March 2015

Risk of double litigation in labour disputes

Background

A company has an employee who has committed a material breach of his employment contract. The employee's violations include wrongful reporting of working hours, inaccurate reporting on fulfilment of work duties and extensive private calls and surfing on the Internet. The company believes that there are grounds for summary dismissal and the employee is therefore, given notice that he will be dismissed with immediate effect. The employee is an active member of a Labour union. The employer is not a member of any employers' organisation and has not signed a collective bargaining agreement.

The union in which the employee is a member chooses to represent the employee and commences proceedings for wrongful termination in the district court. The union and the employee claim that it was the employee's involvement with the union and the fact that immediately before the dismissal the employee had been actively working to establish a collective bargaining agreement with the employer that was the actual reason for the dismissal. Consequently, the union is at the same time bringing a claim before the Labour Court for violation against freedom of association.

Forum rules of labour disputes

Under Chapter 2, Section 1, paragraph 1 of the Act (1974: 371) on judicial procedure in labour disputes (the "Labour Disputes Act") the Labour Court *must* as the first instance take up and settle claims brought by an employers' organisation, worker's rights organisation or an employer who has signed a collective bargaining agreement provided that the dispute relates to the collective bargaining agreement or other labour disputes as outlined in the Swedish Act on Co-Determination in the Workplace (1976:580) or other labour disputes if a collective bargaining agreement applies between the parties. For example, disputes regarding violations against freedom of association or negotiation refusal.

Other labour disputes, pursuant to Chapter 2, Section 2, paragraph 1 should be taken up and settled by the district court, primarily the district court in the area where the employee resides. Examples of such disputes include invalidation of summary dismissal or termination of the employment.

A union that is bringing a claim on their own initiative, such as claims regarding violations against freedom of association may also, if the action is brought by the employee against

March 2015
Risk of double litigation in labour disputes

the employer in the district court, choose to bring the claim to the same district court against the employer rather than commence proceedings at the Labour Court.

In the example above the union, as the plaintiff, can also bring a claim regarding the alleged violation against freedom of association either in the Labour Court in the first instance, or in the district court.

The claim to invalidate the summary dismissal and associated claims for damages shall, however, according to general rules, be taken up by the district court in the first instance and only after a ruling by the district court can a party apply to bring proceedings before the Labour Court. Certain possibilities do however exist when it comes to having such a case tried in the Labour Court as first instance.

As a result of the rules regarding bringing an action under the Labour Disputes Act the union will be given the opportunity to issue proceedings both as counsel and as a plaintiff in two different courts against the same counterparty.

In the example above, one can expect that much of the evidence will be the same. In order to determine whether the dismissal is invalid or if objective grounds were at hand, the district court must determine the reason for the dismissal. If it can be proven that there were objective grounds for dismissal and that the employee's membership in a trade union had nothing to do with the summary dismissal then it is likely that there has been no violation of freedom of association. If the claims could have been handled jointly then it would undoubtedly have meant significant benefits.

Assume that the employee lives in Lycksele. The union representing the employee brings a claim in Lycksele district court and in the Labour Court. The employer is then forced to litigate one case in the district court in Lycksele as well as a parallel case at the Labour Court in Stockholm. This will require, among other things, significant travel costs and the cost of unnecessary pleadings. That this is not desirable either in terms of time management or purely as a matter of costs is not difficult to understand.

Rules on cumulation of claims

A labour dispute that in accordance with the Labour Disputes Act will be taken up by the Labour Court in the first instance *may* be handled jointly with another labour dispute if the court considers it appropriate (known as cumulation). This presupposes, however, that the party filing the complaint is filing the complaints in both cases at the same time, at the Labour Court. The Labour Court may then, if the court with regard to the investigation and other factors finds such handling appropriate, choose to handle a labour dispute that shall be brought before the Labour Court in the first instance together with another labour dispute which otherwise would have been handled by the district court as the first instance. If the union decides to bring proceedings at the Labour Court and the district court, then this rule is not applicable.

March 2015

Risk of double litigation in labour disputes

If an action is brought before two district courts, the Supreme Court may on application by a party, decide that the claims should be dealt with jointly at one of the district courts. The rule assumes, however, that the action was filed in two or more district courts, or two or more courts of appeal. On the other hand, if the action has been brought before the district court and the Labour Court respectively then this rule does not apply.

The possibilities for an employer as a defendant to establish a cumulation when the union has decided to bring an action at the district court and the Labour Court are therefore extremely limited, if not non-existent.

Examples in practice

The Labour Court has addressed the issue of cumulations in two rulings, one from 2007 and one from 2008.

In AD 2007 No. 28 a dismissal led to a dispute between an employee and the company where this individual worked, in addition to this a dispute occurred between the company and the union of which the employee was a member concerning refusal to initiate labour union consultations. The Labour Court initially handled the two claims jointly and issued the summons. After the issuing of summons the question arose whether the plaintiff's cases would continue to be handled jointly.

The current forum rule in Chapter 2, Section 1, paragraph 3 in the Labour Disputes Act is facultative, i.e. the court has the possibility of cumulating two labour disputes but no obligation to do so even if the requirement, that this shall be appropriate is met. According to the Labour Court, assessment as to whether two labour disputes should be dealt with jointly should consider the fact that such a hearing is an exception to the forum regulation that the legislature chose for labour disputes. The forum rule is based on the view that only disputes which have been the subject of negotiation between the parties shall be dealt with in the Labour Court in the first instance. According to the Labour Court, this indicates that the cumulation rule should be applied restrictively. Furthermore, the parties' opinion can be deemed as an important factor but it is not decisive for the assessment.

The Labour Court considered that the investigation and evidence regarding the negotiation refusal was limited. The employee's action against the company, however, would bring about a more comprehensive investigation and evidence. The employee's action also included several different claims for compensation. The evidence which was common for the two claims appeared limited. A further factor was that the parties to the disputes did not agree on the forum issue and the Labour Court, therefore, found that there was not sufficient reason to deviate from the main rule on forums, which was why the dispute regarding the dismissal would be tried in the district court.

March 2015
Risk of double litigation in labour disputes

In AD 2008 No. 100, as well, the court concluded after comprehensive assessment that there was no reason to deviate from the main rule of the forum under the Labour Disputes Act, for which reason the dispute regarding the employees' wage claims would be tried in the district court.

In case NJA 2002 page 643, the Supreme Court brought together two claims, an ordinary civil claim and a labour dispute, at different district courts because it would lead to significant benefits for the proceedings.

Concluding comments

If a trade union has decided to bring an action in the district court and the Labour Court respectively, an employer under the current legislation has extremely limited options when it comes to having the two claims handled jointly. The rule in Chapter 2, Section 1, paragraph 1 of the Labour Disputes Act is compulsory; therefore, there is no possibility for the Labour Court to refer a claim to the district court for joint handling if the dispute falls within the scope of the provision. Furthermore, it can be said that the conclusion from the Labour Court's two decisions with regard to cumulation that even when the action is brought before the same court strong arguments are required to deviate from the main rule on forum.

The unions are given an upper hand by the forum rules in the Labour Disputes Act where they can choose to use their often stronger resource position against small employers in rural areas by initiating proceedings in different courts when two or more claims should reasonably be dealt with together. This does not only costs an employer large sums but also becomes a major burden on our justice system when a claim involving similar issues needs to be tried by two courts at the same time.

One possible solution to the problem could be that the Labour Court is given a possibility to refer, at the request of the parties the dispute to the district court for joint processing if deemed appropriate, or to decide that a dispute in the district court could be taken up directly by the Labour Court when conditions exist to deal with them jointly in the Labour Court.

Marita Gröndahl,
Senior Associate / Advokat

Viktoria Rosén,
Associate