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# Things to consider when bringing trade secret misappropriation cases against both former employees and their new companies

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### Introduction

Claims of misappropriation of trade secrets against companies are tried by the Swedish courts under normal procedural rules. Similar claims against former employees as private individuals are handled as labour cases and tried according to special procedural rules. This means that litigating trade secrets in Sweden often involves employment law and collective bargaining agreements, whether the litigants want it to or not.

When a party brings a trade secret misappropriation case against both former employees privately and their new companies, it may end up faced with numerous complicated procedural and employment-related questions. A recent decision from the Labour Court exemplifies this issue.<sup>(1)</sup>

### Facts

The plaintiff in this case, company A, took legal action against three former employees and their new company, company B, with claims for trade secret misappropriation and demands for significant damages.

Company A was a member of a trade union for employers, union A, while one of the former employees was a member of a trade union for workers, union B (the two other former employees were not unionised). There was a collective bargaining agreement in place between the two unions that dictated certain questions between the parties. These questions would turn out to be of central importance to the case.

The case started out simply enough at the district court level, with a summons application against all defendants that was being handled as one case. However, the case became more complicated when union A intervened on behalf of company A against the unionised former employee and union B. What was once one case was suddenly three:

- a labour case between union A against union B and the unionised former employee;
- a labour case between company A against a non-unionised former employee; and
- a normal case between company A against company B and the last non-unionised former employee.

Under these circumstances, the applicable procedural rules forced the now three-headed case to be moved from the district court to the Labour Court to be tried on the merits.

### Decision

Swedish collective bargaining agreements regularly contain so-called "negotiation arrangements", which regulate how and within what deadlines certain kinds of negotiations between parties bound by the collective bargaining agreement must be held in the event of legal disputes.

According to Chapter 4(7) of the Labour Disputes (Judicial Procedures) Act,<sup>(2)</sup> a claim in court against a member of a union bound by a collective bargaining agreement cannot be tried by the Labour Court, unless such negotiations have been completed.

According to the collective bargaining agreement in place between the parties, union A and company A had to complete negotiations with the unionised former employee and union B within four months of having "becoming aware of the situation to which the legal claim relates" in order to subsequently file suit in court.

The parties disagreed on which exact date this four-month deadline should be calculated from:

- Union B argued for an early awareness date. This would mean that union A and company A had failed to negotiate within the deadline and that their claims should be rejected.
- Union A argued for a later awareness date. This would mean that union A and company A had successfully negotiated within the deadline and the case could proceed.

Put another way, was the awareness date when company A had:

- first realised that there had been an alleged misappropriation of trade secrets, but still felt it had to investigate further; or
- fully investigated the matter and formulated its demands?

The Labour Court's reading of the case law was that the awareness date should be the time when company A had knowledge of the central circumstances of the alleged misappropriation of trade secrets. It did not necessarily need to know of all circumstances needed

for a litigation (eg, all the information needed to formulate a claim for damages, which can take a long time).

Applied to the facts of the case, the Labour Court found that company A had reached the awareness date when it sent a cease-and-desist letter to company B and the former employees alleging misappropriation of trade secrets. Company A had argued that it still had to carry out additional investigations to formulate its claim for damages at this time.

Since company A had failed to negotiate within the timeframe dictated by the collective bargaining agreement, the Court rejected union A's claims against company B and the unionised former employee. The remaining two cases were bounced back to the district court level. However, to complicate matters even further, the remaining cases went to a new district court on account of the first district court having based its jurisdiction over the case on the domicile of the unionised former employee whose case had just been rejected.

This decision also touched on the interesting question of how a plaintiff in a trade secrets case should know that the former employee is unionised. At some point, company A had approached union B with a general request to know whether the former employee was a member of the union. Union B had not answered this question, since union membership is a sensitive personal question. Company A had argued that this was a delay tactic that had impacted the awareness date discussed above.

The Labour Court found for union B on this matter as well. There was no requirement in law or in the collective bargaining agreement for the union to answer general questions and inform company A about whether the former employee was currently or had ever been a member of the union. In order to avoid this problem and be informed about the former employee's unionisation, company A should simply have demanded this information in its early cease-and-desist letter or followed up on this point in a separate letter.

#### **Comment**

The takeaway from this decision is that while trade secret litigation in Sweden is complicated enough on its own, having claims for misappropriation of trade secrets tangled up with employment law and collective bargaining agreements and handled under special procedural rules raises the stakes even more.

Potential trade secret litigants should therefore move quickly and thoroughly in their early investigation in situations where former employees are involved. Litigants should quickly ascertain whether the targets are members of trade unions in order to avoid the harsh deadlines prescribed in many collective bargaining agreements. This emphasises how important the early investigatory phase of a potential trade secrets case is and how time is of the essence. This can be particularly problematic as the litigant may also be conducting complicated and time-consuming IT forensic investigations and preparing expert reports to be used in the subsequent litigation during this early investigatory phase (for further details see "[SharePoint and OneDrive prove difficult to handle in Swedish trade secret litigation](#)").

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#### **Endnotes**

(1) Labour Court, A 180/21.

(2) 1974:371.