatment. Semco finds that the same should apply to bonus schemes. In addition, a bonus is always calculated and paid in arrears. Semco claims that this prevents bonuses from being calculated into an offer phase and that it complicates the payments.

(79) I agree that a pay concept that includes bonus schemes will generate some extra work for the temporary work agencies. However, company bonuses are paid in accordance with objective criteria. It is the user undertaking's task to give the temporary work agency the information necessary for the agency to fulfil the requirement of equal treatment, see section 14-12 b subsection 1 of the Working Environment Act. The extra work accrued for the temporary work agency cannot be sufficient for denying a hired worker equal treatment when it comes to benefits functioning as remuneration for performed work.

(80) In addition, the situation is not such that any form of hired labour will generate extra work with calculating and paying out bonuses. Equal treatment is only relevant to the extent the hired worker would have fulfilled the bonus criteria if he or she had been permanently employed. Under Aker BP's scheme, this entails a requirement of a minimum length of

service and that a notice of termination has not been handed in at the date of payment. If the bonus criteria limit who is entitled to a bonus, the administrative burdens of applying the equal treatment rule are limited correspondingly.

(81) I assume that the problems one may face during the offer phase may be solved by including a reservation in the offer that any obligation to pay bonus in accordance with subsequent information from the user undertaking, will be calculated in arrears. Here, I refer to my previous comments on the user undertaking's joint and several liability for the hired worker's entitlement to pay and other remuneration as a result of the equal treatment principle, see section 14-12 c.

Summary

(82) The review has shown that the centre of the pay concept is whether the benefit is remuneration for work, alternatively for a result or an achievement obtained by the employee him or herself. Bonus payments will also be included as long as they are remuneration for work. This applies irrespective of whether it concerns individual bonus schemes or schemes at group or company level.

(83) In which form the remuneration is paid, or whether it is referred to as pay, is not decisive. It is not a requirement that the remuneration is fixed based on formally binding rules. Remuneration that is unilaterally fixed by the user undertaking may also be included.

The individual assessment of whether Aker BP's bonus scheme involves "pay" within the meaning of the equal treatment rule

(84) On the basis of how I perceive the nature of Aker BP's bonus scheme, and my understanding of the pay concept, the application of the law is more or less evident:

(85) In my opinion, Aker BP's bonus scheme meets all legal criteria for constituting "pay" within the meaning of section 14-12 a of the Working Environment Act subsection 1 (f). The bonus scheme is a form of performance-related remuneration and a part of the aggregate system for remuneration for work.

(86) I mention that the specification in Aker BP's terms on the company's prerogative to manage and amend the bonus scheme does not change this. As I have accounted for, unilaterally fixed schemes are also covered by the equal treatment rule.

The question of deduction for bonus during sick leave and layoff etc.

Introduction

(87) The parties agree that a full bonus for the years 2014–2017 for each of the appellants amounts to a total of NOK 242 467. Furthermore, the parties agree that the bonus for 2017 amounts to NOK 47 681.

A – sick leave

(88) A was on sick leave during the periods 13–23 June and 14–27 November 2016. Semco contends in the alternative that he, during these periods, has not acquired a right to equal treatment when it comes to bonus payments in Aker BP.

(89) A has pointed out that Semco, in a pleading to the Court of Appeal, stated that the company has "accepted that a bonus is to be paid for the period the employer covered payment during sickness". It is claimed that this acknowledgement must imply that that Semco does not have a legal interest in obtaining a judgment ordering such a deduction.

(90) It is not necessarily clear whether the statement A has referred to is a unilateral, private-law binding declaration. Moreover, I have noted that the contended deduction, despite the declaration during the preparations of the work, is mentioned in the Court of Appeal's judgment. Against this background, I take it that Semco has not committed itself to accepting an obligation to pay a bonus during the sick leave. The question of legal interest does thus not arise.

(91) The parties agree that permanent employees on sick leave do not lose their eligibility for a bonus. The question is whether *hired* workers on sick leave must nonetheless accept a reduction in their bonus.

(92) The Supreme Court has been informed that when a hired worker is sick, Semco must find a replacement if the user undertaking so requests. Only worked hours are invoiced to the customer. Therefore, as a starting point, the temporary work agency is financially liable for any absence due to sickness.

(93) Semco contends that the hired labour relationship must be considered terminated during a sick leave. In my opinion, a loss of the right to a bonus is not a natural legal consequence of short periods of sick leave in a long-standing working relationship like the one we are dealing with. I emphasise that the permanent employees do not lose their right to a bonus during a sick leave similar to A's. I has not been stated whether A was replaced in these short periods, but I cannot see that this is decisive for A's eligibility for a bonus during his absence. The substitute himself will not meet the bonus criteria, and the temporary work agency will nonetheless continue to perform for the user undertaking. If the worker on sick leave is not replaced, the company's situation will be the same as when its own employees are absent due to sickness. Either way, I cannot see why the absent hired worker should not be entitled to a bonus on the same terms as the company's own employees who are on sick leave.

A – layoff

(94) For three months around the turn of the year 2015/2016, A did not perform any work for Aker BP, as there was no need for temporary labour under Semco's framework agreement. Semco remunerated A as an employee until 3 February 2016. At that time, Semco had so few assignments that A had to be laid off until 8 May 2016.

(95) A has claimed a bonus for the period he was laid off, which was 3 February to 8 May 2016. He argues that that the user undertaking's own laid-off employees earn bonuses also during layoff.

(96) Semco disputes the claim on factual and legal grounds.

(97) I cannot see that A has presented any evidence for his contention regarding laid-off people's rights in the user undertaking.

(98) Nonetheless, the layoff implied that he did not carry out any work for Aker BP during the relevant period. Although the framework agreement between the undertakings was still effective, A, as a laid-off person, was not in a hired labour relationship with Aker BP. His rights and duties in the employment relationship with Semco were suspended due to the layoff, including his right to remuneration under section 3 of the Layoff Pay Act. The contention that A, during the same period, should have the same potential right to a bonus during the layoff as Aker BP's employees, is therefore without a legal basis.

(99) Consequently, NOK 17 133 will be deducted from the total bonus claim of NOK 242 467 submitted by A for the years 2014–2017. Net bonus after this constitutes NOK 225 334.

B – bonus after transfer to Aker BP

(100) B has submitted a bonus claim for the years 2014–2017. Semco has disputed the claim for 2017 with reference to the eligibility criterion that the temporary worker was still in a non-terminated employment on the payment date in March 2018. B was then employed in Aker BP.

(101) The parties agree that he would have been entitled to a bonus if he had been permanently employed in Aker BP in 2017, as he still worked there at the date of payment in 2018.

(102) As I understand it, it is also undisputed that B would not have been entitled to a bonus from Semco for 2017 if he, on the payment date in 2018, had been employed in a different company than Aker BP. The background of the claim is thus that it is *Aker BP*, as a starting point, that manages the relevant bonus scheme and has received B's services both before and after the change of employers.

(103) Although the situation *for B* is in fact the same in the case at hand, it is irrelevant *to Semco* in which company a hired-out worker starts to work. When, due to the change of employers, the hired-out worker exits the contract with the user undertaking and is possibly replaced, Semco's connection to the user undertaking is severed as concerns the relevant employee. If Semco were obliged to pay bonuses because the worker takes employment in the user undertaking, it would have no possibility to cover the costs under the framework agreement. Thus, there is no legal basis for imposing such an obligation on the temporary work agency.

(104) From the aggregate bonus claim of NOK 242 467 for the years 2014–2017, the amount for 2017 will be deducted for B's part. This constitutes NOK 47 681, and his net bonus will thus constitute to NOK 194 786.

Conclusion and costs

(105) Against this background, I conclude that the bonus scheme in Aker BP is "pay" within the meaning of section 14-12 a (f) of the Working Environment Act. However, A is not entitled to a bonus for his layoff period in 2016. B is not entitled to a bonus for 2017, as he, at the cut-off date for the right to bonus, was employed in a different company than Semco.

(106) Both employees have also claimed holiday allowance from the bonus amounts. The claim is undisputed and thus accepted.

(107) Furthermore, both employees have demanded the addition of "default interest from the due date until payment is made". This part of the claim is also undisputed and therefore accepted.

(108) The appellants have been mainly successful, and are entitled to compensation for their costs, see section 20-2 subsection 2 of the Dispute Act. I note that the key issues of the case have been the interpretation of section 14-12 a subsection 1 (f) of the Working Environment Act regarding pay and the individual application of the law. On these issues, the appellants have been fully successful.

(109) B and A have jointly claimed costs of NOK 103 750 incurred in Stavanger District Court, NOK 119 750 incurred in Gulating Court of Appeal and NOK 520 000 incurred in the Supreme Court, in total NOK 743 500 with the addition of VAT, which totals NOK 929 375. In addition, B and A claim NOK 19 380 in compensation for counsel's and the appellants' travel and accommodation costs. Semco has objected to the size of the claim for costs in the Supreme Court, but I find no reason to reduce the amount. Thus, Semco is to compensate the total costs of NOK 948 755 by a half – i.e. NOK 474 378 – to each of the appellants.

(110) LO Norway has claimed costs in the Supreme Court of NOK 178 561. The claim is accepted.

(111) Against this background, I vote for the following

J U D G M E N T :

1. Semco Maritime AS is to pay NOK 194 786 – onehundredandninetyfourthousandsevenhundredandeightysix – to B with the addition of holiday allowance and default interest from the due date until payment is made within 2 – to – weeks of service of this judgment.

2. Semco Maritime AS is to pay NOK 225 334 – twohundredandtwentyfivethousandthreehundredandthirtyfour – to A with the addition of holiday allowance and default interest from the due date until payment is made within 2 – to – weeks of service of this judgment.

3. Semco Maritime AS and NHO Norway are jointly and severally to pay costs in the District Court, the Court of Appeal and the Supreme Court of NOK 474 378 – fourhundredandseventyfourthousandthreehundredandseventyeight – to B within 2 – to – weeks of service of this judgment.

4. Semco Maritime AS and NHO Norway are jointly and severally to pay costs in the District Court, the Court of Appeal and the Supreme Court of NOK 474 378 –

fourhundredandseventyfourthousandthreehundredandseventyeight – to A within 2 – to – weeks of service of this judgment.

5. Semco Maritime AS and NHO Norway are jointly and severally to pay costs in the Supreme Court of NOK 178 561 – onehundredandseventyeightthousandfivehundredandsixtyone – to LO Norway within 2 – to – weeks of service of this judgment.

(112) Justice **Steinsvik:** I agree with Justice Matheson in all material respects and with his conclusion.

(113) Justice **Bull:** Likewise.

(114) Justice **Skoghøy:** Likewise.

(115) Chief Justice **Øie:** Likewise.

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

J U D G M E N T :

1. Semco Maritime AS is to pay NOK 194 786 – onehundredandninetyfourthousandsevenhundredandeightysix – to B with the addition of holiday allowance and default interest from the due date until payment is made within 2 – two – weeks of the service of this judgment.

2. Semco Maritime AS is to pay NOK 225 334 – twohundredandtwentyfivethousandthreehundredandthirtyfour – to A with the addition of holiday allowance and default interest from the due date until payment is made within 2 – two – weeks of the service of this judgment.

3. Semco Maritime AS and NHO Norway are jointly and severally to pay costs in the District Court, the Court of Appeal and the Supreme Court in the amount of NOK 474 378 – fourhundredandseventyfourthreehundredandseventyeight – to B within 2 – two – weeks of the service of this judgment.

4. Semco Maritime AS and NHO Norway are jointly and severally to pay costs in the District Court, the Court of Appeal and the Supreme Court in the amount of NOK 474 378 – fourhundredandseventyfourthousandthreehundredandseventyeight – to A within 2 – two – weeks of the service of this judgment.

5. Semco Maritime AS and NHO Norway are jointly and severally to pay costs in the Supreme Court to in the amount of NOK 178 561 – onehundredandseventyeightthousandfivehundredandsixtyone – to LO Norway within 2 – two – weeks of the service of this judgment.