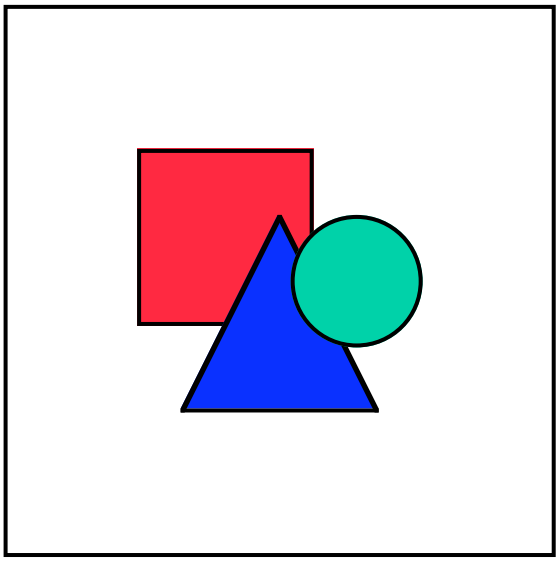

JUDGMENT

Passed: 29 September 2005

Case no.: 04-099016TVI-OTIR/07

Presiding judge:
District Court Judge Dagfinn Grønvik

Lay assessors:
Marit Elisabeth Brevik
Eli Rygg

The case concerns:
Notice of termination of employment

Per Yngve Monsen — Counsel: Trygve Staff

versus

Siemens Business Services AS — Counsel: Magne Olsen

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The following

Judgment

was passed:

Subject matter of the action

The case concerns a termination of employment.
The plaintiff, Per Yngve Monsen, is an employee of the defendant, Siemens Business Services AS (SBS). The plaintiff was handed the notice on 4 October 2004, to terminate his employment on 31 January 2005, "on the grounds of cut-downs of production". The plaintiff has invoked that the notice is unlawful and that there have been extraneous considerations. The plaintiff has alleged the following:

Principally:

1. that Siemens Business Services AS' termination of Per Yngve Monsen's employment be adjudged invalid,
2. that Siemens Business Services AS within 14 days of the judgment having been served pay compensation as appraised by the court to Per Yngve Monsen, plus interest in accordance with Section 3 first paragraph, first sentence of the Act relating to interest on overdue payments (forsinkelsesrenteloven) from the due date until such time as payment is effected.

In connection with the petition to terminate the employment:

3. that Siemens Business Services AS' petition to terminate the employment not be granted.

At all events:

4. that Siemens Business Services AS be adjudged to compensate Per Yngve Monsen's litigation costs plus interest in accordance with Section 3 first paragraph, first sentence of the Act relating to interest on overdue payments, from 14 days after the judgment is served on him until payment is effected.

The defendant claims that adequate reasons have been put forward for the termination of the employment and contests that there were extraneous considerations.

The defendant [Translator's note: It says "saksøker", i. e. "the plaintiff"] has demanded the following:

Principally:

1. that the Court find in favour of Siemens Business Services AS
2. that the employment be terminated from whatever time the Court decides.

Petititon for vacating position:

3. that Per Yngve Monsen vacate his position until such time as a final and enforceable judgment has been passed.

At all events:

4. that Siemens Business Services AS be awarded the litigation costs plus interest on overdue payments under the law, from the due date until such time as payment is effected.

The parties to the case and the background for the case

Siemens AS is a wholly owned subsidiary of the German group of companies, Siemens AG. The Siemens Group has around 4,000 employees in Norway. Siemens Business Services AS (SBS) is a subsidiary of Siemens AS with around 400 employees in Norway. SBS is a major company in information technology (IT). It has carried out IT projects in Norway such as the Defence Forces' new joint IT solution (FISBasis) and the Tax Service's countrywide solutions. It is divided into the following divisions:

- Solutions (SOL), which is mainly engaged in consultancy, projects, systems integration, and corporate solutions
- Product Related Services (PRS), which is engaged in IT-infrastructure, maintenance and availability, among other things.
- Operation Related Services (ORS), which is basically engaged in IT – outsourcing and operation.

Up until 1 October 2004 there was also a separate division called Infrastruktur (INFRA) whose main tasks were infrastructure, logistics and coordination of supplies. The FISBasis

project was included in that division and stood for the provision of data solutions to the Defence Forces.

The plaintiff, Per Yngve Monsen, was employed on 28 October 1999 as a ”Controller” for BU Defence. “As from 1 April 2001 the positions and salary terms were altered. After that date he held the position of divisional economist for the INFRA division. He was on the divisional management, reporting to the CFO at SBS. His monthly salary was NOK 32 000 with a guaranteed variable salary of NOK 4000 and a variable salary agreement of NOK 100 000. In 2003 he was paid approximately NOK 630 000 in accordance with that salary agreement with a 200 per cent maximum target attainment.

In January 2001 SBS entered into a framework agreement with the Defence Forces regarding computer equipment sales and services for NOK 700 million. Within the body of agreements there have been supplies/provisions for NOK 1.3 billion

At the Board meeting on 10 September 2004 it was informed that INFRA would be included in FISBasis with effect from 1 October 2004 and that it would be transferred to PRS with effect from 1 October 2005. It was informed that “*Consequently, hired consultants will be released; other employees will get new positions.”*

A meeting was held in the division on 14 September 2004. This information was given at the meeting plus the information that all employees would keep their positions.

At a meeting on 15 September 2004 Monsen was informed by Mr Harbitz, the CFO, that his position had been discontinued. SBS did not have another position for him at that time. He was given the opportunity to leave the same day with three months’ paid notice and 3 months’ termination payment; to quit with a “Solstad package” or to find himself a new position with SBS which he himself would create.

A meeting was held on 22 September 2004 at which the matter was discussed. A competency profile was called for. Another meeting was held on 29 September 2004.

Negotiations were held on 1 October 2004 pursuant to Section 57 of the Working Environment Act at which it was stated that the management were considering giving

Monsen notice (of termination of employment). It was stated that no other suitable work had been found. He actually had all his duties as a divisional economist taken away from him on the grounds that the division no longer existed.

On 3 October 2004, Advocate Holst-Larsen submitted a petition on behalf of Monsen for a preliminary injunction for the right to retain his position. Here he alleged that the real reason why he had been given notice is that at internal meetings he has pointed out that SBS has calculated an unlawful markup in the FISBasis contract with the Defence Forces. It is alleged that the contract presupposes that *SBS may calculate a maximum contribution ratio of 8 % for EDP material which has been included in the GPL or which the Defence Forces order otherwise.* It is alleged that the contribution ratio has been calculated at around 20 per cent without the customer being informed.

Monsen was given notice on 4 October 2004, the termination date being set at 31 January 2005. In a memo from CFO Harbitz of that same date it was stated that his title and fixed salary would be maintained during the period of notice. He was given other duties to perform.

Negotiations were held on 21 October 2004 under Section 61 of the Working Environment Act. Regarding the process of seeking other suitable work, the following is stated: *The search has been concentrated on SBS AS in line with Siemens' practice that a search shall be limited to the relevant legal unit. A specific offer was put forward as coordinator for"post-procurements*
...the annual salary for this position is NOK 300 000 plus overtime pay according to the rules in force at the time.
The offer was not accepted by Monsen.

In accordance with the Oslo District Court's ruling of 22 November 2004, the petition to retain the position was partly refused and the Court partly found for the defendant on formal grounds.

Notice of proceedings was served on 17 December 2004.

On 4 January 2005, Monsen was offered the position of Business Controller at ORS. The salary offered was in keeping with his previous salary. The offer was not accepted.

The reply and the petition for a vacation of the position are dated 28 January 2005.

At the beginning of February 2003, the newspaper VG had several articles about *Computer-related invoices possibly having been blown up…* (SBS) may have *earned up to NOK 50 million more than they are allowed to on a billion [NOK] agreement with the Defence Forces.*

Due to the articles in the press the matter was brought up in the Storting (the Norwegian Parliament) and the Defence Minister has set up a commission of inquiry. The Commission of Inquiry has not completed its work.

The Oslo District Court's ruling of 30 March 2005 did not find in favour of the petition for the position to be vacated while the case was being heard. The appeal was rejected by the Borgarting Appeal Court's ruling of 15 July 2005. .

The main hearing went before the Court for 3 days from 28 August 2005.

The plaintiff has mainly alleged the following:

Principally it is submitted that SBS has not documented any true need for the scaling down of operations or efficiency drives. SBS and the INFRA division have been running at a surplus all along, including for the last accounting year. SBS increased its staff from 2003 to 2004 by 36 members, from 356 to 392. The number of hired consultants has been relatively stable. Even though there was a reorganisation, this does not automatically give grounds for notice of termination of employment. There was no scaling down of operations – please also see the minutes of the board meeting. There were certainly no grounds for speeding up a notice of termination of employment, the timing was not critical.

The onus of proof is on the plaintiff, and the courts may verify whether the rule has been correctly applied, cf. Rt-1984-1058. The time for such an assessment is basically the time of notice of termination of employment.

Alternatively it is argued that the way in which the matter has been handled is inexcusable. There is no adequate evidence of any need for a notice of termination of employment, there is no documentation of what was required to be gained from the efficiency drive. There is no evidence to suggest any notice of termination of employment [being given] before the meeting on 15 September 2004 between Harbitz and Monson, at which Harbitz expressed that the pieces of the puzzle were in place and that there was no room for Monsen. There was too little scope in the judgment of who, if anyone, was to be given notice. It has not been considered in relation to all the 12 economist positions, only in relation to the divisional economists at SBS. The competency profile that had been prepared was unfair. Monsen, who had a 200 per cent target attainment in the two preceding years and who received good feedback, was appraised on a majority of the items as having ”very limited” personal qualities. This is clearly contrary to how he was regarded by his colleagues. He got the opportunity to make a statement regarding the profile. SBS did not offer him another position before he was given notice on 4 October 2004. The offer of 21 October 2004 was a disgracefully low offer - he was offered less than half his [original] salary.

No reasonable weighing up of interests was carried out that would suggest notice being given. The conclusion is that this was an unfair termination of employment.

It is also argued that the real reason for the notice of termination of employment is the “blowing of the whistle”. This is an extraneous consideration. The blowing of the whistle was an act of loyalty. Monsen had taken it up internally with the management of SBS. He had then taken it up with the person in the right quarter at the parent company and with the top of the group, Siemens AG in Germany. His blowing of the whistle was well founded. He had firsthand knowledge of a very serious matter. SBS had overinvoiced the Defence Forces contrary to the agreement.
They concealed it in their own accounts. Such whistle blowing is in compliance with the Business Conduct Guidelines, which is part of Monsen’s employment agreement. His blowing of the whistle to the press in February 2005 was also legitimate. Monsen blew the whiles at a time when he was afraid of SBS and invidiuals in the Defence Forces’ logistics organisation (FLO) were trying to erase any traces.

The dismissal must be ruled invalid and Monsen must be awarded compensation.

It is of no significance that Monsen did not accept the jobs he was offered The first offer was a ridiculously low offer for half his original salary. The other came in response to Monsen having had conversations with Burghardt and after the notice of proceedings. It was a position with an indefinite content and it was not on the management.

If Monsen is able to keep his position, there will be no financial loss. If the notice is ruled as unfair but the employment terminates in accordance with the defendant's alternative claim, he will suffer a financial loss due to his loss of earned income in the time ahead. Two annual salaries of NOK 600 000 should be assumed as a starting point..

Also, he is entitled to redress. Emphasis must be placed on the fact that he loyally reported the incident to the company but was met with unlawful behaviour. This is an enormous strain on him, as his sick note shows. This will be of importance to other whistleblowers and is thus of importance to society as a whole. NOK 500 000 is being indicated.

As regards the petition to vacate the position, we claim that here is nothing in relation to the assessment of whether there has been any unfairness that would suggest that the principal statutory rule should be disregarded.

The Defendant has principally alleged that:

The reorganisation was well founded. The activity and the profitability of the INFRA division had gradually gone down. The number of employees in the division had consistently diminished. It was therefore not necessary to maintain a divisional management with a divisional economist. Moreover, this was in compliance with how SBS is organised internationally. Such a reorganisation process is within the employer's managerial prerogative. Management must decide whether it is desirable to have 4 or 3 divisions, cf. Dege, Labour Law page 51. There does not have to be a failing economy but there were losses month by month at that time. Please see Rt-1989-508 "Spigerverkdommen" [The judgment pertaining to Spigerverket – a major Norwegian company]. The courts of law must exercise caution when verifying such assessments.

The handling of the matter may be tried but there is nothing that calls for criticism The Board assumed that the division would be closed down. Then a briefing was given at a meeting with all the employees. There are no elected representatives at SBS. The matter has been discussed by the working environment committee. It is not correct that it has only had consequences for Monsen. The divisional vice-president has got a new position. Heads of departments have lost their departments. The criteria for selection have been clear. They were contested by Monsen or his counsel at the time. He was compared with the other divisional economists. They were heads of bigger divisions, and they had more competency and better qualifications. Please see the written evaluations.

There is nothing reprehensible about Harbitz raising the issue of vacating the position at the meeting on 15 September 2004. He suggested potential solutions. What the business needed was clear as a result of the downward trend.

The offers for other suitable work have been genuine. There is nothing reprehensible about the way in which these were made. Offer no. 2 was also genuine. It had turned up because one of the divisional economists became responsible for the whole of Scandinavia and thus needed relief. It is an important element in the assessment of fairness that Monsen turned down a suitable position. The offers were made during the period of notice. Please see Frostating Appeal Court's judgment (LF-1993-246) where a foreman was offered work as a production worker with a considerable reduction of his wages and this was regarded as other suitable work. Please also see Dege, Labour Law page 607.

The weighing up of interests has been sufficiently broad and intense. The job has been discontinued. Monsen has been offered another job. The matter has been handled fairly.

The plaintiff's allegations that extraneous factors were taken into consideration are wrong. From a legal point of view, the onus of proof is on the plaintiff for such matters having been taken into consideration.

There were some emotive reactions following the whistleblowing internally in the group at the beginning of 2004 but the matter was shelved. Please see Skymoen's testimony. There was no persecution of those who had reported to the group management. Management did

not know who it was at the time of the notice. It did not become known until later on. We deny that there were extraneous considerations.

In the event of damages, the Court must attach importance to the fact that Monsen has been offered other work.

Alternatively we claim that the employment must be terminated in accordance with Section 62 of the Working Environment Act.

We petition for a ruling that the position be vacated during the proceedings.

The Court's remarks.

The Court assumes that the management of SBS decided to reorganise by making the INFRA division subordinate to a department, which resulted in the positions of the divisional management disappearing – this applied to the plaintiff's position as divisional economist, for instance. The grounds given for the reorganisation was the consistently deteriorating financial trend, the organisation of SBS Norge was in compliance with the organisation on a global level and that consequently the global business strategy was being followed up in a better way. The Board was informed about this and had no objections. Such a decision must be within the employer's managerial prerogative. The courts must exercise great caution by verifying such decisions, cf. Rt-1989-508 Spikerverksdommen. The Court finds no reason to criticise this decision.

The reason given for giving Monsen notice is that operations were to be scaled down. The onus of proof is on the employer, that it really is such a scaling down of operations that produces fair grounds for giving notice of termination of employment, cf. Section 60 of the Working Environment Act. The Court may fully verify the legal and actual basis. The Court cannot see that the defendant has fulfilled its burden of proof. There is no necessary connection between reorganisation and scaling down of operations. Many companies are in a permanent process of finding the best possible organisation. Giving notice because operations are being scaled down is, however, extraordinary and requires adequate and fair grounds. In this case, the Board was informed on 10 September 2004 that the employees

would get new positions. This was also stated at the meeting with all the employees on 14 September 2004. Vice-president Skymoen explained that the working environment committee had also been told that all the employees would be getting other positions. The Court uses as a basis that the administration did not misinform the Board or the employees. No financial calculations have been submitted that would suggest cuts. Neither has the defendant provided documentary evidence of any information having been provided externally about any scaling down of operations. The Court therefore considers it very clear that no scaling down of operations was likely at SBS that would suggest notice of termination of employment.

The Court cannot see that it is the start of a fair handling of the case during the reorganisation process when CFO Harbitz suggested notice of termination of employment at the meeting with Monsen on 15 September 2004. There is nothing to indicate that the administration at that point had made a sufficiently broad consideration of other jobs at SBS. The defendant has not claimed that it had considered whether Monsen could carry out any of the work that was being done by hired consultants or whether there were other jobs that were not being done. It is extraordinary that Monsen was the only employee for whom SBS had not found other work. The divisional vice-president continued without such line responsibility with the same salary and terms of employment. Former heads of department became consultants with the same salaries as before. The Court can understand that Monsen at that time got the feeling that attempts were being made to squeeze him out of SBS and that during the following process he deemed it necessary to have a lawyer present.

The Court cannot see that the subsequent process in any way makes it seem likely that the defendant consequently made a broad appraisal of other possible and suitable work for Monsen within the organisation. The Court finds it likely that the written competency profile that was prepared, has been adapted to the desire that Monsen should quit his job. Nor was it put before Monsen in order to give him the opportunity to comment on it. The Court emphasizes that it would have been extraordinary if a person with allegedly such poor qualities was promoted divisional economist after two years with SBS, was paid the maximum bonus for the last two years and moreover, received very good testimonials for being conscientious by other colleagues.

The Court goes on to emphasize that none of the witnesses from SBS were able to point to a single notice of termination of employment based on scaling down operations since the company was founded. Nor could they give a single example of anyone having been offered poorer salary terms after a reorganisation process. The fact that the plaintiff did not receive a reasonable offer at once, seems extraordinary. So does the first offer of other work with a possible halving of the salary.

The defendant has in no way fulfilled his onus of proof that dismissal was necessary because of a scaling down of operations. Even on this basis, the notice of termination of employment must be set aside.

However, the Court must also decide on whether there were extraneous considerations since this has significance when fixing the compensation. The plaintiff [Translator's note: it says "saksøkte", i.e. "the defendant"] has maintained that the real reason why he was given notice was that he reported errors in connection with the FISBasis contract to Siemens AG in Germany, which led to the entire Norwegian management being admonished for having moved money between the divisions. A review was carried out in the new year of 2004. SBS in Norway was then made familiar with the documents Monsen had sent to Germany. After that, according to Monsen, Vice-President Skymoen said at a joint meeting: "We have a mole high up in the system. He will be found and fired."

The defendant has claimed that there were no such extraneous considerations. They have claimed that they did not know who had reported internally in the company until after the notice (of termination of employment) had been given.

The Court considers it likely that Monsen has raised matters regarding the invoicing after the FISBasis contract internally. He has claimed internally that the invoicing was too high. The Court refers to his own statement about this, which are not challenged. This statement is supported by internal emails, minutes of meetings and particularly the statements of Nyland and Hansen.

The Court must decide whether Monsen has had fair grounds for his criticism. SBS have not responded to a large number of provocations in respect of this matter. The Court must

follow the usual procedure and make a stand on this issue based on the exhibits produced by the parties in Court.

6 PRICES AND TERMS AND CONDITIONS

6.1 Prices

An authorised product list states current prices and products

SBS is to update the prices in the GPL on a quarterly basis.

Vouchers etc. are to be submitted to the FISBasis project for approval unless otherwise agreed between the parties.

6.1.1 Products

SBS can calculate a maximum contribution margin of 8% for all EDP material acquired during this contract period. The Defence Forces have the right of insight into SBS's finance systems for verifying prices.

…

Contribution margin The difference between the price offered to the Defence Forces and SBS' cost price.

…

SBS's cost price The price SBS pays for goods delivered to its own warehouse.

In the Court, the defendant claimed that this in fact was a fixed price agreement. The price was fixed when it was listed in the GPL. Monsen claimed that the agreement be understood according to its wording, meaning that a delivery's contribution margin could be 8 per cent at the most. Monsen's understanding is supported by the fact that it was calculated and invoiced that way when the Defence Forces knew the cost price through negotiations with the supplier. Hansen and Nyland were also completely clear that that was the intention. It is therefore indisputable that parts of the supplies were priced in accordance with the wording of item 6.1.1 of the contract.

By way of an amended agreement it was concluded that the GPL should be submitted monthly. Among other things, this was due to computer equipment prices falling during that period, which meant that the prices indicated there were too high in relation to the actual acquisition price. SBS did not put up sufficient resources to be able to update that list monthly with prices. Stenersen, who was responsible for this, complained about it internally. Several witnesses said that this was a well known problem that the management

of SBS knew about. This list with prices that were too high was submitted to the Defence Forces all the same. The defendant has not claimed that the Defence Forces were told that the prices on the list were too high. Advocate Wilhelmsen, who has been engaged by Siemens AS to go through this, said that spot checks showed a contribution margin of 10 per cent and in fact right up to 29.4 per cent on individual invoices. This has also been documented with examples from the plaintiff's side. Harbitz explained that there were major losses and uncertainties in the contract that would suggest that a certain margin had to be set in the GPL. The Court cannot see that the contract allows for this. Moreover, such problems have not existed since the losses on some foreign exchange fluctuations which were definitely SBS's risk at the beginning of the contract period. Hansen, who had the responsibility for logistics, said that they made sure that payments to subcontractors were made simultaneously with the payment from the Defence Forces so as to avoid interest losses. As a general rule no orders were made until one was ready for the order.
A loss of NOK 300 000 has been written off on the entire contract. For a delivery worth NOK 1.3 billion this is very little. In other words, such costs did not accrue.

The Court also considers it likely that SBS got a contribution margin that was far higher than 8 per cent. The plaintiff has indicated 20 per cent. It is not possible for the Court to verify this indication.

The Court also finds it likely that the SBS management made transactions for accounting purposes so as to make the contribution margin less visible in the accounts in the autumn of 2003. Funds have been transferred from INFRA to other departments, inter alia nearly NOK 9.5 million on 15 October 2003. At the same time costs from other departments were transferred to INFRA. The outcome was that in the accounts the contribution margin looked lower. It is difficult to see that such exercising of the contract is in compliance with honesty and good faith when the Defence Forces are entitled to look at the accounts. The actual contribution margin that SBS receives as a result of the contract will then be concealed in the accounts. These accounting transactions were done at the level above Monsen. It was Harbitz who was SBS' CFO.

All things considered, the Court finds that Monsen had good cause to react to the above matters.

The Court then starts looking at whether Monsen reacted adequately to these matters.

In April 2002 Monsen signed the business conduct guidelines, which thus became part of his job agreement. He was obliged to report it if the law was breached within his area of responsibility. *All written communication and reports produced internally or externally must be accurate and trustworthy. In line with good accounting principles, data and other documents should always be complete, correct and expedient as regards timing and system. The obligation to provide trustworthy accounts also applies to costs.*

The Court finds it obvious that the management broke its own guidelines. The Court finds it likely [through documentation received] that Monsen raised the issue internally. In this situation the Court cannot see that Monsen did anything that was disloyal to Siemens' or SBS' interests by bringing the matter up with Siemens in Germany in the New Year of 2004. The business conduct guidelines specifically underline the company's overall interest in business being conducted in an honest and verifiable manner. If the management of any of the subsidiaries break these guidelines, they are the ones who are not loyally following the company's interests. In the review that was carried out, the entire management were criticized for the transfers between the divisions.

The Court considers it likely that Skymoen subsequently said that they had a mole in the company who would be found and fired. In Court he said that this was a "gush of sentiment" but that they had already made the issue null and void a week before. The defendant claims that Monsen denied that he was the source and that they believed him.

The Court finds it likely that the SBS management in Norway understood that Monsen was the source of the whistleblowing to Siemens in Germany. Against the background of the nature of the complaint it is only natural to imagine that it had been submitted by people at INFRA. The complaint was accompanied by print-outs of accounts and underlying vouchers. In the case of several of these there were only two people at INFRA who had access to the computer system. These were Divisional Economist Monsen and Divisional Vice-President Moestue. The latter was given a new job and retained his salary and terms of employment. Half a year later Monsen was subjected to a process that led to the notice of termination of his employment. This procedure was extraordinary as we have seen above. The Court also refers to Monsen's statement that an employee said she believed he

was the source. All in all, the Court finds it likely that the true reason for the notice being given was that Monsen had reported [the incident in question] to Siemens in Germany.

The Court further points to the fact that Monsen was in touch with Siemens Germany after he had been given notice. He attended a meeting at Hotel Plaza on 8 December 2004. When he left that meeting, Harbitz came and met him at the door. He interpreted this as yet further confirmation that confidentiality was not being protected. He assumed that the offer of a new position that came at the beginning of January 2005 was an attempt at rendering him harmless. He therefore did not accept it. He had previously bee stripped of all his duties with immediate effect and his admission card had been put out of function when he came for negotiations. Based on that situation the Court can understand that he did not accept the offer of another position in January 2005.

Monsen was afraid that SBS and certain people with the Defence Forces' logistics organisation (FLO) would try to change the exhibits. He therefore contacted [the newspaper] VG with the matter. The Court cannot see that that was reprehensible. Advocate Wilhelmsen sent an account of this to FLO and it was used by the Defence Forces. Advocate Wilhelmsen distanced himself from this account in Court. However, he did say that it was based on information he had received from people on the management of SBS and the internal audit. This could indicate that such an action was brewing. Monsen has also said that the management had a very generous entertainment account. Monsen knew that the Defence Force people had not asked to see the foundation material. He was therefore worried that they would not safeguard the Defence Forces' interests when going through the account(s). Colonel Herland, who is heading up the Defence Forces' inquiry said that two people from FLO had been admonished and/or been released from their assignment for being too closely linked to SBS. He said that Monsen's allegations were not baseless. The Court concludes that Monsen had cause to go to the newspapers at that time. This cannot in any way be considered reprehensible.

This is an extraneous and unlawful consideration to make in relation to giving notice of the termination of employment. The Court refers to Rt-2003-1614, which reads that a *"whistleblower"- a vigilant coworker with a critical attitude who dares to speak out/report matters - is an asset both to the company and to society. That is why one must accept critical remarks within generous limits.* In that case, it was made clear that such protection

against reactions on the part of the employer does not apply to baseless and unjustified remarks. This means that protection must be present when there is cause for such remarks and they are loyally submitted as in this case.

The notice of termination of Monsen's employment is not valid.

The defendant has made an alternative demand that the employment must end if the notice of termination of employment is ruled to be invalid. Section 62, first paragraph, second sentence of the Working Environment Act reads as follows: *In special cases, the Court may decide, following a demand on the part of the employer, that the employment shall end if, after weighing up the parties' interests, it finds that it would obviously be unreasonable for the employment to continue.* This is meant to be a restricted exception to the rule, cf. Friberg, the commentary version of the Working Environment Act, 8th edition page 685. The Court has come to the conclusion that this must be applied in this case even though nothing can be held against Monsen. The Court points to the fact that Monsen has been part of the management. In such cases, a mutual lack of confidence would make it difficult to continue being employed on the management. The position he had does not exist anymore. Monsen was afraid that the alternative position he was offered in January 2005 was a way of placing him on the sidelines. In the Court's judgement such a position could either develop into a position of development or into a stagnating one. But the fact that the plaintiff is not confident that he will be treated fairly in another position does not suggest to a great degree that the employment should continue. For the defendant's part, it counts that the position no longer exists and that the relationship between the parties has become very strained as a result of the dispute.

The Court declares that the employment shall end on 1 November 2005.

The defendant has claimed compensation to be determined at the Court's discretion. In accordance with Section 62 of the Working Environment Act the *compensation shall be stipulated at the amount which the Court considers to be reasonable when taking account*

of the financial loss, the relationship between the employer and the employee and the circumstances as such.
It shall both cover the financial loss and be an *ex gratia payment of compensation where non-financial matters shall be taken into consideration, cf. Ot.prop. [Proposition to the Odelsting - the larger division of the Norwegian Storting (Parliament)] no. 41 (1975-76).*

The Court has used as a starting point that the employment must end. From that time on the plaintiff has no job. He must receive compensation for his loss of income from 1 November until he gets a new job. It is difficult to estimate how long that will be. In Rt-1997-1506 one uses as a basis that they should get other work after *a few years have elapsed.* In Friberg (Op. Cit.) page 686 it is indicated that the limit should be two years. The Court has assessed that it is normal to give top executives who have to quit, two annual salaries. The Court assumes that on the basis of the plaintiff's age, education and job experience, he will certainly get a job within one year-plus after his employment ends. As regards his loss of income for the period concerned, the Court assumes at its discretion what he earned the last year before the disputes arose, plus holiday pay. The Court does not attach importance to the fact that he did not get paid a bonus last year. The criteria for receiving a bonus seem so discretionary that this is not an element. The Court stipulates it at its discretion at NOK 750 000.

The plaintiff is also to have an ex gratia payment of compensation at its discretion for what he has been subjected to. The plaintiff indicated that NOK 500 000 would be a suitable amount. In Rt-2005-518 two employees who had been dismissed after having downloaded large quantities of pornographic material were awarded NOK 250 000 each in accordance with the corresponding provision in the Working Environment Act § 66 no. 5. They had been given back their positions and the compensation established earlier on by lower courts for the financial loss. It reads as follows:
74)

> *As mentioned, the compensation is to be set following a broad assessment of what is reasonable. It appears from what I have mentioned in relation to the discussion of the question of dismissal that both A and B must be reproached for wilfully having set aside the rules for using the company's computer system. Their abuse of the system was more extensive both in terms of the time spent and the number of hits on pornographic websites than what was expressed in the letters of dismissal.*

Such widely qualified unlawful behaviour must be given considerable weight when calculating the compensation.

(75)

Following an overall assessment I have reached the conclusion that the compensation may suitably be set at NOK 250,000 for each.

The plaintiff in our case cannot be reproached for anything. He has reacted to a reprehensible matter at the company in a reasonable manner and has reported the matter internally. He has been subjected to a reprisal. This is both contrary to Norwegian law in general, cf. the statement in Rt-2003-1614 and also the protection that employees have now been given, cf. Ot.prop. no 49 (2004-2005). When assessing the damages the Court must also attach importance to the fact that the complaint from Monsen was discussed, which meant that his identity was in fact disclosed contrary to the Business Conduct Guidelines, item G, and a reprisal was implemented. It reads: *All documentation will be confidential. Reprisals will not be tolerated under any circumstances.* The Court further agrees that such compensation must also have a certain penal element so that employers do not implement such reprisals. Importance must also be attached to the human factor of the considerable pressure exerted on Monsen. He has been on sick leave as a result of this for one year. Had he not managed to portray his arguments in such a way that they seemed likely he would have had great difficulty getting a new job. The Court has found that the level indicated by the plaintiff's counsel is somewhat low. The Court finds that the redress part should by its discretion be set at NOK 750,000.

In accordance with this, the compensation is set at NOK 1 500 000 at the Court's discretion.

The petition for vacating the position

In case one of the parties appeals against the judgment the Court must come to a decision on the petition that the plaintiff vacate his position while the case is being heard. Basically an employee is entitled to retain his/her position. According to Section 61 no 4, second

paragraph, third sentence of the Working Environment Act, the Court may *decide that the employee must vacate his position while the case is being heard, if the Court finds it unreasonable that the employment be continued.* The Court assumes that the notice of termination of employment is due to extraneous considerations. It is not unreasonable that the plaintiff should remain in his position while the case is being heard by the courts. His claim for remuneration for his work is related to his position. It will probably be difficult to get a new job so long as the case has not been settled. The petition is not allowed.

Litigation costs

The case has partly been won and partly lost because the Court found for the plaintiff on one count. The litigation costs will be determined in accordance with Section 174 of the Civil Procedure Act (tvistemålsloven). The plaintiff has won the case on the major counts. The Court agrees with Evju in Subjects relating to Labour Law page 158, that the employee should be awarded the litigation costs in this sort of case.

Mr Trygve Staff, the counsel, has submitted a bill of costs amounting to NOK 113,143.75, of which his fee is NOK 90,000, copying is NOK 515, and VAT is NOK 22,628.75. No objections have come in regarding the bill of costs and the litigation costs are stipulated in accordance with the bill of costs. The Court will round off the amount to the nearest NOK. The judgment is unanimous.

Conclusion of judgment:

1. Siemens Business Services AS' termination of Per Yngve Monsen's employment is invalid.

2. Per Yngve Monsen's employment with Siemens Business Services AS will end as from 1 November 2005.

3. Siemens Business Services AS will pay NOK 1 500 000 – onemillionfivehundredthousand– for damages to Per Yngve Monsen, plus interest in accordance with Section 3, first paragraph, first sentence of the Act relating to interest on overdue payments (forsinkelsesrenteloven) from the due date until such time as payment is effected.

4. Siemens Business Services AS shall pay NOK 113,144 - onehundredandthirteenthousandonehundredandfortyfour – in litigation costs to Per Yngve Monsen, plus interest in accordance with Section 3, first paragraph, first sentence of the Act relating to interest on overdue payments (forsinkelsesrenteloven) from the due date until such time as payment is effected.

5. The deadline for meeting the demands under items 3 and 4 is 2 – two – weeks from judgement being served.

Conclusion of ruling:

6. Siemens Business Services AS' petition for Per Yngve Monsen's vacation of his position during the hearing of the case is not allowed.

The Court rise.

Dagfinn Grønvik
Arild Nesdal

Marit Elisabeth Brevik Eli Rygg

The judgment may be appealed to the Appeal Court. The notice of appeal must be submitted directly to the District Court within 1 – one – month of the judgment having been served.
The notice of appeal must be signed or co-signed by an advocate. The appellant may also contact the Court's office and get the notice of appeal registered and signed there.

At the same time as the notice of appeal is submitted, the appellant must pay an appeal fee, which is 24 times the court fee. If the main hearing lasts for more than one day, the fee will be increased. If the appeal concerns an asset of less than NOK 50,000, it may be lodged without the consent of the Appeal Court. An application for [such] consent must in such cases be submitted at the same time as the notice of appeal.

TRUE TRANSLATION CERTIFIED:
Elisabeth Undall Styren
Government Authorised Translator
(Norwegian-English and English-Norwegian)
Oslo (Norway), 5th July 2006