SUPREME COURT OF NORWAY

J U D G M E N T

given on 7 April 2022 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Arne Ringnes
Justice Espen Bergh

HR-2022-728-A, (case no. 20-183236SIV-HRET)
Appeal against Hålogaland Court of Appeal's judgment 23 October 2020

Norep AS	(Counsel Magne Mjaaland)
v.	
Haugen-Gruppen AS	(Counsel Thor Einar Kristiansen)

(1) Justice Falkanger**:**

Issues and background

(2) The case concerns a claim for indemnity under section 28 of the Agency Act and the interpretation of the definition of "commercial agent" in section 1 subsection 1. The main issue is whether a person must have been directly involved with orders to be covered by the rules for commercial agents set down in the Act.

(3) Haugen-Gruppen AS imports and sells products to the major supermarket chains in Norway. In 1991, the company entered into an agreement with Norep AS on sales and agency work. In 2008, this agreement was replaced by a new and revised agreement.

(4) Under the 2008 agreement, Norep was through "active and serious sales work to promote the sale and distribution of HG's products" in the counties of Nordland, Troms and Finnmark. It was particularly incumbent on Norep to promote Haugen-Gruppen's sale "in the best possible way through regular visits to retailers and wholesalers". Norep was to offer products, take complaints and contribute in sales promotion campaigns. In return, the company would receive a commission "of net invoiced wholesale sales directly or indirectly to Norep's geographic area".

(5) In line with what has become an increasingly common practice in the grocery industry, the customers' orders – at least under the 2008 agreement – went directly to Haugen-Gruppen. The orders were thus not taken and forwarded by Norep as an intermediary.

(6) When Haugen-Gruppen terminated the agreement in October 2018, Norep demanded indemnity under section 28 of the Agency Act in the form of a one-year commission. However, Haugen-Gruppen held that the Agency Act was not applicable and that there was no basis for such indemnity.

(7) Norep brought an action Haugen-Gruppen in Salten District Court, which, on 10 March 2020, ruled as follows:

> "1. The District Court finds in favour of Haugen-Gruppen AS.
> 2. Norep AS is to pay NOK 350 000 excluding VAT to Haugen-Gruppen AS, within two weeks of the service of this judgment."

(8) The District Court found that the contractual relationship was not regulated by the Agency Act, as the "procuring orders" requirement in section 1 subsection 1 was not met. Nor had the parties agreed that the Agency Act should apply. Section 28 of the Agency Act on indemnity could not be applied analogously, and there was no basis for claiming damages.

(9) Norep appealed to Hålogaland Court of Appeal, which, on 23 October 2020, ruled as follows:

> "1. The appeal is dismissed.
> 2. Norep AS is liable to Haugen-Gruppen AS for costs in the Court of Appeal of NOK 291 126, payable within two weeks of service of this judgment."

(10) Like the District Court, the Court of Appeal did not consider Norep to fall under the "procuring orders" requirement for commercial agents in section 1 subsection 1 of the Agency Act. The parties had not agreed that the Act should apply, and there was no basis for an analogous application of section 28. Norep did not submit a claim for damages in the Court of Appeal.

(11) Norep has appealed to the Supreme Court against the application of the law. In the appeal, Norep contends – for the first time during the proceedings – that EEA law is significant for the interpretation of section 1 subsection 1 of the Agency Act. Norep has abandoned its contention that the parties agreed that the Agency Act would apply.

(12) During the preparatory phase, the Supreme Court asked the EFTA Court for an advisory opinion regarding the interpretation of Article 1 (2) of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. The EFTA Court delivered its advisory opinion on 14 December 2021.

(13) On 21 January 2022, the justice leading the preparatory phase made the following decision based on section 30-14 of the Dispute Act regarding this limitation of the appeal:

> "The proceedings will be limited in accordance with section 30-14 subsection 3 of the Dispute Act, so that the Supreme Court will only deal with the "procuring orders" requirement in section 1 subsection 1 of the Agency Act. If the Supreme Court finds that the Court of Appeal has made an error in law, the Court of Appeal's judgment must be set aside, and the proceedings related to the other conditions for claiming indemnity must continue in the Court of Appeal.
>
> If the Court of Appeal is found to have applied the law correctly on the above point, the Supreme Court must consider the application of the law with regard to an analogous application of section 28 of the Agency Act."

(14) Also within the scope of the issues that the Supreme Court is thus to consider, the circumstances of the case are much different from in the lower instances. I mention that EEA law has not previously been invoked and that an advisory opinion has been obtained from the EFTA Court.

The parties' contentions

(15) The appellant – *Norep AS* – contends:

(16) The Court of Appeal has made an error in law in assuming that Norep, in order to be covered by the Agency Act, had to have been involved with orders generated to Haugen-Gruppen.

(17) The expression "procuring orders" in section 1 of the Agency Act may imply that the order must have been taken and forwarded by the agent. However, the wording may also be read to imply that this is not a requirement. The latter interpretation best safeguards the protective considerations behind the Agency Act.

(18) Under any circumstances, the provision must be read in accordance with Article 1 (2) of Council Directive 86/653/EEC of 18 December 1986. Under this provision, it is not a requirement that the agent takes the order, as the EFTA Court has confirmed in its advisory

opinion of 14 December 2021. A commercial agent may contribute in several ways to the procurement of orders to the principal, and thus fulfil the conditions in Article 1 (2) without having been directly involved with the orders.

(19) As reflected in the preparatory works, section 1 was meant to correspond to the Directive. Based on traditional Norwegian interpretive theory alone, section 1 cannot be read as a condition that the agent is directly involved with the orders. Under any circumstance, it follows from Article 3 of the EEA Agreement that domestic courts have a duty to interpret domestic law into EEA law.

(20) Norep is in any case entitled to indemnity under an analogous application of section 28 of the Agency Act. The Court of Appeal's criteria for when such analogy can be used are too strict.

(21) Norep AS asks the Supreme Court to rule as follows:

> "1. Hålogaland Court of Appeal's judgment of 23 October 2020 is set aside.
> 2. Norep AS is awarded costs in the District Court, the Court of Appeal and in the Supreme Court."

(22) The respondent – *Haugen-Gruppen AS* – contends:

(23) The Court of Appeal's interpretation of the expression "procuring orders" in section 1 subsection 1 of the Agency Act is correct. A condition for Norep to be covered by this term is that it – as a self-employed intermediary – has taken and forwarded orders to Haugen-Gruppen. The wording of the provision is clear and does not allow for a dynamic interpretation. This system was well adapted to the way agency agreements came about with the adoption of the Act, and it is still well founded, particularly as it safeguards important considerations related to foreseeability and preparation. It is also supported by other provisions of the Agency Act, particularly sections 5 and 20.

(24) Haugen-Gruppen acknowledges that section 1 of the Agency Act does not coincide with Article 1 (2) of Council Directive 86/653/EEC of 18 December 1986. This is set out in case law from the Court of Justice of the European Union (CJEU) and in the EFTA Court's advisory opinion delivered in the case at hand. When the Directive is thus incompatible with the Agency Act, the latter must take precedence. In addition, the "presumption principle"[1] in Article 3 of the EEA Agreement was not successfully invoked in the Supreme Court's judgment in Rt-2000-1811 (*Finanger I*). Our case cannot be considered otherwise.

(25) Even if the Court of Appeal's interpretation of the expression "procuring orders" in section 1 of the Agency Act is found to be incorrect, the judgment contains sufficient information for the Supreme Court to establish that Norep in any case was not a commercial agent under the Agency Act. At most, Norep has contributed to the formation of purchase agreements between Haugen-Gruppen and customers. This is not sufficient.

(26) There is no basis for an analogous application of section 28 of the Agency Act. It would not be sufficiently unreasonable if Norep is not entitled to indemnity under the principles expressed in the provision.

[1] A Norwegian term on the presumption that Norwegian law is in accordance with international law.

(27) Haugen-Gruppen AS asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
> 2. Haugen-Gruppen AS is awarded costs in the Supreme Court."

My opinion

Section 1 subsection 1 of the Agency Act

(28) Norep is claiming indemnity under section 28 of the Agency Act due to the termination of the agreement with Haugen-Gruppen. A condition for making such a claim is that the company is covered by the definition of commercial agents in section 1 subsection 1 of the Agency Act. The provision reads:

> "For the purpose of this Act 'commercial agent' shall mean a person who as a business activity has undertaken by agreement with another person (the principal) to negotiate on an independent and continuing basis the sale or the purchase of goods for the principal's account by procuring orders on behalf of the principal or by concluding transactions in the principal's name."

(29) The issue before the Supreme Court is the wording "procuring orders". The question is whether the Act requires that the commercial agent has been directly involved with orders – in the sense that the agent must have taken orders and forwarded them to the principal. Read in context, my understanding is that the Court of Appeal finds that the Agency Act lays down such a requirement.

(30) According to section 1 subsection 1, several criteria must be met to qualify as an agent. It is essential that the person is self-employed, and he must, over time, "negotiate … the sale and purchase of goods for the principal's account". The sale and purchase of goods may be negotiated in two ways, one of which is by "procuring orders" to the principal.

(31) The expression "procuring orders" is not clear-cut, but at a purely linguistic level, it must imply that the agent gets hold of or receives orders. The core of the expression probably aims at cases where the person procures the orders himself and then forwards them to the principal. However, I cannot see that the wording rules out that the person may be a commercial agent even if the orders go directly from the customers to the principal.

(32) The Agency Act was prepared by a separate work group. The report from this work sets out on pages 36-37, reproduced in Proposition to the Odelsting no. 49 (1991–1992) pages 7-8, that one of the objectives of the Act is to protect the interests of commercial agents:

> "The introduction of a new product often requires considerable efforts from the agent. The efforts may initially yield a modest number of orders and an equally modest remuneration. Only when the product is well known in the market, the agent may expect to receive orders in such a scope that the agency agreement becomes profitable to him. The agent always risks that the principal, after the product has been introduced in the market, terminates the agency agreement and establishes his own sales organisation. In such cases, the agent may be left with a remuneration that does not correspond to his efforts. It is true that the commercial agent has a possibility to guard himself against such situations by ensuring that the agency agreement contains provisions to that effect, for instance in the form of separate remuneration upon termination of the agency agreement.

> However, the agent is often financially weaker than the principal and thus in an inferior negotiation position. For this reason, the agent cannot have such terms included in the agreement."

(33) In other words, one of the purposes of the Act is to protect commercial agents, particularly by being given a fair remuneration for the work effort made. As far as I understand, the work effort will largely be covered by the "negotiating the sale or purchase of goods for the principal's account" requirement. The very expedition of the orders hardly requires much effort. Considerations of purpose therefore do not imply that the Act must also be interpreted to lay down a condition necessitating the commercial agent's direct involvement with the orders.

(34) The preparatory works do not clearly state how "procuring orders" should be interpreted. But in the mentioned Proposition, the following is set out in the comments to section 5 (1) on the commercial agent's general obligations:

> "The agent's task is to procure orders to the principal, and possibly enter into agreements in the principal's name. In (1) it is established that the agent must 'make proper efforts' in this regard. The details of the obligation to 'make proper efforts' depend on the individual circumstances, such as the content of the agency agreement, established case law, commercial practice and custom. A minimum requirement of activity on the agent's part is that he takes and forwards orders from third parties, unless otherwise expressly stated in the agreement, see Tore Sandvik: *Handelsagentur og mellommannsforhold i varehandelen* [commercial agency and other intermediary relationships in commodity trade], 1971, p. 60."

(35) I read this as a presupposition that the parties may agree that the commercial agent is not to take and forward orders from the customer, and that the arrangement nonetheless is covered by the Agency Act. This is also the starting point for the mentioned presentation by Tore Sandvik.

(36) Thus far, I find it difficult to conclude based on domestic sources of law that section 1 subsection 1 must be interpreted to express a requirement that a commercial agent takes and forwards orders.

(37) Moreover, in the preparatory works to section 1 of the Agency Act, it is stated that the provision must be understood in the same manner as in Article 1 (2) of Council Directive of 18 December 1986 (86/653/EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents. I reference Proposition to the Odelsting no. 49 (1991–1992) p. 12:

> "The Ministry's Proposition mainly corresponds to the work group's draft section 1. Any person considered a 'commercial agent' within the meaning of the Council Directive, will also fall under the definition in the Proposition, see Article 1 (2) of the Directive."

(38) I will therefore turn to Article 1 (2) of the Directive.

Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

(39) As a result of rules in Annex VII (30) of the EEA Agreement, the Directive is directly binding on Norway. The Directive is incorporated into Norwegian law through the Agency Act.

(40) Article 1 (2) of the Directive reads:

> "For the purposes of this Directive, 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal."

(41) The agent's obligation to "negotiate" the sale or the purchase corresponds to the "procuring orders" condition in section 1 subsection 1 of the Agency Act. The provisions are structured in different manners, but the legislature presupposed that section 1 subsection 1 would have the same content as Article 1 (2).

(42) When the Supreme Court during the preparatory phase requested the advisory opinion from the EFTA Court, two questions were raised. The first one read:

> "Shall the term 'negotiate' in Article 1(2) of Directive 86/653 be interpreted as presupposing involvement with orders from customers to the principal, with the result that the orders may not go directly from customers to the principal, as is described in the facts of this request?"

(43) In its advisory opinion of 14 December 2021, the EFTA Court maintains among other things that the term "negotiate" contains an autonomous concept in EEA law, see paragraph 30. After having discussed different language versions of Article 1 (2), the following is set out in paragraph 34:

> "Notwithstanding such differences, the wording used in the various language versions of Article 1(2) of the Directive do not contain any requirements presupposing involvement with orders from customers to the principal or that orders must be placed via the commercial agent. That conclusion is supported by the context and objective of Article 1(2)."

(44) In paragraphs 39-41, the EFTA Court points out some of the consequences of interpreting into the provision a condition necessitating the commercial agents' involvement with orders from the customer to the principal:

> "The Court observes that it would enable the principal to evade his obligations to the agent and jeopardise the achievement of the objective pursued by the Directive, if the classification of 'commercial agent' were made subject to conditions additional to those laid down by Article 1(2), such as a condition necessitating the direct involvement of the commercial agent in taking or finalising orders.
>
> It should be noted that the fact that a commercial agent does not have a role in taking or finalising orders on behalf of the principal does not, in itself, prevent the commercial agent from carrying out the main tasks of a commercial agent, namely to bring the principal new customers and to increase the volume of business with existing customers

> (compare the judgment in *Trendsetteuse*, cited above, paragraphs 32 and 33).
>
> It is possible for the commercial agent to accomplish those tasks by providing information and advice, as well as through discussions aimed at facilitating the conclusion of the transaction for the sale of goods on behalf of the principal, without requiring the commercial agent to have a direct involvement in taking orders (compare the judgment in *Trendsetteuse*, cited above, paragraph 34)."

(45) The EFTA Court then concludes in paragraph 45:

> "The answer to the first question must therefore be that Article 1(2) of the Directive, and in particular the term "negotiate", should be interpreted as not necessarily presupposing the agent's direct involvement with the placing of orders by customers with the principal, or excluding a scenario in which orders go directly from customers to the principal."

(46) Advisory opinions from the EFTA Court are not binding on Norwegian courts, but the Supreme Court has established, in HR-2016-2554-P (*Holship*) among others, that considerable importance must be attached to them, see paragraph 77:

> "In their interpretation of EEA law, however, national courts shall attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law. The purpose of the EFTA Court is, according to the preamble of the Surveillance and Court Agreement, among other things, to "arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". The EFTA state's courts must therefore normally apply the EFTA Court's interpretation of EEA law, and cannot disregard an advisory opinion by the EFTA Court unless "special circumstances" so indicate, cf. Rt. 2013, p. 258, paragraphs 93–94, with reference to the plenary judgment of Rt. 2000, pp. 1811–1820. In order for the EFTA Court to fulfil its intended purpose, the court's interpretation of EEA law cannot normally be disregarded unless there are weighty and compelling reasons for doing so."

(47) In other words, an advisory opinion from the EFTA Court may only be disregarded if there are compelling reasons for doing so.

(48) I cannot see that such reasons have been demonstrated in the case at hand. The EFTA Court's statement is clear and builds on a number of sources of EU law. The statement is particularly supported by the ECJ's judgment of 4 June 2020 in Case C-828/18 *Trendsetteuse*. There, the CJEU sets out that a commercial agent's tasks include bringing the principal new customers and increasing the volume of business with existing customers, and that this can be accomplished by providing information and advice, as well as through discussions. There is no requirement on the commercial agent to take and forward orders. I confine myself to referencing the judgment's paragraphs 33, 34 and 38.

(49) Against this background, I rely on the EFTA Court's interpretation of the Directive. Article 1 (2) must then be interpreted not to contain any requirement that the commercial agent takes orders and forwards them to the principal.

Conclusion on the interpretation issue

(50) Consequently, section 1 of the Agency Act must be interpreted to imply that it is not a condition for qualifying as a commercial agent that the intermediary takes and forwards orders. No such requirement can be read from the wording of section 1 subsection 1, and the preparatory works show that the provision must be interpreted in the same way as Article 1 (2) of the Directive.

(51) From this, one may conclude that there is no conflict between section 1 subsection 1 of the Agency Act and Article 1 (2) of the Directive.

(52) It is therefore unnecessary to further discuss the "presumption principle" in Article 3 of the EEA Agreement or Haugen-Gruppen's contention related to the Supreme Court judgment in Rt-2000-1811 (*Finanger I*).

(53) The Court of Appeal's interpretation of section 1 subsection 1 of the Agency Act is consequently incorrect.

Conclusion and costs

(54) Against this background, the Court of Appeal's judgment must be set aside.

(55) The appellant is the successful party and is entitled to full compensation from the respondent for its costs in the Supreme Court, see the general rule in section 20-2 subsection 1, cf. section 20-8 subsection 1 of the Dispute Act.

(56) A statement of costs has been submitted claiming NOK 896 550 in legal fees in the Supreme Court. The court fee of NOK 29 352 is extra. The claim thus totals NOK 925 902 and is exempt from VAT.

(57) The amount is high, but due to the system that prevents two advocates from arguing before the Supreme Court[2] for the first time in the same case, Norep had to change counsel in the Supreme Court. Also, EEA law was not invoked until the Supreme Court proceedings, and the EFTA Court hearing must have been very resource-demanding. I therefore find that the costs have been necessary, see the Dispute Act section 20-5 subsection 1. The claim is thus accepted.

(58) The appellant has also claimed costs in the Court of Appeal and the District Court. However, as the Court of Appeal's judgment is now being set aside, these costs must be determined in the Court of Appeal in connection with the continued hearing there, see section 20-8 subsection 3 of the Dispute Act.

[2] In Norway, an advocate must convincingly argue (but not necessarily win) two cases in the Supreme Court before being permanently admitted.

(59) I vote for this

J U D G M E N T :

1. The Court of Appeal's judgment is set aside.

2. Haugen-Gruppen AS is to pay Norep AS's costs in the Supreme Court of NOK 925 902 within two weeks of service of this judgment.

(60) Justice **Bergh:** I agree with Justice Falkanger in all material respects and with his conclusion.

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

(62) Justice **Matheson:** Likewise.

(63) Chief Justice **Øie:** Likewise.

(64) The Supreme Court then gave this

J U D G M E N T :

1. The Court of Appeal's judgment is set aside.

2. Haugen-Gruppen AS is to pay Norep AS's costs in the Supreme Court of NOK 925 902 within two weeks of service of this judgment.