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Legal presumptions in labour law

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Sammendrag	This article explores the critical role of legal presumptions in labour law, focusing on their impact on enforcing workers' rights and protections. By examining the evolution of these presumptions within the EU labour law and Norwegian labour law, the discussion highlights how presumptions address the challenges of employee misclassification and the enforcement of labour rights. Key developments, like the introduction of a general presumption of employment in Norwegian law, illustrate the diversity and significance of these legal mechanisms. The article delves into various types of presumptions, their justifications, and their practical implications, aiming to shed light on their advantages and potential drawbacks in enhancing labour law's protective function.

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1. Introduction

Legal presumptions have long been a part of labour law, playing a crucial role in ensuring the effective enforcement of rights and protections for workers. Perhaps one of the most notable instances is the burden of proof rule in anti-discrimination law. This rule was developed in EU law based on the principle of effectiveness, which requires that national laws and procedures must not hinder or make it excessively difficult for individuals to enforce or exercise substantive rights.[1] In recent times, there has been a notable expansion in the use of legal presumptions within EU labour law. A prominent example of this is the Transparent and Predictable Working Conditions Directive (Directive 2019/1152), which establishes legal presumptions as one mechanism that member states can choose to ensure effective enforcement of the directive. Additionally, the emergence of platform work has prompted the proposal of new presumptions, particularly aimed at addressing employee misclassification issues. An important development in this regard occurred on 8th February 2024, with the provisional agreement on the new platform work directive. The directive mandates member states to institute a legal presumption of employment when facts are found which indicate control and direction. Some member states already have legal presumptions on employee status, and a general presumption was introduced into Norwegian law on 1st January, 2024.[2] However, notable variations exist in both their design and application.

This article delves into the intricate realm of legal presumptions in labour law, exploring their defining characteristics and the underlying justification. By comparing different legal presumptions, the article aims to illuminate the potential advantages and disadvantages of various approaches to presumption rule design. Of particular focus will be the new and unusual legal presumption concerning employee status in Norwegian law. However, before delving into specific examples, it is essential to establish an understanding of the fundamental aspects of legal presumptions.

2. Presumptions and legal presumptions – some general aspects

Every legal system incorporates presumptions of both facts and law. The term «legal presumption» encompasses various meanings. Primarily, it may denote presumptions concerning facts, aligning closely with factual presumptions, which stem from the observed connection between phenomena, such as slurred speech and alcohol intoxication.[3] These assumptions, inherent to human cognition, form the basis of a prima facie perception regarding facts, shaping the initial understanding until further evidence is presented. In systems allowing for free evidence evaluation, factual presumptions influence the evidentiary burden on parties, guiding the court's assessment without rigid adherence to predefined norms.

Contrastingly, a legal presumption of this nature, entails a *regulated* inference concerning facts binding the court's assessment.[4] The presumption dictates that if condition X is met, then something Y shall, according to a legal norm, be presumed.[5] However, in this article, the term «legal presumption» extends beyond factual matters to encompass presumptions influencing the application of law. The delineation between these legal presumptions is not always clear, exemplified by the legal presumption in anti-discrimination law, which intersects both factual circumstances and legal elements, an area which we will elucidate later.[6]

Legal presumptions derive their basis from either statutory or non-statutory law, with their justification intertwined with the norms governing evidence evaluation, such as standards of proof and burdens of proof. While Western legal systems uphold the principle of free evidence evaluation, variations exist in evidentiary rules among jurisdictions, necessitating consideration when assessing legal presumptions at both EU and national levels.[7]

In this article, the term «standard of proof» denotes the degree of certainty required for a factual proposition to be deemed accurate by the court.[8] The requisite standard of proof varies between jurisdictions.[9] For instance, Norwegian civil law generally mandates proof to a preponderance of probability, diverging from other EU/EEA member states and the CJEU, which often operate with a higher standard of proof.[10] The principle of

preponderance of probability in Norwegian law aims to ensure the most materially correct judgments and equitable treatment of parties.[11]

Conversely, «the burden of proof» refers to which party bears the risk that the standard of proof is not met.[12] Legal scholars have different views on whether general rules about the burden of proof can be established in Norwegian law. One view is that the party who claims that a right has been established or changed, will then, in general, have the burden of proof for all factual circumstances necessary to establish the right. Conversely, the party claiming that an already established right has been lost or diminished bears the burden of proof for all factual circumstances necessary for such an effect to occur.[13] Others stress that the burden of proof must be assessed based on the substantive legal rule.[14] Nevertheless, it is a common view that one must at least be cautious when establishing general rules.

The terminology surrounding legal presumptions and burdens of proof sometimes overlaps, complicating clear distinctions. In this discourse, the term «burden of proof» denotes a legal norm assigning the risk of non-compliance with the standard of proof to a specific party, for example the employer. A legal presumption typically shifts the burden of proof only upon the indication of a presumptive factual circumstances.[15]

Thus, a typical legal presumption comprises three elements: the condition for the presumption to arise (X), the content of the presumption (Y), and the criteria for its rebuttal (Z).[16] Complexity varies between legal presumptions, exemplified by EU directives such as

Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, featuring a straightforward presumption in article 5,[17] and more intricate ones, such as the burden of proof rule in non-discrimination law, as regulated by the Equal Treatment Directive (2006/54/EC) Article 19. In the latter example, the presumption is that there has been «direct or indirect discrimination». Hence, it is a presumption of discrimination.[18] The condition for the presumption to arise is that the person who claims to be discriminated against must «establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination». For the presumption to be rebutted, the respondent has «to prove» that there has not been discrimination. The three characteristics of a legal presumption can easily be identified. However, the nuanced interpretation of the presumption's content, intertwined with legal concepts such as «discrimination,» underscores its complexity and its dual role in both factual and legal realms.

3. Justifications for legal presumptions

While factual presumptions, as previously noted, often stem from empirical experience, legal presumptions typically find their foundation in specific values (which, again, can be based on experience). Legal presumptions serve distinct purposes, broadly categorized into at least four objectives. Firstly, legal presumptions are instrumental in ensuring the realization of substantive law.[19] They operate in tandem with the substantive rules they accompany, with their effectiveness evaluated in light of the overarching purpose of the relevant substantive rule. However, it is pertinent to note that this justification may seem overly broad since it applies to most areas of law.

A more tangible purpose of legal presumptions is to safeguard parties who encounter challenges in gathering evidence or initiating legal proceedings to enforce their rights. Moreover, legal presumptions may be justified, based on who was best placed to secure evidence when it was possible. Lastly, the justification of legal presumptions involves weighing up the potential consequences of incorrect court decisions. This entails balancing the interest of the parties affected by the presumption, with particular attention to whether an erroneous decision in one direction would be more detrimental than the opposite outcome.

In the realm of labour law, characterized by its protective mandate, these justifications assume heightened significance. Labour law, grounded in the principle of safeguarding human dignity, recognizes the inherent vulnerabilities of individuals within the employment relationship. As articulated by Hugo Sinzheimer in 1927, labour law’s essential mission is to uphold human dignity amidst the various economic, organizational, and personal dependencies prevalent on the labour market and in the workplace.[20] Furthermore, labour law serves broader societal interests in maintaining peace and stability, making the efficacy of legal mechanism particularly crucial. Consequently, the rationale of legal presumptions in labour law is fortified by these overarching objectives.

Legal presumptions have long been integral to labour law, and in the subsequent discussion, we will examine some key areas where such presumptions exist, elucidating their specific justifications. Thereafter, we will delve into newer presumptions concerning employment and employee status.

4. Some «older» legal presumptions in labour law

4.1 Dismissal protection

Dismissal protection constitutes a cornerstone of labour law. It is a clear manifestation of the principle that labour is not (merely) a commodity.[21] A right to protection against unfair dismissal is provided by the (revised) European Social Charter Article 24.[22] Furthermore, Article 30 of the Charter of Fundamental Rights states that every worker has the right to protection against unjustified dismissal in accordance with union law and national laws and practices. According to the *Explanations*,[23] this article draws on Article 24 of the revised Social Charter. While there are no general regulations for dismissal protection at the EU level, specific regulations do mandate protection against dismissal in certain situations.[24] For instance, Article 18 of the new Transparent and Predictable Working Conditions Directive requires member states to ensure protection against dismissals for exercising rights provided for in the Directive, incorporating legal presumptions. Some of the oldest legal presumptions in Norwegian labour law concern legislation that protects against dismissals in specific situations. The Working Environment Act[25] provides more extended protection against dismissal in the event of sickness, pregnancy, and military service (Sections 15-8, 15-9 and 15-10, respectively). An employee cannot be dismissed on such grounds, but he or she can be dismissed for other reasons, provided, that the general requirement of just cause in Section 15-7 is met. These provisions include presumptions regarding dismissals that *temporally* occur in connection with the protected situations (illness, pregnancy, military service). The legal presumption in Section 15-8 (2), for example, reads as follows:

> «Unless other grounds are shown to be highly probable, absence from work owing to accident or illness shall be deemed to be the reason for dismissal during the period when the employee is protected against dismissal pursuant to this section.»

The legal presumptions in Sections 15-9 (pregnancy) and 15-10 (military service) are similarly designed. The condition for the presumptions to apply is, at least at first glance, simple: the dismissal must have occurred within a specific period, which, concerning for example Section 15-8, is during the first 12 months after the employee became (wholly or partially) unable to work. The requirement to rebut the presumption is stringent, demanding clear preponderance of evidence, as interpreted by the Supreme Court.[26] This interpretation aligns with the preparatory works, which require strict or substantial evidence when the employer claims the dismissal is based on other grounds protected by the provisions.[27]

These legal presumptions serve the purpose of effectively enforcing the extended dismissal protection. In the preparatory works, it is pointed out that the purpose is to avoid an employee who is ill or pregnant having to initiate legal proceedings to enforce their rights,[28] meaning that the employee shall thus be spared from such processes when he or she is already in a demanding situation, as the Supreme Court stated in a judgment in 2018.[29] Also, the preamble to Council Directive 92/85/EEC of 19 October 1992 acknowledges that «the risk for dismissal for reasons with their condition may have harmful effects on the physical and mental state of pregnant workers». Hence, the protective purpose of the legal presumption is clear. Moreover, adequate dismissal protection in the case of pregnancy or military service is crucial to ensure effective rights to leave in these situations.[30] In addition, the general considerations concerning who is in the best position to secure evidence also support placing the burden of proof on the employer. The stricter standard of proof can easily be justified in these situations: An incorrect judgment in favour of the employer is far more serious than an incorrect judgment in favour of the employee. The societal interest is perhaps particularly evident regarding the protection against dismissal in connection with military service and the associated legal presumption, introduced in 1940: The interest in ensuring a well-functioning military service, which could be in danger if those who serve risk losing their employment.[31] However, gender equality and a more inclusive working life are also essential societal goals.

Also, the norms for assessing evidence related to the general dismissal protection are adapted to fit the specific protective purpose of these rules. In Norwegian labour law, there is a general requirement of just cause, cf. the

Working Environment Act 2005 Section 15-7. The requirement was introduced in legislation in 1936 but has, through case law and by legislation, been developed into a much more comprehensive requirement than it originally was. Today, the requirement has several elements and entails a broad discretionary assessment of whether it is reasonable to terminate the employment.[32] The Supreme Court has stated that the threshold for dismissal is generally high,[33] and the courts can review all aspects of the dismissal.[34] This includes whether the legislation has been correctly applied in the specific case, whether the dismissal is based on a correct and sufficient factual basis, whether the reasoning is based on relevant arguments, and whether the assessment is broad enough to ensure that the interest of the employee is secured.[35]

What must be proven is that the dismissal has just cause – not that it is unjustified. Hence, the employer bears the risk that the facts on which the dismissal is based are correct, regardless of whether the employee initiates legal action and claims that the dismissal is unjustified.[36] There are several reasons why the burden of proof is placed on the employer. It is the employer's responsibility to ensure that a satisfactory process is conducted before a decision to terminate the employment is made and that the dismissal has just cause. Hence, the employer is best positioned to secure documentation and other evidence in the dismissal process.[37] Furthermore, if the burden of proof were on the employee, the dismissal protection would be considerably less effective. Moreover, an incorrect judgment would often be more severe for the employee, as the dismissal affects the employee as a person – he or she loses work and income.

The standard of proof is preponderance, cf. the general preponderance principle in civil cases. However, it follows from case law that the standard of proof is stricter in civil cases based on factual circumstances that are incriminating or, in other ways, particularly burdensome for a party, for example, a case where the dismissal claims to be due to criminal or other illegal actions executed by the employee. In these cases, more than a preponderance is required, but not to the extent that any reasonable doubt should benefit the employee in the same way as if he or she had been accused in a criminal case. The requirement is a *qualified* preponderance of the evidence.[38] The reasoning for the higher standard of proof is that an incorrect decision against the blamed party, the employee, will be worse than an incorrect judgment in the opposite direction.[39]

4.2 Non-discrimination

The burden of proof rule in Norwegian non-discrimination law evolved in parallel with similar rules in EU law, initially shaped by the CJEU and later regulated in various Directives.

While Norwegian law initially developed these rules through the Equality Ombudsman and the Equality Tribunal,[40] today the rules align with EU law, given Norway's implementation of the relevant Directives.[41]

The burden of proof regulation is codified in the Working Environment Act of 2005 Section 13-8 and the Equality and Anti-Discrimination Act of 2017 Section 37.[42] While the Working Environment Act covers protection against discrimination in the workplace based on political views, membership of a trade union, age, part-time or temporary work, the Equality and Anti-Discrimination Act covers discrimination based on gender, pregnancy, leave of absence in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, or gender expression. The Equality and Anti-Discrimination Act applies not only to the workplace but to all sectors of society. Thus, the legal presumption in Section 37 of this Act has a much broader scope than just the workplace. The provision, which has the title «Burden of proof», states that

> «[d]iscrimination shall be assumed to have occurred if circumstances apply that provide grounds for believing that discrimination has occurred and the person responsible fails to substantiate that discrimination did not in fact occur».

The first question is what is required for the legal presumption to apply. The Directives do not provide much guidance, other than that the presumption of discrimination must be based on facts. The CJEU has established that it is for the national courts to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence that the employer adduces in support of its contentions that it has not breached the principle of equal treatment.[43] Discrimination laws in member states have a variety of formulas for establishing the presumption.[44] The facts can be based on information or external circumstances in the case. In Norwegian law, the person claiming to be discriminated against must provide «grounds for believing that discrimination has occurred» and it is not required for there to be a preponderance of such evidence. If such facts are established, it will be up to the party accused of discrimination, for example the employer, to rebut the

presumption, in order to prove that discrimination has not occurred.[45] Hence, the burden of proof is shifted to the employer, who must prove that discrimination has *not* occurred. It shall be assumed that the invoked discrimination has occurred unless the court, after an overall assessment of the evidence, concludes that it is more likely that it has not occurred. The facts establishing the presumption are relevant both for the burden of proof to be reversed, and for the overall assessment of whether there is a preponderance of probability that discrimination has not occurred.[46]

The legal presumption thus entails a two-tiered assessment. The wording of the Directive and the Norwegian provisions indicate this, and this is also how the provision has been understood in practice by the CJEU.[47] The Norwegian Supreme Court has also used this two-tiered assessment in two cases, Rt. 2012 p. 424 and Rt. 2014 p. 402. In a more recent case, HR-2020-2476-A, the Supreme Court has made statements that cast doubt on this two-tiered assessment. The Court stated that the burden of proof rule:

> «... is not an exception from the general standard of proof in civil cases. The standard of proof is, here as otherwise, that the most probable fact – after an overall assessment of the evidence – prevails. General bases for the findings of fact, for instance that contemporaneous evidence carries more weight, also apply as usual. A different matter is that the provision imposes a duty on both parties to submit all evidence to which they have access. If, after such overall findings of fact, the evidentiary doubt is absolute, which means that one fact is as probable as the other, the provision sets out this shall be to the detriment of the «person responsible»...»

This has led to a change in the Equality and Non-Discrimination Tribunal's practices, moving from a two-tiered assessment to an evidence assessment consisting of only one step:

> «In the assessment of evidence, the general evidence requirement in civil cases applies. The tribunal must base it on the fact which, after an overall assessment of the evidence, is most likely, see the Supreme Court's judgment in HR-2020-2476-A sections 74 and 75. If, after such an assessment of the evidence, there is absolute doubt, the law's burden of proof rule is applied, cf. § 37...»[48]

This implies that the structure has changed to an overall assessment of the evidence, where the burden of proof rule only becomes significant if there is so-called 'absolute doubt', meaning that one alternative is as likely as another. Legal scholars have criticized such an approach, and it is doubtful whether the Supreme Court really intended to deviate from the two-step approach.[49] Furthermore, some scholars have even argued that the standard of proof following from the burden of proof rule in Norwegian non-discrimination law is not in accordance with EU law, and that a stricter requirement must apply.[50] The basis for such criticism is unclear. The CJEU has so far not interpreted a specific standard of proof requirement from the Directives, and these requirements vary greatly between member states' jurisdictions. Nevertheless, this illustrates a more general point: the implementation of EU legal presumptions in the member states is complicated, because the norms for assessing evidence differ between jurisdictions.

The rationale for the burden of proof rule in discrimination law is to ensure effective compliance with anti-discrimination protections. The Norwegian preparatory works emphasize that this rule is essential for providing genuine protection.[51] They particularly note that discrimination cases can be complex and that the employer often holds the relevant documentation, which makes it difficult, and sometimes impossible, for individuals to prove that discrimination has occurred. Furthermore, the rule is intended to have a preventative effect, encouraging employers to conduct orderly and responsible case management. Similar justifications can be found in EU law.[52]

4.3 Whistleblowing and protection against retaliation

The rules safeguarding whistle-blowers were initially introduced in 2006 under Chapter 2 of the Working Environment Act of 2005. Since then, these regulations have undergone multiple revisions aimed at enhancing protection and ensuring robust enforcement. Employees are granted the right to report issues of concern in the employer's undertaking, as outlined in Section 2 A-1 of the Act. This includes breaches of legislation, written ethical guidelines within the undertaking, and ethical norms widely accepted in society. Whistleblowers retain the option to report such concerns either internally or externally to a public supervisory body or other relevant public authority. Externally reporting to others, for example the media, is permissible under certain conditions, as detailed in Section 2 A-2 of the Act. It is explicitly regulated that the employer has the burden of proof to

demonstrate that a whistleblower has not followed proper procedures according to these provisions, cf. Section 2 A-2 (4).[53]

When a report is submitted in accordance with these regulations, certain obligations are triggered for the employer, including the obligation to investigate. Additionally, the employee is afforded special protection as whistleblower, which encompasses protection against retaliation, as stipulated in Section 2 A-4 of the Act.

Retaliation is defined as any adverse action, practice, or omission that occurs as a consequence of, or in response to, the employee's reporting of concerns. This may include actions such as dismissal, disciplinary measures, warnings, threats, or social exclusion. The prohibition against retaliation also extends to situations where an employee informs the employer of their intention to report concerns. In cases where retaliation occurs, employees are entitled to seek redress and compensation, irrespective of the employer's culpability, as outlined in Section 2 A-5 of the Act. The legal presumption associated with the prohibition against retaliation is outlined in Section 2 A-4, which states:

> «If the employee submits information that gives reason to believe that retaliation has taken place, the employer must substantiate that no such retaliation has taken place.»

Under the general principles of evidentiary law, it would traditionally fall upon the employee to demonstrate that retaliation had occurred. However, a legal presumption, akin to that which pertains to anti-discrimination rules, operates differently, shifting the burden of proof when information indicating potential retaliation is presented. This obligation to provide information should not be interpreted rigidly.[54] Typically, demonstrating that unfavourable treatment occurred shortly after the employee's notification is sufficient to establish grounds for the presumption. Subsequently, the burden shifts to the employer to rebut the presumption by demonstrating that the adverse treatment was unrelated to the employee's report. The standard of proof required of the employer in this context is the preponderance of evidence, consistent with the general principle applied in civil cases.

This legal presumption is justified on grounds similar to those we have previously discussed. Its purpose is to facilitate effective enforcement by providing employees with greater leverage when asserting claims of unlawful retaliation. The rationale underlying this presumption is twofold. Firstly, it acknowledges that employers typically possess the most pertinent information regarding such matters, thus placing them in the best position to furnish evidence.[55] By shifting the burden of proof to the employer, the presumption ensures that relevant information is more readily accessible for adjudication. Secondly, it underscores the strong constitutional protection afforded to an employee's freedom of speech. By enhancing the protection of this fundamental right, the presumption bolsters the overall effectiveness of legal safeguards against retaliation. Moreover, there is a compelling societal interest in uncovering issues of concern within enterprises. Research conducted by Oslo Economics in 2017 illustrates the significant cost savings realized by society through the establishment of a system wherein employees can report such concerns effectively.[56] This approach, as opposed to relying solely on public enforcement mechanisms, proves more efficient and resource effective.

The legal presumption should be viewed in conjunction with enforcement mechanisms and the possibility for employees to receive compensation regardless of the employer's fault.

Together, these legal measures are designed to strengthen the protection afforded to whistle-blowers. In line with the enforcement of anti-discrimination legislation, the Anti-Discrimination and Equality Board has been granted expanded authority, following legislative changes in 2021, to address violations of the prohibition against retaliation outlined in Section 2 A-4 and to award compensation (except for cases involving dismissal or termination), as stipulated in Section 2 A-8. Previously, such cases were exclusively adjudicated by the courts. However, few instances of retaliation were brought before the courts, and surveys revealed that many employees were deterred by the financial risk.[57] In fact, as many as 50 per cent of employees who observed issues of concern in their workplace refrained from reporting them.[58] The extension of the Anti-Discrimination and Equality Board's jurisdiction aims to establish a more expedient and cost-effective resolution mechanism. By providing a faster and less financially burdensome avenue of resolution, this expansion seeks to encourage greater reporting and address concerns more efficiently.

Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of union law also includes provisions for protection against retaliation. Article 21 (5) stipulates that:

> «In proceedings before a court or other authority relating to detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered

> a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that it was based on duly justified grounds.»

According to this provision, the legal presumption applies when the reporting person demonstrates that they reported an issue and suffered a detriment, without specifying a temporal proximity between the report and the suffered detriment. However, the preamble of the Directive (44) emphasizes the importance of a «close link between the reporting and the adverse treatment suffered» for it to be considered retaliation.

In this context, the legal presumption outlined in Section 2 A-4 (4) of the Norwegian Working Environment Act, as interpreted in alignment with the preparatory work, corresponds with Article 21 (5) of the Directive. Nevertheless, the Directive still requires implementation into Norwegian law. A proposal for implementation, through a separate Act on the protection of persons who report a breach of EEA law, has been submitted for consultation. This bill includes a separate legal presumption with wording mirroring that of Article 21 (5) of the Directive.

The Directive regulates notices of breaches of EU law (and EEA law), extending beyond labour law. However, the legal presumption in Article 21 (5) is justified in similar ways to the legal presumption in Norwegian labour law. Firstly, in justifying the regulation of protection of whistleblowers, reference is made to fundamental rights, such as the freedom of expression, as well as society's interest in uncovering breaches of EU law. Secondly, the legal presumption is explicitly based on the difficulty faced by whistleblowers in proving the link between the reporting and the retaliation, as highlighted in the preamble : «... it can be very difficult for reporting persons to prove the link between the reporting and the retaliation, whilst the perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning» (93).

5. Presumptions related to forms of employment and employee status

5.1 Transparent and predictable working conditions

The purpose of the new Transparent and Predictable Working Conditions Directive (Directive 2019/1152), which supersedes the Written Statement Directive (Directive 91/533/EEC), is to enhance working conditions by fostering greater transparency and predictability in employment while maintaining labour market adaptability, cf. article 1 (1). Evolving trends in the labour market, characterized by the emergence of new forms of employment and increased variability in work arrangements, have underscored the need to bolster employees' rights to essential information regarding their employment relationships and working conditions. The Directive encompasses various mechanisms aimed at bolstering the effective enforcement of EU labour law, as delineated in, among others, Article 11 and Article 15.

Member states are afforded a certain flexibility in selecting enforcement mechanisms under these provisions, with legal presumptions emerging as one option. These provisions should be construed in conjunction with Article 16, which mandates that employees possess, inter alia, a right to recourse in instances of violations of their rights stemming from the Directive, and Article 18, which governs protection from dismissal and the burden of proof.

The Norwegian legislator has opted to incorporate legal presumptions as the mechanism for meeting the requirements outlined in Article 15 of the Directive. As per the Directive, member states retain the discretion to define the specifics of these presumptions, referred to as the «favourable presumptions». The preamble highlights three presumptions: «a presumption that the worker has an open-ended employment relationship, that there is no probationary period or that the worker has a full-time position, where the relevant information is missing» (39). However, introducing a presumption concerning the absence of a probationary period in cases of missing information was deemed unnecessary in Norway. This because the Working Environment Act already mandates that a probationary period is only applicable if expressly agreed upon in writing, as stipulated in Section 15-6. Therefore, such a presumption was deemed redundant. Nevertheless, the Norwegian legislature has introduced two other legal presumptions in alignment with the Directive.

The first presumption, articulated in in Section 14-6 (3), pertains to permanent employment. If an employer fails to communicate in accordance with the Act that an employment is temporary, it is presumed that the

employee holds a permanent position unless an alternative is made highly probable. Notably, this presumption was already established through case law, as evidenced by the decision of the Supreme Court in Rt. 2007 p. 129. The statutory provision merely serves to codify existing legal precedent.

The second presumption, as outlined in Section 14-6 (4), pertains to job percentage. If an employer fails to furnish information regarding this aspect in accordance with the Act, the employee's assertion regarding the job percentage is to be presumed correct unless an alternative is made highly probable. This means that the employee's claim serves as the default position, and it does not necessarily imply that the employee holds a full-time position. When evaluating whether the employer successfully rebuts this presumption, considerations may include factors such as the employee's actual working hours and the demand within the enterprise.[59] Some employer associations contended that this presumption was redundant, arguing that part-time employees who consistently work beyond agreed-upon hours over the preceding twelve months are entitled to a position equivalent to their actual working hours during this period.[60] This right is stipulated in the Working Environment Act Section 14-4 a and is not classified as a legal presumption. However, the government countered this argument by highlighting that this provision differs from what is mandated in Article 15 of the Directive and thus fails to meet its requirements. Consequently, the introduction of a separate legal presumption was deemed necessary to align with the Directive's provisions.

Although the legal presumption outlined in Section 14-6 (4) is new, the implications of lacking written information regarding part-time work would also previously probably have required the employer to demonstrate that a lower percentage than full-time employment had been agreed upon. This expectation stems from established case law, indicating that employers generally bear the burden of proof in disputes regarding agreed working conditions when the requisite written information is absent.[61] However, whether an equally stringent evidentiary standard, as stipulated in Section 14-6 (4), could be applied in such cases, remains uncertain. In the previous mentioned judgment from 2007, the Supreme Court inferred that there must be a clear preponderance of probability to establish an agreement on temporary employment. Although the specific issue in that case did not pertain to a percentage of the employee's position, the importance of such information for the employee suggests that a similarly strict evidentiary standard might have been applied by the courts.

Norway has opted not to utilize the opportunity provided in Article 15 (2) of the Directive, which permits the application of the presumption contingent upon notification to the employer and subsequent failure to provide the missing information in a timely manner. The legislature deemed such a provision overly complex, noting that employees typically engage with their employer before initiating any formal legal process.[62]

These legal presumptions are likely to facilitate employees more effective assertion of their rights. As the legislature anticipates, they may have a normative impact, prompting employers to prioritize compliance in practice.[63] However, the effectiveness of these presumptions is contingent upon employees pursuing legal recourse if their claims against the employer are not addressed. Unlike cases of discrimination and retaliation, where tribunal solutions are available, the employee must resort to court proceedings to enforce these rights. In return, the legal presumptions relating to the requirements for written information are stronger than those relating to discrimination and retaliation.

5.2 Employee status

5.2.1 Introduction

Misclassification of employee status has received a lot of attention over the past years, both within the EU and on the national level, especially concerning platform work. Determining the personal scope is pivotal in labour law, as employee status often dictates access to the protections afforded by collective agreements and worker protection legislation. Given the evolving nature of the labour market and how work is organized, this issue remains constantly relevant. Throughout this article, we have observed the application of legal presumptions in various aspects of labour law, primarily aimed at ensuring effective compliance and enforcement of legislation. Many EU member states have implemented legal presumptions concerning employment relationships, each differing in scope, conditions triggering the presumption, and requirements for rebuttal. Notably, at the EU level there has been significant development, with the provisional agreement reached on 8th February 2024,

regarding a platform work Directive, which includes a legal presumption regarding employment status. The focus now shifts to examining the new presumption of employee status within Norwegian labour law.

5.2.2 The concept of employee – a flexible legal concept

A common characteristic of labour law in the Nordic countries is the flexible nature of the concepts of an employee. In all these nations, whether someone is considered an employee depends on a comprehensive and holistic assessment of various criteria.[64] The definition of an employee in Norwegian law is delineated in different Acts, with slight variations in wording and interpretation. However, the fundamental principle is that the term must be construed in alignment with objectives of each such Act. Consequently, there may be discrepancies between the concepts in legislation concerning worker protection and social security. Nonetheless, the concept of an employee converges in the most essential labour statutes. Particularly significant is the definition outlined in Section 1-8 of the Working Environment Act of 2005. This definition has evolved over time through a dynamic interplay between legislative adjustments and judicial interpretation. Effective on 1st January of 2024, the wording of the definition was revised concurrently with the introduction of the legal presumption in the Working Environment Act.

Section 1-8 (1) defines an employee as «anyone who performs work for and subordinated to another». Unlike previous versions, this provision explicitly enumerates the key elements that must be emphasized in determining whether an individual qualifies as an employee. It stipulates that «emphasis must, among other things, be placed on whether the person in question makes his personal workforce available on an ongoing basis, and whether the person in question is subordinated through management, leadership and control». The intent behind this revised wording, as outlined in the preparatory works, is not to alter the legal landscape but to provide clarity regarding the central elements emphasized in case law and preparatory materials.[65]

Therefore, the determination of employee status continues to rely on a purpose-oriented overall assessment, where factors beyond those explicitly mentioned in Section 1-8 remain relevant. The primary indicators of employee status are traditionally that

- the worker is obliged to stay available personally to work and cannot use substitutes on his or her own account;
- the worker is obliged to submit to the employer's supervision, leadership, and control of work;
- the employer provides the work location, machines, tools, work materials or other equipment necessary to perform the work;
- the worker bears the risk for the work result;
- the parties' relationship is relatively stable and is terminable with notice;
- the worker mainly works for one employer.[66]

Therefore, the relevant criteria and their relative importance must be evaluated on a case-by-case basis, considering specific circumstances. Both case law and legislative drafts emphasize the need for a broad interpretation of the concept of «employee». The Supreme Court has articulated that the intention of the legislature is to protect those who require safeguarding under laws such as the Working Environment Act and the Holiday Act.[67] This principle should guide the assessment, focusing on whether there exists a relationship of dependence and subordination necessitating protective regulations.[68] When the criteria outlined in Section 1-8 are present, an employment relationship is typically established.[69] The principle of factual primacy prevails, meaning that the actual nature of the work relationship takes precedence over formal contractual arrangements.

The purposive approach in determining employee status grants significant discretion to the judiciary, with an expectation that the concept of employee remains adaptable to societal developments.[70] While changes in the wording of Section 1-8 are not intended to alter the understanding of the definition, discussions in the preparatory work contribute to a clearer understanding of the assessment criteria, and some new criteria are introduced. There is an emphasis on factors such as dependence, subordination, and fairness within the contractual relationship.[71] While these considerations are not new and are consistent with previous case law, the preparatory work underscores their importance. Furthermore, the preparatory work highlights the relevance of the negotiation power between the parties and the economic dependency that may exist *before* entering into an agreement, stemming from disparate market power. For instance, the example of platform workers lacking substantial bargaining power with platforms in negotiating prices or terms is mentioned.[72] This aspect seems to

be given a more prominent place in the assessment than previously.[73] Additionally, the employment opportunities available to an individual are emphasized as indicative of their true freedom to negotiate terms. Although economic dependency is a well-known concept in labour law, its explicit inclusion as a criterion in the classification assessment is a noteworthy and new development in Norwegian law.

The discussion in the preparatory work also delves into a clarification of how subordination, management, and control should be interpreted in the context of platform work. The committee emphasized the need for the employee concept to be «technology-neutral», ensuring that work can be performed digitally and in locations beyond the traditional workplace, whether done regularly or sporadically.[74] Furthermore, it underscored, in alignment with the purposive approach, that the method of management and control – whether through algorithms or technical applications – should not impact the assessment.[75] Additionally, the committee stressed, consistent with previous Supreme Court assumptions, that the list of criteria relevant for the assessment should not be applied mechanically. Instead, there should always be a purpose-oriented overall assessment.

Given the broad understanding of the concept of employee and the guiding principle that those in need of protection should receive it, questions arise regarding the necessity of introducing a legal presumption. This aspect will be explored further in the following discussion.

5.2.3 The background and justification for the employee status presumption

The proposal for a legal presumption was initially put forward by the aforementioned law committee, comprised of experts and representatives from social partners. The committee conducted a comprehensive assessment of challenges related to misclassification issues. However, when it came to proposing legislative changes, there was disagreement among the committee members. The majority, consisting of experts and trade union representatives, supported legislative changes, including the introduction of a legal presumption.

Surveys conducted during the committee's deliberations indicated that Norway has a relatively low proportion of independent contractors/self-employed compared to other countries, comprising only 6 % of the total workforce.[76] The committee concluded that this low proportion was not inherently problematic.[77] Additionally, the surveys revealed a perceived stability in the utilization of different forms of working arrangements.[78] Moreover, approximately 70 % of survey respondents expressed a desire to be independent contractors, while around 20 % preferred employee status.

The committee's work underscored an important objective: to reduce the number of individuals falling into the «grey zone», particularly concerning platform work, although platform work is not prevalent in Norway; In the Nordic countries, platform work is estimated to be performed by only between 0.3 % to 2 % of the total workforce.[79] The committee recognized the likelihood of misclassification occurring. While the number of disputes cases regarding employee status before the courts was not deemed significant, the majority of the committee stressed the importance of being proactive in addressing potential misclassifications before they escalate.

The majority's reasoning for the legal presumption alone is not very comprehensive. The rationale behind support, as perceived by the majority, seems to be twofold. Firstly, it acknowledges the challenges individuals face in initiating legal proceedings, due to factors such as costs. Secondly, it serves as a signal to entities that may seek to evade responsibility or deter individuals from challenging their employee status. Conversely, the minority expressed concerns that a presumption rule could lead to an increase in legal proceedings, without necessarily providing clarity in classification matters.[80]

The legislator largely concurred with the committee's underlying understanding and rationale. It emphasized the importance of minimizing the number of individuals in the ambiguous grey area between employee and independent contractor statuses, recognizing that such ambiguity is disadvantageous for both parties involved.[81] Additionally, the legislator acknowledged the potential signalling effect of a presumption rule and its role in facilitating individuals' ability to assert claims for employee status. Moreover, the legislator also took into account other considerations, such as the promotion of increased unionization and fostering fair competition between enterprises.[82] These factors contributed to shaping the final presumption rule that was adopted, which differed from the proposal put forward by the committee. We will delve into this further in the next point.

5.2.4 The content of the presumption

The presumption rule proposed by the majority in the law committee introduced the condition «reasonable doubt about the classification», for the presumption to apply. However, this condition lacked specific guidance and might have been challenging to apply in practice, requiring a preliminary assessment of employee status based on various relevant elements.[83] In contrast, the legislator opted for a different and more far-reaching presumption. The one that was finally adopted in the Working Environment Act Section 1-8 has the following wording:

> «It shall be presumed that there is an employee relationship unless the principal makes it overwhelmingly clear that there is an independent contractor relationship.»

While this wording does not explicitly set a condition for the presumption to occur, it implies that a binding agreement on work must exist between the parties. According to Norwegian law, such an agreement can be established verbally, in writing, or through conclusive conduct. Thus, if there is an agreement on work, the presumption of employment applies. It is worth noting that this presumption requires less grounds for its application compared to the legal presumption outlined in Article 5 of the provisional agreement for the platform Directive. The platform Directive's presumption requires not only a contractual relationship, but also «facts indicating control and direction, according to national law, collective agreements, or practice in force in the Member States and with consideration to the caselaw of the Court of Justice».[84] Therefore, the determination of such circumstances would also be subject to legal assessment.

The presumption outlined in Norwegian law can be rebutted, with the burden of proof resting on the principal. The standard of proof required for rebutting this presumption is stricter than that of the preponderance principle. Instead, it necessitates a clear preponderance of probability, akin to the requirement for legal presumptions relating to extended dismissal protection, see 3 above.

The justification for placing the burden of proof on the client includes the recognition that the purchaser of labour typically defines and established the framework for the contractual relationship. As such, they are in the best position to ensure alignment between formal agreements and the actual conditions of work.[85] The stricter standard of proof is justified by the potential for this rule to act as a genuine deterrent, thus promoting preventive and normative effects.[86]

The preparatory work underscores that the presumption rule pertains to factual considerations and is not intended, at least initially, to influence the legal assessment of the employee status itself.[87] In essence, this means that the presumption is relevant for determining whether there are factual indicators of supervision, management, and control, but not for the legal determination of what constitutes these criteria and their significance. However, in practice, distinguishing between the assessment of facts and the legal assessment may prove challenging. This is because the legal assessment involves a purposive approach, entailing a broad discretionary evaluation of various factors, see 4.2.2. Regarding supervision, management, and control, for instance, the principal must demonstrate not only the absence of legal entitlement to these aspects according to the agreement but also, regardless of the agreement, that they have not actually exercised supervision, management, and control. Proving the absence of something can be inherently challenging, and this difficulty could conceivably influence the emphasis placed on other elements in the legal assessment.

5.2.5 Potential challenges

The introduction of the legal presumption solely in the Working Environment Act raises certain ambiguities and challenges, particularly concerning its applicability to other related Acts, such as the Holidays Act[88] and the Labour Dispute Act,[89] which regulates the right to enter into collective agreements in the private and municipal sectors. Although the definitions of an employee in these Acts have been aligned with the changes of the definition in the Working Environment Act Section 1-8, the issue of how the legal presumption extends to these Acts remains unclear and unaddressed in the preparatory work. While the legal understanding of employee classification coincides across these Acts,[90] this does not necessarily imply that the legal presumption, with its stringent standard of proof, automatically applies to them. The fact that only specific parts of the employee definitions were amended in accordance with changes in the Working Environment Act could suggest that the presumption was not intended to apply to these Acts. However, disparities in the burden of proof and standard of proof could lead to inconsistent outcomes in practice. It is challenging to reconcile a scenario where the same

set of factual circumstances yields different results, based solely on the Act under which the classification is evaluated. Such an outcome would be incongruous and probably not aligned with the legislative intent. Given the fundamental importance of consistent and equitable treatment across these Acts, it seems reasonable to interpret this as meaning that the legal presumption should also apply to the classification question under the Holidays Act and the Labour Dispute Act.[91]

The issue of enforcement concerning disputes over employee status also raises challenges, as such disputes still need to be adjudicated in court without the existence of low-threshold dispute resolution mechanisms, unlike other essential rights for workers. Nor does the Labour Inspection Authority have the competence to issue orders concerning employee status.[92] While the legal presumption increases the likelihood of success in claiming employee status, it may not be sufficient to ensure effective enforcement, especially considering the structural barriers present in the labour market that make it difficult for individuals to pursue legal action against employers. One potential solution discussed by the committee was the implementation of alternative dispute resolution mechanisms, such as empowering the Dispute Resolution Board to handle cases relating\ to employee classification.[93] However, this proposal was rejected by the committee.[94] Instead, a majority in the Parliament decided that the government should explore the possibility of granting the Labour Inspection Authority the authority to enforce employee status through orders under Section 18-6 of the Working Environment Act. While this could contribute to some extent to more effective enforcement, further investigation is warranted to determine whether employee classification disputes could also be adjudicated in tribunals.[95] This approach would not introduce a new solution to the classification issue, but would instead draw upon historical precedent. Historically, Norway had a specialized tribunal, the Work Council, established by worker protection Acts in the early 20th century.[96] The council had the authority to make decisions regarding the scope of worker protection legislation, including its personal scope. While decisions of the council could be challenged in court for legality, its discretion was not subject to challenge. However, the Work Council was abolished in 1968 during a reform of the supervisory and enforcement system, with the rationale being that its role was no longer necessary, due to the clarity of legislation at the time.[97] However, this is no longer the case.

6. Conclusions

Legal presumptions serve as a fundamental mechanism in labour law, enhancing the enforceability of worker protections by addressing evidentiary challenges and balancing power asymmetries inherent in the employment relationship. The varied applications of legal presumptions across areas such as dismissal protections, anti-discrimination laws, whistleblower protection, and employee classification underscore their critical role in ensuring effective compliance and enforcement of substantive rights. By easing the evidentiary burden on employees, legal presumptions facilitate access to justice and reinforce principles such as fairness and human dignity.

Recent developments, including the introduction of presumptions related to employee status and platform work, reflect the evolving labour market dynamics and the need for adaptive legal frameworks. While these measures offer promising pathways to mitigate issues like misclassification and precarious work, they also raise questions about enforcement, consistency across legal regimes, and the potential need for accessible dispute resolution mechanisms.

In conclusion, while legal presumptions contribute significantly to advancing labour protections, their effectiveness hinges on thoughtful design, robust enforcement mechanisms, and continued alignment with societal and economic changes. Future legislative efforts should focus on refining these tools, ensuring harmonized application across jurisdictions, and addressing enforcement gaps to maintain and strengthen the protective mandate of labour law.

Notes

1 Strandberg, Magne, «Beviskrav og bevisbyrde etter likestillings- og diskrimineringsloven», *Lov og Rett* 2022, pp. 510-529 (Strandberg 2022), on p. 513.

2 LOV-2023-03-17-3.

3 Jerkø, Markus, *Bevisvurderingens rettslige rammer*, Oslo 2017 (Jerkø 2017), p. 157.

4 Cf. i.e. Eckhoff, Torsten, *Tvilsrisikoen*, Oslo 1943, p. 27.

5 Jerkø 2017 p. 168.

6 See also Robberstad, Anne, *Hvem har bevisbyrden ?*, Oslo 2021 (Robberstad 2021), p. 65.

7 See further, for example, Strandberg, Magne, *Beviskrav i sivile saker*, Bergen 2012 (Strandberg 2012), p. 81-168.

8 Boucht, Johan, «Non-conviction Based Confiscation: Moving the Confiscation of Criminal Proceeds from the 'Civil' Sphere: Benefits, Issues and Two Procedural Aspects», in Franssen, Vanessa and Hardin, Christopher (eds.), Criminal and Quasi-criminal Enforcement Mechanisms in Europe. Origins, Concepts, Future, 2022, p. 235 with further references.

9 See i.e., Boucht 2022 p. 235.

10 Strandberg 2022 p. 523-524. See also Robberstad 2021 p. 24.

11 Strandberg, Magne, «Markus Jerkø: Bevisvurderingens rettslige ramme. Bevistema, bevisbyrde, beviskrav», *Tidsskrift for forretningsjus* 2019, p. 148-155, on p. 151. Strandberg has, however, challenged this justification, see Strandberg 2012.

12 The clarification regarding the «burden of proof» in Norwegian jurisprudence is important for understanding its usage in this article. Rather than indicating a legal obligation to provide specific evidence, it refers to the party who bears the risk if something is not proven to the required standard. See further on this Robberstad 2021 p. 21.

13 Strandberg 2022 p. 511.

14 Robberstad 2021 p. 23. Different Jerkø 2017 p. 118.

15 Strandberg 2022 p. 514.

16 Jerkø, Markus, «Den rettslige bevisbyrden», *Jussens Venner* 2019, p. 39-72, on p. 66. Some also refer to non-rebuttable or conclusive presumptions. This is not a presumption but a substantive legal rule that attaches legal consequences to a fact.

17 According to the directive, the seller is liable to the consumer for a lack of conformity which exists at the time the goods were delivered, cf. article 3 (1). The presumption in Article 5 (3) is that a lack for conformity of the goods, which becomes apparent after delivery, shall be presumed to have existed at the time of delivery. The condition is that the lack of conformity becomes apparent within six months of delivery of the goods. This presumption may be rebutted by the seller (cf. «[u]nless proved otherwise»). The presumption does not apply if it is incompatible with the nature of the goods or the nature of the lack of conformity. This legal presumption also closely resembles a factual presumption; if a product breaks shortly after delivery, based on experience, it is often reasonable to presume that it was due to a defect in the product, see Jerkø 2019 p. 67.

18 In Norwegian jurisprudence, the rule is normally described as a burden of proof rule. However, it implies that discrimination is presumed if facts indicate this. Jerkø 2019 p. 66 classifies it as a legal presumption. See also Robberstad, Anne, « Skyld kan ikke bevises », *Lov og Rett* 2013, p. 345-357, on p. 357.

19 Cf. i.e. Augdahl, Per, «Stephan Hurwitz: Tvistemaal. Hovedpunkter af dansk civilprocesret I domssager. Kjøbenhavn 1941, G. E. C. Gads forlag» [bokanmeldelse], *Tidsskrift for rettsvitenskap* 1942, p. 211-224, on p. 217-218.

20 Cf. i.e. Sinzheimer, Hugo, «Das Wesen des Arbeitsrechts» [1927], reprint in Kahn-Freund, Otto von and Ramm, Thilo, *Hugo Sinzheimer. Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden*. Band 1, Frankfurt-Köln 1976, p. 108-114.

21 Cf. Kenner, Jeff et al. *The EU Charter of Fundamental Rights: A commentary*, Oxford 2014, p. 832. I put merely' in parentheses because the actual degree of commodification of labour can be debated.

22 Several states have not ratified the revised charter, and several of the countries that have ratified it, have made reservations against Article 24, see further Schmitt, Mélanie, «Article 24. The Right to Protection in Cases of Termination of Employment» in Niklas Bruun et al (eds*.), The European Social Charter and the Employment Relation*, Oxford and Portland 2017, p. 423 ff.

23 Explanations relating to the Charter of Fundamental Rights of December 12 2007 (2007/C 303/02). The Explanations only refer to the Transfer of Undertakings Directive 2001/23/EC and the Insolvency of the Employer Directive 80/987/EEC, as amended by Directive 2002/74/EC. [Note: I've capitalised here to match with the approach in the main text.]

24 See further regarding the scope of Article 30 Schmitt, Mélanie, «Article 30 – Protection in the Event of Unjustified Dismissal» in Filip Dorssemont et al (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation*, Oxford-London-New York-New Dehli-Sydney 2019, p. 505 ff.

25 Act of June 17 2005 No. 62 relating to the working environment, working hours and employment protection etc. (The Working Environment Act).

26 HR-2018-1189-A paragraph 46. The court assumed in paragraph 55 that this understanding of the standard of proof only applies sometimes to provisions with the same or similar wording. The court's understanding was limited to the provisions regarding special protection against dismissal in the Working Environment Act. Hence, the same wording may imply a different standard of evidence in different provisions, see also Robberstad 2021 p. 24-25.

27 Ot.prp. nr. 41 (1975–1976) p. 76. The legal presumption was introduced with the Working Environment Act of 1977 Section 64 No. 2. The previous Working Environment Act of 1956 also had substantive rules on protection against dismissal due to illness in Section 44. Even though this provision did not contain a legal presumption, it cannot be ruled out that a presumption was applied in practice. As mentioned in n. 31, such a legal presumption existed in a separate law regulating dismissal protection in connection with military service. In his direction Friberg, Odd and Lysebråte, Karsen, *Arbeidsvilkår for arbeidere i jordbruket*, Oslo 1962, p. 60, in relation to the similar provision in the Act of December 19 1958 on Working Conditions for Agricultural Workers Section 15 [this sentence seems to be missing some words – I'm wondering if it should start with something like «This is stated»?]. However, Friberg did not express himself as clearly in his commentary edition of the Working Environment Act 1956, cf. i.e., Friberg, Odd, *Arbeidervernlover*, 6th Edition, Oslo 1970.

28 Ot.prp. nr. 41 (1975–1976) p. 76 and Prop. 115 L (2012–2013) p. 203.

29 HR-2018-1189-A paragraph 53.

30 NOU 2012: 18 p. 159. The Working Environment Act Chapter 12 regulates the right to pregnancy leave, military service leave, and other rights to leave of absence.

31 See Act of 29th March 1940 prohibiting employees from being deprived of employment due to being called up for military service etc. The act was repealed in 1995 in connection with the regulation (with some changes) included in the Working Environment Act. The original preparatory work does not explain further the need for the legal presumption, except for expressing the view that it is «reasonable» and «necessary», cf. Ot.prp. No. 9 (1940) p. 5 and Innst. O. No. 23 (1940) p. 69.

32 The dismissal protection introduced in 1936 was far more limited than today's rules. It has since developed through interaction between the courts and the legislator, see further Hotvedt, Marianne J. and Skjønberg, Alexander S. «The Supreme Court's Influence on the Evolution of Labour Law in Norway» in J. G. Murcia et al. (eds.), *The Impact of the Supreme Courts on the Development of Labour Law in Europe*, Oviedo 2023, p. 175-207.

33 Rt. 2009 p. 685 paragraph 52.

34 Rt. 1984 p. 1058 (on p. 1067) and Rt. 2015 p. 1332 paragraph 36.

35 HR-2021-2389-A paragraph 43.

36 HR-2022-390-A. See also HR-2018-1189-A paragraph 46, and already Rt. 1959 p. 900. The preparatory works for the first provision on dismissal in 1936 suggest that the burden of proof lay with the employee, cf. Ot.prp. No. 31 (1935) p. 49. As far as dismissal protection is regulated in collective agreements, it has already been assumed by the Labour Court in ARD 1918-19 p. 130 that the employer has the burden of proof. Even if one party has the burden of proof, the question of who must in practice provide evidence for a fact can change back and forth during the case, cf. i.e., Robberstad, Anne, *Sivilprosess*, 6th Edition, Oslo 2024 p. 285. If, for example, it can be proven that the facts on which the dismissal is based are correct, it will be up to the employee to disprove this. However, this concerns the actual presentation of evidence.

37 In this direction HR-2018-1189-A paragraph 54. See also Fanebust, Arne, *Oppsigelse i arbeidsforhold*, Oslo 1985, p. 212–213.

38 Rt. 2014 p. 1161 paragraph 23.

39 Therefore, it may be that the court must also apply the general principle of preponderance in cases regarding dismissals based on such circumstances, because the interests of third parties are significant, i.e., in cases involving suspicion of a school or kindergarten teacher committing child abuse, see Rt. 2014 p. 1161 paragraph 24.

40 See LKN-1981-2. See further i.e. Ot.prp. No. 29 (1994-95) p. 10-11.

41 However, the protection according to Norwegian law goes further, since the rules apply to more areas of society and protect more groups from discrimination than required by EU law. See further i.e. Hellum, Anne and Blaker Strand, Vibeke, *Likestillings- og diskrimineringsrett*, Oslo 2017 (Hellum and Blaker Strand 2017), p. 361-364.

42 Act of 16th June 2017 No. 51 on equality and anti-discrimination.

43 C-54/07 *Feryn* paragraph 33.

44 Farkas, Lilla and O'Farrell, Orlagh, *Reversing the burden of proof: Practical dilemmas at the European and national level*, European Commision 2014, p. 75.

45 Hence, both the issue to be proved and the evidentiary requirement are different for the employee and the employer. The employee only needs to prove that there are grounds for believing that discrimination has occurred, while the employer must prove that discrimination did not occur.

46 Strandberg 2022 p. 523.

47 C-303/06 *Coleman* paragraph 52.

48 See for example DIN-2021-23.

49 See Hellum and Blaker Strand 2017 p. 371-376. See also Strandberg 2022 p. 514-517, 523. By contrast, Robberstad 2024 p. 288. She argues that the legal presumption cannot be applied in a «mechanical two-step operation» and that whether discrimination has occurred «must be determined as a whole from the total evidence picture after the entire assessment of evidence is completed». When the defendant's arguments have been taken into account, there may no longer be «reason to believe» that discrimination has occurred, and the legal presumption would not apply.

50 Hellum and Blaker Strand 2017 p. 375. Strandberg 2022 p. 523-524 agrees with the criticism regarding the structure of the evidence assessment, but is more doubtful about whether a stricter standard of proof is required by EU law.

51 See i.e. Ot.prp. No. 77 (2000-2001) p. 91, Ot.prp. No. 33 (2004-2005) p. 129-130, NOU 2008: 6 p. 107, NOU 2009: 14 p. 273–275. See also i.e. Rt. 2012 p. 424 paragraphs 35–36.

52 See i.e. Barnard, Catherine, *EU Employment Law*, 4th Edition, Oxford 2012, p. 327-329, 395-396.

53 This rule of evidence is based on the premise that whoever claims a restriction on freedom of expression must justify and prove it, cf. Ot.prp. No. 84 (2005-2006) p. 52.

54 Ot.prp. No. 84 (2005-2006) p. 44.

55 Ot.prp. No. 84 (2005-2006) p. 44, Prop. 74 L (2018–2019) p. 39,

56 NOU 2018: 6 p. 132–133.

57 NOU 2018: 6 p. 171.

58 NOU 2018: 6 p. 134.

59 Prop. 130 L (2022–2023) p. 68.

60 Prop. 130 L (2022–2023) p. 68.

61 Cf. Rt. 2004 p. 53 and Rt. 2007 p. 129. See also Prop. 130 L (2022–2023) p. 65.

62 Prop. 130 L (2022–2023) p. 65.

63 Prop. 130 L (2022–2023) p. 68.

64 Hotvedt, Marianne J. et al, *The Future of Nordic Labour Law. Reports from The future of work: Opportunities and Challenges for the Nordic Models*. TemaNord 2020:534 p. 33-36. The degree of flexibility does, as Hotvedt et al. shows, differ between the countries.

65 Prop. 14 L (2022–2023) p. 27–28.

66 Ot.prp. No. 49 (2004-2005) p. 73. See also NOU 2021: 9 p. 165.

67 Rt. 2013 p. 354 paragraph 39.

68 Hotvedt, Marianne J. Kommentarer til arbeidsmiljøloven § 1-8, Karnov lovkommentar, 2024.

69 Prop. 14 L (2022–2023) p. 61.

70 Prop. 14 L (2022–2023) p. 29.

71 Prop. 14 L (2022–2023) p. 28.

72 Prop. 14 L (2022–2023) p. 29.

73 In the same direction Hotvedt, Marianne, Arbeidsrett: Rettslig regulering av plattformbaserte arbeidsrelasjoner. Paper at det nordiske juristmøde, Reykjavik 2022.

74 NOU 2021: 9 p. 243.

75 NOU 2021: 9 p. 247. See also Prop. 14 L (2022–2023) p. 29.

76 NOU 2021: 9 p. 107.

77 NOU 2021: 9 p. 240.

78 NOU 2021: 9 p. 240.

79 Munkholm, Natalie Videbæk, Arbejdsret. Retlig regulering af platformbaserede arbejdsrelationer. Paper at det nordiske juristmøde, Reykjavik 2022.

80 NOU 2021: 9 p. 251.

81 Prop. 14 L (2022–2023) p. 30–31 and Innst. 181 L (2022–2023) p. 10-11.

82 Innst. 181 L (2022–2023) p. 10.

83 Hotvedt 2022 p. 10.

84 The contractual relationship must also be between a digital labour platform and a person performing platform work through a platform. This is a natural legal criterion in view of the Directive's scope.

85 Prop. 14 L (2022–2023) p. 30.

86 Prop. 14 L (2022–2023) p. 31.

87 Prop. 14 L (2022–2023) p. 30.

88 Act of April 29 1988 No. 21 relating to holidays.

89 Act of January 27 2012 No. 9 concerning labour disputes.

90 Prop. 14 L (2022–2023) p. 29, 66.

91 The legal presumption does not apply in accordance with the Labour Dispute Act, which regulates the access to collective bargaining, use of industrial action, and establishment of collective agreements. Whether there is a need for a similar legal presumption under this Act, and whether the absence of such complicates collective regulation, is a larger topic for discussion. See further Hotvedt, Marianne J. «Kollektive forhandlinger for oppdragstakere?», *Arbeidsrett* 2020, p. 1-44, Munkholm 2022, Hotvedt 2022. The fact that asymmetrical market positions in negotiations have been given a greater place in the legal assessment is particularly noteworthy concerning the concept of employee under the Labour Dispute Act.

92 Although the Norwegian Labour Inspection Authority does not have the competence to determine the classification, the authority can make a «prejudicial» assessment of this when enforcing provisions that fall within its competence. For example, if there is a question of whether a working time provision has been complied with, the Labour Inspection Authority will have to determine – if this is unclear – whether the individual in question is an employee, so that the Act applies.

93 NOU 2021: 9 p. 251–252.

94 See further Section 17-2 of the Working Environment Act.

95 Innst. 181 L (2022–2023) p. 9–10.

96 See Act of 19th June 1936 No. 8 on workers' protection Section 4 and Act of 12th December 12 No. 2 on workers' protection Section 4.

97 See prp. No. 68 (1966-67) p. 21–25 and further on the reform Friberg, *Arbeidervernloven*, 5. edition, Oslo 1968, p. 32.