

Deregulation of Labour Law – the Swedish Case

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1. Introduction

Deregulation implies abolition of rules, but it is also misleadingly used when changes in less interventionist methods and forms are meant.¹ The terms “simplification” or “re-regulation” of existing rules are then often used. Deregulation is, however, not a characteristic feature of Swedish labour law. So far it took place only in the area of the contracting-out of manpower and lifting of the ban on private employment agencies in 1991 and 1993. There has been, however, much talk about “flexibility”, especially with regard to working hours. Regulation of labour law in the government sector is certainly not a new phenomenon. It might be more correct to speak of re-regulation here as “privatisation”, in the sense that specific public law framework has been harmonised with that concerning labour law in the private sector. This article presents an analysis of the deregulation process in relation to the market, the individual and collective labour relations (or: in relation to the market, and individual as well as collective labour relations), which is followed by a summary evaluating the prospects of future challenges in the area of labour relations.

2. Deregulation of labour law in Sweden

2.1 Labour market regulations

2.1.1 Private employment agencies and temporary work agencies

For a long time now these the two issues have been dealt with as one in Sweden. It is remarkable that of the Nordic countries only Sweden has adopted such a view.²

According to the old Swedish Act of 1935,³ amended in 1942,⁴ contracting out

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¹ See A. Ogus, *Regulation. Legal Form and Economic Theory*, 1994, p 10.

² For a more comprehensive account I refer to my articles, “A Look at Contract Labour in the Nordic Countries”, in JT 1995–96 No 3, pp 625–654 and “Public Employment Exchange and the Use of Temporary Employment Agencies in the Nordic Countries”, in *Recht der Europa. Festschrift für Hilmar Fenge*, 1997, pp 183–205 and to R. Fahlbeck, “Employment Exchange and Hiring out of Employees in Sweden”, in TtR 1995 No 4, pp 589–622.

³ Prop 1935:83, ratifying the 1933 ILO Convention No 34/1933.

⁴ Prop 1942:123.

of manpower was deemed to constitute employment exchange and was hence prohibited when the major objective of the arrangement was to procure work for a job-seeking person. The purpose of the 1942 amendment was to bring to an end the impresario activities in the entertainment business.⁵ The 1942 amendment caused a lot of confusion in legal application as well as in real life.⁶ The prohibition was less than successful and the entire scheme came subsequently under fire.⁷ After repeated attempts to work out more effective rules in the 1960s and 1970s,⁸ the 1942 amendment was repealed in 1991. Yet, the 1991 Act contained some slight restrictions on the use of "temps", and the public employment exchange monopoly was left untouched. It must be mentioned that it was the Social Democratic Government which started the deregulation process. It was a controversial issue. The changes were seen as an adjustment due to the appearance of new companies offering various kinds of services, and as a corrective measure of the ineffectiveness of the former legislative regime spanning from 1935.⁹

The demands of real life and the quest for flexibility had thus defeated this lame-duck legislation. A further step taken in 1993 by the non-socialist Government implied that the monopoly of employment exchange was abolished. Competition aspects were decisive when deregulation was suggested.¹⁰ In the legislative history references to the case law of the European Court of Justice can be found.¹¹ The

⁵ Even the exchange of au pair jobs was considered as job placement in violation of the principal ban on private employment exchange; see two Supreme Court cases, *NJA 1948 p 493* (under the guise of "language exchange") and *NJA 1992 B 1* ("Au Pair Magazine").

⁶ In court practice, the amendment was applied to so-called typewriting agencies that had sent their employees to work with principal employers; see Supreme Court cases, *NJA 1962 p 680* and *1989 p 629*. The same treatment in *NJA 1973 p 562* (manpower was contracted out to a dockyard). As time went by, the Swedish Labour Court had to deal with the 1942 amendment with respect to the application of the so-called veto right in Sections 38–40 of the Joint Regulation Act of 1976, see Labour Court judgements AD 1979 No 31, 1987 No 154 and 1990 No 67.

⁷ See, e.g., two pamphlets from the Confederation of Swedish Employers (SAF): "Nyttiga serviceföretag eller olaga arbetsförmedling", 1988 and "Tillåt privat arbetsförmedling", 1990.

⁸ The entire issue of the applicability of the 1942 amendment is meticulously discussed in prop 1970:166 with respect to further amendments of the 1935 Act. At that time the Swedish Government had approached the ILO about the activities of the so-called typewriting agencies, and received the reply that the ILO Convention No 96/1949, Part II, should apply. See, e.g., the Swedish Report, DsIn 1966:6. *Den ambulerande skrivbyråverksamheten*.

⁹ Prop 1990/91:124, pp 13–18.

¹⁰ Prop 1992/93:118, pp 19–20, see also SOU 1992:116. *Privat arbetsförmedling och uthyrning av arbetskraft*, pp 74–75.

¹¹ See Case C-41/90 *Höfner and Elser v. Macrotron* [1991] ECR I-1979. In this case the Court disapproved of parts of the German public employment exchange monopoly under Articles 86 and 90 of the E.C. Treaty. The case concerned the recruitment of a sales manager for a German company. The company had entrusted the assignment to two personnel consultants, but the sales manager was never appointed. The consultants were not paid by the company. Two similar cases relate to the Italian legislation on placement agencies, Case C-55/96 *Job Centre Coop* [1997] ECR I-7119 (intermediary for temporary staff) and Case C-163/96 *Silvano Raso and others* [1998] ECR I-533 (dock work monopoly).

supply of manpower falls within the ambit of the freedom to supply services, as provided for by Article 59 et seq. of the E.C. Treaty.¹²

It must be mentioned here that the ILO Fee-Charging Employment Agencies Convention (Revised), No 96/1949 (substituting the Fee-Charging Employment Agencies Convention, No 34/1933) was ratified by Sweden in 1950,¹³ but was subsequently denounced by Sweden in the Spring of 1992.¹⁴ The Private Employment Agencies Convention of 1997, revising the 1949 Convention, is under deliberation. In 1949 Sweden also ratified the ILO Employment Service Convention No 88/1948, requiring that the ratifying members should “maintain or ensure the maintenance of a free public employment service” (Article 1).¹⁵

The 1993 Act thus lifted the Swedish ban on private employment exchange with a view to profit.¹⁶ The only restriction left is that in accordance with Section 6 a job seeker/employee may not be charged any fees for registration costs or other services.¹⁷ Violations of this rule will bring penal sanctions (fine or imprisonment). A survey from 1995 indicates that the private employment exchange recruiters have not invaded the market; they account for only 0.4% of those who took up new employment. It is much more surprising to find that the public employment exchange accounts for only 12-13% of all those persons who received information about another job ending up in new employment.¹⁸

The 1993 Act also abolished some restrictions laid down by the 1991 Act. Section 4(1) of the 1993 Act provides that the hired-out employee is guaranteed the right to take up employment with the principal employer after having fulfilled the assignment. The so-called competition clauses set up by temporary work agencies in order to discourage the employee to take up such employment have thus been outlawed. Section 4(2) also provides that an employee who has left the principal employer in order to take up employment with a temporary employment agency cannot be hired out to his former employer earlier than six months after the expiry of his former employment contract. This restriction is motivated by the fact that employees must not be subjected to unfair recruitment procedures by temporary employment agencies.¹⁹ It is an open question, however, whether this restriction applies to cases in which the employee has been made redundant, and where he

¹² Case 279/80 *Alfred John Webb* [1981] ECR 3305.

¹³ Prop 1950:188.

¹⁴ Prop 1991/92:89.

¹⁵ Prop 1949:162.

¹⁶ An exception has been made for the employment exchange of seamen (Section 3), which is a reflection of the ILO Convention No 9/1920, ratified by Sweden in 1921, prop 1921:361.

¹⁷ See further SOU 1992:116, pp 96–98 and prop 1992/93:218, pp 27, 29. Once I suggested such a solution in an address held to the Swedish Labour Law Association in Stockholm in 1989, see R. Eklund, “Entreprenader – arbetsrättsliga aspekter på en organisationsfråga”, JT 1989–90, pp 271–285, 278.

¹⁸ Report from National Labour Market Board, Arbetsförmedlingens marknadsandelar 1995 (Uin 1996:3). AMS, p 13.

¹⁹ Prop 1990/91:124, p 55, prop 1992/93:218, p 32.

subsequently takes up employment with a temporary employment agency. It is obvious that the restriction cannot apply, if, for example, a temporary employment agency has taken over certain functions of the principal employer, and therefore even the employees of the principal. This is job-contracting proper and must hence be distinguished from labour-only contracting. A case of this kind may also be deemed to be a legal transfer of a part of an undertaking or business under the E.C. Directive 77/187 concerning the safeguarding of the employees' rights in relation to transfers of undertakings and parts thereof, as well as the applicable provisions of the Swedish Employment Protection Act and Joint-Regulation Act, as amended in 1994.²⁰

The 1993 Act was evaluated in 1997.²¹ The Report found, among other things, that very few private employment exchange agencies had been set up and that no negative experiences had been noted with the exception of artist exchange agencies which started to exact fees from job applicants.²² There was no evidence that the frequency of regular jobs was affected by the fact that manpower was contracted-out. The frequency of contract manpower had increased, however. Still, it related to only 0.2% of the total labour force.²³ In May 1998 the same figure was estimated to be 0.44% (approx. 18,500 persons).²⁴ The largest companies belong to the branch organisation SPUR. The branch includes not only companies that are involved in the contracting-out of manpower, but also companies in recruitment business, consultant services and job-contracting (usually "out-sourced" activities). The 1997 Report suggests that a statute should regulate the institutionalization of a supervisory board, and the monitoring of the service agencies, and that they should be registered if certain basic conditions are fulfilled. The Government has, however, declared lately that it has no intention to intervene.²⁵

2.1.2 Fixed-term contracts

The number of fixed-term contracts has been steadily growing in Sweden. Recent statistics indicate that such contracts amounted to 644,000 in August 1998. At the same time, the number of self-employed persons, including helping family members, was 416,000.²⁶ This means that approx. 1/4 of the working force do not have regular employment, since the entire labour force on the Swedish labour market amounted to 4,046,000 persons in August 1998. The group of fixed-term contracts included in the statistics is made up of the following: substitute employment, trial employment, holiday work, employment for a special job or project, employment

²⁰ Prop 1994/95:102.

²¹ SOU 1997:58. *Personaluthyrning*.

²² Op.cit., pp 34–36.

²³ Op.cit., pp 40–41 (9,400 persons in late 1996).

²⁴ Source: "Branschens utveckling och omfattning. Personaluthyrning, entreprenader, rekrytering." SPUR, 1998, p 9.

²⁵ Prop 1997/98:150, p 105.

²⁶ Arbetskraftsundersökningen i augusti 1998 (Labour Force Survey, August, 1998). SCB, p 8.

“out of necessity” (labour on call), probationary and seasonal work. This catalogue does not entirely coincide with the list of fixed-term contracts stipulated by the Employment Protection Act (see below). A survey from 1996 shows that substitute employment is the most frequent type of fixed-term contract.²⁷ Some 180,000 employees work as substitutes (40%). The growth of labour on call employment has been considerable, amounting to some 100,000 persons (18%). The latter type of employment is not employment in the legal sense of the word, it must be classified in other legal terms.²⁸ Likewise, employment for a special job or project is on the increase (90,000).²⁹

The increase in the various types of fixed-term employment is the result of *the need for increased flexibility* in the labour market.³⁰ It is noteworthy that the requirement of flexibility seems to have appeared without any changes in the legal framework.³¹ No deregulation of the legal framework, giving the employers more freedom to act, has actually taken place. It may imply that the employers have made more extensive use of the options already available. It must also be said that many concessions have been made in the respective collective bargaining agreements covering the various segments of the Swedish labour market, entitling employers to opt for fixed-term contracts on more flexible terms than the ones provided by the statute.

Here is also the place to shortly discuss the ways in which employers may conclude fixed-term employment contracts. The basic rule of the 1982 Employment Protection Act is the preference of regular employment (Section 4). Exceptions to this rule are found in Sections 5, 5a and 6 of the Act. Section 5 originates from the 1974 and the 1982 Employment Protection Acts.³² Section 5 provides, inter alia, that short-term employment for a limited time, season or job may be entered into “if the work is of a specific nature”, or when there is “substitute employment, probationary or holiday work”, or when there is “a temporary work load” lasting for not more than six months during a period of two years. Section 6 provides for “trial employment” up to six months. Trial employment may be discontinued at any time.

Section 5a is an innovation and the result of an amendment in 1996/97 introduced by the Social Democratic Government after heated debate. It provides for so-called “consensual fixed-term employment”. It entitles the employer to enter into this form of employment, for whatever reason, limiting it, however, to 12

²⁷ Report from the National Labour Market Board, *Anställningsformer*. Ura 1997:4, p 6.

²⁸ It is a form of employment in which an employment contract usually exists, but where the employee performs gainful work occasionally and only when the employer has such work to offer. See A. Henning, *Tidsbegränsad anställning. En studie av anställningsformsregleringen och dess funktioner*, 1984, pp 212 et seq.

²⁹ Report from the National Labour Market Board, *Anställningsformer*. Ura 1997:4, p 6.

³⁰ SOU 1997:58, p 24.

³¹ The same conclusion in “Arbetsmarknad utan AMS.” SAF, 1997, p 32.

³² Prop 1973:129 and prop 1981/82:71.

months (18 months in a special case) during a period of three years. Only five employees may be so employed simultaneously. The basic objective of the introduction of such a provision has been to make it *easier for small enterprises to employ*.³³

The above-mentioned 1996/97 amendment of the Employment Protection Act did not come as a bolt from the blue. The legislative history reveals all the frustrations in introducing an even more innocuous labour law provision. It all started in 1993 when the non-socialist Government proposed an amendment to the Employment Protection Act in the situation of high unemployment. Many more far-going proposals were suggested at the time,³⁴ but the Government was satisfied to submit only a few of them to the Parliament.³⁵ The amendment came into force on 1 January 1994, and included, inter alia, a provision which entitled the employer to extend trial employment from six months to 12 months, as well as a provision which gave the employer a right to exempt two "keypersons" from the seniority list in case of redundancies. The reform package was heavily contested by the trade unions and the Social Democrats. In the national elections in the autumn of 1994 the Social Democrats promised to "restore" the old labour regulations. The Social Democrats won the elections and the new Government submitted a "restoration bill" at the end of 1994.³⁶

So, the state of the law was back to square one on 1 January 1995. Soon thereafter, in March 1995, the Government appointed a commission headed by an independent chairman and composed of representatives of the labour market parties. The task of the commission was to prepare a "social contract" concerning the controversial labour law issues against the background of high unemployment. The Minister of Labour held that the main objective of the commission was to "find ways and means of designing the future labour law, preferably by means of collective bargaining agreements".³⁷ The commission could not reach a joint conclusion. The debate culminated in May 1996 when the commission's (i.e. the chairman's) proposals were made public. The proposals contained, among other things, the introduction of rules on "consensual fixed-term employment" (similar to the rules of Section 5a of the Employment Protection Act), variations in the periods of notice, new provisions on part-time employment, the introduction of manpower competence funds and the lifting of some of the restrictions relating to the seniority rules in connection with redundancies.³⁸

At face value the package looked attractive, but the differences between the two major combatants on the Swedish labour market (SAF and LO) regarding particularly the seniority issue were irreconcilable. There was a lack of trust between the labour market parties, said the commission's chairman, and continued: "The

³³ Prop 1996/97:16, p 32.

³⁴ SOU 1993:32. *Ny anställningsskyddslag*.

³⁵ Prop 1993/94:67.

³⁶ Prop 1994/95:76.

³⁷ L. Blomberg, "Anställda ska få inflytande", in the daily *Dagens Nyheter*, 17 March 1995.

³⁸ *Samarbetsavtal?* 10 May 1996 (mimeographed).

political pressure to make the labour market parties reach a joint conclusion on labour law in the promised land of collective bargaining agreements is strong. Why doesn't it happen? The answer is very simple. They do not have to agree upon anything since the Employment Protection Act is to a large extent an alternative to collective bargaining agreements. There is no economic pressure laid upon them to come to an agreement."³⁹ So, the Government's attempt to find a solution by means of a tripartite experiment failed. The trade union representatives hoped for continued discussions. The employer representatives refused. However, on 28 May 1996 the labour market parties agreed to continue the discussions. Another round of conciliation talks was supposed to ensue, with experienced conciliators taking part, but the talks never took place.⁴⁰

Again the Government was cornered. In the meantime, the battle to win the public opinion had been won by the SAF, the reason being that since the beginning of the 1990s SAF had been leading an intensive campaign whose essence was the reform of labour law. On 23 August 1996 the Government declared that it intended to present a modernized labour law proposal before the Parliament. A limited package, including the above-mentioned "consensual fixed-term employment", was presented together with the Centre Party. The co-operation of the Centre Party was necessary because the Government had no parliamentary majority. The package included also amendments related to the Act's recall right, period of notice, part-time and substitute employment forms and the conclusion of local collective agreements.

The reform agenda was highly moderate. No other proposal than the introduction of a special type of employment, called "consensual fixed-term employment", implied more flexibility.⁴¹ The package came immediately under fire from one of the leading trade unionists, the negotiations secretary of the LO, who said that the Social Democratic Government had to face "a historical cross-roads", if it opted for the suggested "neoliberal deregulation".⁴² The Government's proposal was untimely. In 1996 the LO Congress held its convention simultaneously with its presentation. Vehement protests were launched from the rostrum by the trade union delegates. The delegates even demonstrated openly on the streets of Stockholm on 9 September 1996. A leading industrial relations expert said that the controversy between the Social Democratic Government and the LO was unprecedented in the history of the consolidated labour movement in Sweden.⁴³ However, the Govern-

³⁹ T.Hagström, "Undantagslag får ersätta LAS", in the daily *Dagens Nyheter*, 26 May 1996.

⁴⁰ However, a preliminary agreement was concluded between the Swedish Agency for Government Employers, on one hand, and two of the public sector trade unions, on the other, on 23 August 1996. The agreement never came into force.

⁴¹ Same observation in R. Fahlbeck, *Flexibility. Potentials and Pitfalls for Labour Law*, 1998, p 32.

⁴² See, e.g., H. Karlsson, "Ovärdigt en arbetarregering", in the daily *Dagens Nyheter*, 5 September 1996.

⁴³ Comment by N. Elvander, professor of industrial relations in Uppsala, in the daily *Dagens Nyheter*, 7 September 1996.

ment did not yield and a bill was submitted to the Parliament on 24 October 1996.⁴⁴ The bill was said to be based upon a “reasonable balance” between the employees’ needs for employment security and the employers’ needs of adjustment to the market situation. The amendments were meant to *facilitate employment of new staff* for employers.⁴⁵ The proposals came into force on 1 January 1997. It was a setback for the employers to find soon thereafter, however, that the new provision on “consensual fixed-term contract” did not automatically supersede the corresponding less generous provision on fixed-term contracts as set forth in the forestry collective bargaining agreement when the case was handed down on April 1, 1998.⁴⁶

2.1.3 Labour Law as applied to the government sector

Revision of various specific rules applicable to the government sector has been taking place during a time-span of more than 30 years. The point of departure was the year of 1965, when the public sector trade unions were accorded the right to strike and to conclude legally binding collective bargaining agreements.⁴⁷ The former administrative legal framework of public employment was then done away with. The basis of the employment contract was henceforth to be the private contract. The second step was taken in 1976, when an attempt was made to harmonize the government sector’s labour law with the one applied in the private sector, as part of the major revision of collective labour law, which resulted in the 1976 Act on Joint Regulation.⁴⁸ The Act on Official Employment came into force on 1 January 1977. Further refinements of the state sector labour law was done in the 1980s.⁴⁹ A third major step to harmonize the state sector’s labour law with that of the private sector’s was taken in 1994. A new Act on Official Employment came into force. Another wave of deregulation measures swept over the existing rules. Many of them were abolished. The reform was dictated by two objectives: to increase the efficiency of the public sector and to facilitate and improve the handling of personnel issues.⁵⁰ Some of the special provisions applicable to public employees, especially state em-

⁴⁴ Prop 1996/97:16

⁴⁵ Op.cit., pp 19–20, 23.

⁴⁶ Labour Court judgement AD 1998 No 36.

⁴⁷ Prop 1965:60.

⁴⁸ Prop 1975/76:105. App 2.

⁴⁹ So, for example, efficiency aspects dictated that the skills factor should be paramount in connection with the appointment of civil servants in 1985 and 1986, see prop 1985/86:116, DsC 1983:16. *Meritvärderingen vid statliga tjänstetillsättningar m.m.* The right to appeal the (state) employer’s decision on certain issues was curtailed in 1986, see, inter alia, prop 1986/87:84, DsC 1985:20. *Överprövning av beslut i personalfrågor.* Recently, also the collective bargaining parties in the state sector have asked the Government to limit the right to appeal certain decisions related to time-off for civil servants; see “Ramavtal 1998–2001, 8 May 1998. App 11”. One may add that very few decisions taken by the (state) employer are nowadays subject to the exercise of state authority. Appointment of a person to a post is one of such decisions, subject to a right of appeal; see the 1974 Labour Disputes Act, Chapter 1, Section 2.

⁵⁰ Prop 1993/94:65, pp 29–30.

ployees, have survived, but their volume has been dramatically reduced.⁵¹

The development now described can hardly be described in terms of deregulation; it is rather an example of re-regulation. The objective of the legislative efforts described above has been to harmonize the rules applied in the various sectors of the labour market. This has meant doing away with a huge number of specific rules which applied solely to government employees. In Swedish parlance, one often talks here about “privatization” of public employment law.

2.1.4 Company health services

Once, company health services benefited from a state subsidy covering just about 1/3 of the total costs. The subsidy was abolished on 1 January 1993.⁵² The reason for the abolition was that it no longer worked as an incentive for the promotion of health services in smaller enterprises with less than 20 employees. It was found that some 80% of all the employees benefited from health services, while the goal had once been set at 75%. One could say that the goal had been reached. The abolition of the subsidy system is no doubt a form of deregulation, since from 1993 the employers may provide for health services either by providing in-house facilities or by means of procuring such services from external service providers.

2.2 Individual labour relations

2.2.1 Working time issues

Sweden applies a 40-hour working week.⁵³ The “flexibility” debate has been lively with regard to this matter. A special type of flexibility would be to give the employer a *right to vary the working time* over a longer period of time, apart from flexible working time entitling the employee to begin and finish work within a certain time margin. Flexible working time is doubtlessly dictated by the employer’s efficiency interests, so that he could allocate work to periods when the work load is high.⁵⁴ The legal point of departure is, however, different. The employer is the sole decision-maker as regards the daily allocation of working hours, if nothing else is provided for by the collective bargaining agreement, which is usually, however, the case. If an agreement stipulates a 40-hour working week, the working time is also fixed by means of this stipulation week after week, and cannot be varied

⁵¹ So, for example, the rules applicable to dismissals and summary dismissals, as designed by the 1982 Employment Protection Act, apply to all employees in Sweden since 1994, though special rules apply to judges (Swedish Constitution, Chapter 11, Section 5) and other long-tenured employees, such as prosecutors, earlier appointed professors and military personnel (1994 Act on Life-Long Tenured Employment).

⁵² Prop 1991/92:100. App 11, pp 28–29.

⁵³ In fact, the average work-week for all employees (both full and part-time) is shorter, as low as 31,3 hours if all absence from work is accounted for, SOU 1996:145. *Arbetstid – längd, förläggning och inflytande*, p 84.

⁵⁴ See D. Johnsson & J. Malmberg, *Avtalsutveckling på arbetstidsområdet*, 1998, pp 22–26.

from one week to another. If the 40-hour working week is not part of the agreement, the 1982 Act's provision applies instead.⁵⁵

A hotly debated issue in Sweden is a demand for a statutory working week of only 35 (or even 30) hours.⁵⁶ The objective of this proposal is to *create new jobs*. In a recent Government Report the problem has been referred to the labour market parties.⁵⁷ Not surprisingly, the major labour market parties were unanimous in their rejection of the proposed legislation.⁵⁸ Also in early 1998 the Deputy Minister of Labour declared that she had no intention of submitting a new working time act to the Parliament since the working time issues were on the agenda during the 1997–1998 wage negotiations.⁵⁹

This brings me to the next issue, viz. the 1997–1998 wage negotiations. Many trade unions had asked for a shorter working week in their opening proposals. The employers rejected the requests. One of the most influential trade unions, the Paper and Paper Pulp Workers' Union was the first one to act. After protracted negotiations the paper and paper pulp industry collective bargaining agreement was ready on 4 January, 1998, after active intervention of impartial umpires under the 1997 industrial peace agreement. It was otherwise a meagre agreement, said the President of the Union, but he also held that "it was a breakthrough as regards the matter of a shorter working week".⁶⁰ The essence of the agreement is that the working time has been reduced by 1.5% of the total number of hours worked per year. Technically, and this is the innovation introduced by the impartial umpires, it has been achieved by the institutionalization of *individual working time accounts* to which a fixed percent of the yearly wage is allocated. The account may be used in a three-fold way: paid non-working time, pension bonus or cash money. This opens up a plethora of alternatives and increases the individual's freedom of choice. Thus, flexibility is not the same as deregulation. The paper and paper pulp agreement also gives the employer a right to vary the working time by up to 40 hours per year and individual, as applied to daytime work (not shift-work). The employers have been clamouring for flexible working hours for a long time.⁶¹ The union yielded this time. Usually, trade unions strongly resist such ideas: working time issues are

⁵⁵ Labour Court judgement AD 1984 nr 108.

⁵⁶ See SOU 1996:145, pp 270–312 (relating to the political parties' views on the 35-hour working week; this is the view advocated by the Left Party and the Green Party, while the Social Democrats and non-socialist parties – the Conservatives, Liberals, Christian Democrats and the Centre Party – are against it). The Parliamentary Labour Market Committee has lately rejected bills from members of the Parliament on the reduction of the working week to 35 hours; see 1997/98:AU1, p 20 and 1997/98:AU8, p 11.

⁵⁷ SOU 1996:145, pp 148, 229–234.

⁵⁸ Summary in Lag & Avtal No 4/1997.

⁵⁹ Riksdagens protokoll 1997/98:54, 22 January 1998. As a result of the outcome of the national elections in 1998 the Social Democratic Government has come to an agreement with the Left Party and the Green Party to refer the issue of a shorter working week to a joint working committee. Source: the daily *Dagens Nyheter*, 7 October 1998.

⁶⁰ Comment in the daily, *Dagens Nyheter*, 5 January 1998.

⁶¹ See, "Arbetsmarknad utan AMS." SAF, 1997, pp 37–39.

looked upon as a strictly collective labour law matter.⁶² The paper and pulp agreement paved the way for similar designs in other collective bargaining agreements entered into at the beginning of 1998.

The above-mentioned commission on working time issues should investigate the need for flexibility. As a matter of fact, the Swedish 1982 Working Time Act is semi-mandatory (Section 3), which means that the Act gives the social partners an option to derogate from the statute, and in this way makes them masters of the Act being able to sidestep the supervision of governmental agencies. Such derogations must take place as a rule at branch level. Derogations have also been abundant. However, it is argued in the Report that flexibility considerations require that derogations should take place in the normal course of events at entrepreneurial level; it would be “a signal from the legislator that *flexibility at the workplace level* should be accorded more weight”.⁶³ Looked upon from this point of view it is no wonder that the trade unions have publicly rejected the proposal, while the employers have seconded it.⁶⁴ Other flexibility aspects discussed in the Report relate, inter alia, to the employee’s individual working hours,⁶⁵ and the option to use up all the vacation days exceeding four weeks in order to shorten the working day,⁶⁶ and the calculation period for the average 40-hour working week, which is now limited to a four-week period while the commission suggests that the calculation period should be extended to ten weeks.⁶⁷ This is, it is held, “a signal that the regular working time should be used to a larger extent than at present to meet the variations in the need for manpower”.⁶⁸

It may be interesting to highlight the views advanced by the representatives of the social partners in the above-mentioned Government Report.⁶⁹ The employer side (both private and public sector employers) argues that the commission has failed to introduce sufficiently flexible rules. For example, employer representatives insist that the individual employee should be the sole decision-maker as regards issues such as whether the employee should have breaks, daily and weekly periods of rest, and even whether the stipulated 40-hour working week should be calculated on a yearly basis instead of on a 10-week basis. The present overtime standard (200 hours calculated on a yearly basis) should also be maintained. On the trade union’s side, the LO representative has held, inter alia, that the flexibility aspects have not been sufficiently well analysed. She stated that flexibility was already accounted for within the range of the present Act, rejecting the idea

⁶² “This is an important power issue”, says a trade union lawyer, K. Junesjö, *Strejk – en demokratisk rättighet för bättre arbetsförhållanden*, 1998, p 25.

⁶³ SOU 1996:145, p 196 (my emphasis).

⁶⁴ Lag & Avtal No 4/1997.

⁶⁵ SOU 1996:145, pp.188–192.

⁶⁶ Op.cit., pp 192–193.

⁶⁷ Op.cit., pp 218–221.

⁶⁸ Op.cit., p 220.

⁶⁹ See the following, op.cit., pp 313–329, 333.

that the derogatory powers should be passed down to the enterprise level. It would only create opportunities for opportunistic behaviour on the employer's side, who could, e.g., take advantage of retrenchments in order to ask for concessions with regard to sensitive working time issues. Criticism has also been launched against the calculation period of 10 weeks as the basis of the average 40-hour working week. It has been argued that the employer's unilateral right to vary the working time within a longer period of time would weaken the employees' position.

2.3 Collective labour relations

2.3.1 Wage setting process is being decentralized

Decentralization of wage setting in terms of both the process and the actors involved has been going on for a long period of time, the critical year being 1980. Until then wage agreements were entered into at a high central level between SAF and LO – the model wage setters on the labour market in Sweden. Since the re-regulation of the public sector labour law in 1965 other actors have made wage negotiations more multi-faceted. For a long period of time Sweden applied probably one of the most centralized collective bargaining wage systems in the world.⁷⁰ In 1980, in the aftermath of a devastating conflict involving the largest number of employees ever affected by industrial action on the Swedish labour market, the central employers' organization (SAF) decided to no longer engage in centralized wage bargaining.⁷¹ The centralized wage bargaining system was considered to have fallen into disrepute.⁷² As a result of this, with the exception of wage negotiations in 1990 when a stabilization agreement under the aegis of a Government-appointed commission made SAF change its mind in order to de-escalate the rate of the galloping wages, the wage-setting process was transferred to the branch level.

Simultaneously, the earlier rigid tariff-wage systems have been abandoned. These systems were frequent in the public sector, but they never applied to, for example, the engineering and building industries, where the minimum wage systems prevailed. The tariff-systems related the individual wage to the post occupied by the employee. Factors such as efficiency played no role in those systems – hardly a good incentive for work! Today, wages are set individually (which applies even to professors!) and differ according to the criteria found in the various collective bargaining agreements. This means a move downwards in the negotiation systems, often to the level of a separate enterprise or authority.⁷³

⁷⁰ See A. Victorin, "The implementation of a wage-policy: centralized collective bargaining in Sweden", in *Scandinavian Studies in Law* 1975, pp 295–315.

⁷¹ See H. De Geer, *Arbetsgivarna. SAF i tio decennier*, 1992, pp 143, 158–175.

⁷² See A. Victorin, "Niedergang und Ende des zentralisierten Tarifsystems in Schweden", in *Zeitschrift für Arbeitsrecht* 1985, pp 423–445.

⁷³ The private employers' view is that the individual wages should always be set at the entrepreneurial level, "Arbetsmarknad utan AMS." SAF, 1997, p 35.

2.3.2 Derogation from statutory norms

Derogation from the labour law norms is a device which has been used for a long time now. It means that a collective bargaining agreement may replace the statute. This legislative technique has been used in the areas of employment protection, vacation, time-off legislation, joint regulation, etc. It was once held in the legislative history of the 1974 Employment Protection Act, when the seniority rules were introduced, that “the conditions of the working life and the organisation of the undertakings were so varied that it was impossible to design a universal seniority rule, because there would always be cases when it would not work well”.⁷⁴ Hence, the seniority rules of the Act were made semi-mandatory. No doubt, the derogatory power gives the social parties a good chance of adjusting the statute to their special needs or the modalities of the specific case. It gives the parties a procedural flexibility.⁷⁵ The legislative technique must be looked upon as one of the characteristics of the Swedish model; it is, again, an example of the interplay between statutes and collective bargaining agreements. The 1996 Report on working-time issues argues that this technique creates both flexibility and stability.⁷⁶

In some cases, derogations may be made by means of agreement between the employer and an individual employee. This is the case, for example, as regards a longer period of notice than the one provided for in Section 11 of the Employment Protection Act. Similar provisions are found in the Vacation Pay Act.

As a rule, the said statutes prescribe that the derogation must be approved by the central labour organisation. In other words, the local union is not permitted to derogate from the provisions of the statute unless it is given powers to do so by means of, for example, a delegation clause in the branch collective bargaining agreement, or by means of the fact that the trade union internally delegates such power to the local union. The employers prefer to insert the delegation clause into the collective bargaining agreement. The clause cannot thus be unilaterally withdrawn. The reason for placing the derogatory powers at the central labour organization level is that the legislator wanted to be sure that the employees were represented by a strong counterpart.⁷⁷ However, the provisions of the 1976 Joint Regulation Act do not indicate that this is the case. Instead, the legislator assumes here that the derogations are made at the entrepreneurial level.

One interesting point emerged in the context of the 1996/97 amendment of the Employment Protection Act (see above). The provisions for fixed-term contracts in the Employment Protection Act, Sections 5, 5a and 6, are semi-mandatory, which means that they can be derogated from. One may also find plenty of such possibilities in the collective bargaining agreements of the respective branches. When the

⁷⁴ Prop 1973:129, p 160.

⁷⁵ The concept is also used by A. Numhauser-Henning, “Arbetets flexibilisering”, in *Studier i arbetsrätt tillägnade Tore Sigeman*, ed. by Arbetsrättsliga föreningen, 1993, p 262.

⁷⁶ SOU 1996:145, pp 229–230

⁷⁷ Prop 1973:129, p 191.

1996/97 amendments were presented, Section 2 of the statute no longer required that derogations from the fixed-term employment and seniority provisions had to be sanctioned by a collective bargaining agreement concluded at the national/branch level. It was held that the basis for this change was that the statute should be "neutral" and that it should not specifically designate a particular level.⁷⁸ Some of the LO trade unions immediately intervened in order to prevent their local unions from derogating in these matters from the statute. The unions claimed that they could do so with reference to the Charter of the LO which accorded to the Board of the Union the right to conclude a collective bargaining agreement (which is indisputable).⁷⁹ From the legal point of view such a stand is questionable since the legal power to derogate on issues such as those found in the actual provisions of the Employment Protection Act emanates from the statute and not from the union's charter.

3. The driving forces behind the deregulation

A few aspects related to the more frequent use of *contract labour* must be highlighted, since this group of employees is a paramount example of the deregulation process in Sweden. In short, the practice of hiring temporary manpower from an external provider of personnel is a reflection of the need for a temporary substitute, which is often due to the simple fact that some of the regular employees are ill or on leave, or else in cases when there is a sudden increase in the work load, or in times when the business reaches a peak. In some instances, the use of temporary manpower may be dictated by the need for specialized workforce. It is also apparent that employers occasionally use temporary employment agencies as a recruitment tool, sometimes referred to as "*try-and-hire*".⁸⁰ Restrictions in the statutory framework related to the conclusion of short-term employment contracts may be the result of the emergence of this form of employment. Data indicate that the majority of "temps" seem to get permanent employment after some time.⁸¹ The practice of contracting-out manpower may also reflect the shortcomings of the *public employment exchange* and its inability to provide employers with short-term employment forms.

Parallel to the growth of temporary staff another feature is becoming more prominent: all sectors of the labour market, including the public sector, show a tendency in which the principal employer reduces, or cuts down, the so-called *satellite activities or peripheral functions*. This feature has far-reaching repercussions on the way

⁷⁸ The issue is discussed in prop 1996/97:16, pp 27–28.

⁷⁹ The daily Svenska Dagbladet, 10 September 1996, Dagens Nyheter, 28 November 1996, LO-tidningen No 37, 29 November 1996.

⁸⁰ See H. Jakhelln, "Try and Hire – Arbetsformidling eller vikaryråvirksomhet?", in Lov, dom og bok. Festskrift til Sjur Brækhus, 1988, pp 241–251.

⁸¹ SOU 1997:58, p 48.

in which work is organised regarding auxiliary activities. The employer concentrates on the core-activities.⁸² Auxiliary activities are “out-sourced”.⁸³ It is held that this method ensures flexibility and reinforces marketing contacts on both sides of the process: customers and suppliers.⁸⁴ Hence, the borderline between the use of temporary employment agencies as a reserve of manpower, on the one hand, and the more extensive use of job contracting, on the other, has become blurred. This also means that the borderline between the organization (hierarchy), on the one hand, and the market, on the other, is getting less clear.⁸⁵ This is only another variant of the theme discussed in Ronald Coase’s classical article, “*The Nature of the Firm*”, appearing in *ECONOMICA* in 1937. According to Coase, it was *transaction costs* which determined whether work was to be performed inside or outside a firm. Coase writes on p 395: “A firm will tend to expand until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or to the costs of organizing another firm.” Hence, transactions will be performed within a firm (“in-house”) as long as this is the most profitable arrangement. When this no longer applies, they will be externalized and passed along onto the market. Additionally, modern companies or self-employed persons tend to organise the production and services along the lines of networks.⁸⁶

Caution exercised by the law in the area of employment protection indicates, however, that the major motive to make the legal framework less stiff as regards the most recent legislative employment protection schemes has been to *curb the high unemployment*, and to make it *easier for smaller enterprises to employ new personnel*. It is apprehended, however, that these amendments have not changed the minds of the employers. It is true that the rate of employed persons has increased.⁸⁷ Yet, as mentioned before, the growth in fixed-term contracts seems to have come about without the recourse to the 1996/97 amendment of the Employment Protection Act. One is tempted to say, when thinking about the turbulence surrounding the 1996/97 package, that it was “much ado about nothing”.

⁸² See, e.g., “Branschens utveckling och omfattning. Personaluthyrning, entreprenader, rekrytering.” SPUR, 1998, p 3.

⁸³ E.g., “Arbete utan anställning. Om de förändrade relationerna på arbetsmarknaden.” SAF, 1996, pp 15–16.

⁸⁴ H. Lundgren, *Bortom de mentala murarna. Bilder av morgondagens arbetsliv och arbetsmarknad*, 1997, p 32.

⁸⁵ The major work in institutional economics, often referred to, is O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications. A Study in the Economics of Internal Organization*, 1975. See also a field study, R. Eklund, *Bolagisering – ett mode eller ett måste?*, 1992, concerning the impact upon labour law when large and medium-large companies reorganize in order to set up subsidiaries instead of conducting the same business within the former divisions or departments of the company.

⁸⁶ See B. Hedberg et al., *Imaginära organisationer*, 1994, “Arbete utan anställning. Om de förändrade relationerna på arbetsmarknaden.” SAF, 1996, p 5 and H. Lundgren, *Bortom de mentala murarna. Bilder av morgondagens arbetsliv och arbetsmarknad*, 1997, pp 25–30.

⁸⁷ Arbetskraftsundersökningen i augusti 1998 (Labour Force Survey, August, 1998). SCB, p 1.

"Flexibilization" and "decentralization" aspects apply to both the discussion on the future working time act and the wage setting procedures. Generally, it can be said that the private employers' organisation (SAF) has been extremely successful with respect to the wage-setting structures. Individualized and differentiated wages are now the rule. The pattern has also spread out to other sectors of the labour market. The employer organisations have likewise been successful in achieving more lenient provisions on fixed-term contracts inserted into the respective collective bargaining agreements. SAF or its member organisations have also successfully convinced their counterparts to accept new rules on industrial action whose aim is to curb the frequency of labour conflicts. It is generally perceived that the above-mentioned 1997 industrial peace agreement signed on 17 March 1997 has been a "success".⁸⁸

It is no doubt that this agreement was an innovation in the sense of fostering peaceful wage negotiations among the major social partners in private industry. The agreement lays down special procedures whose aim is to prevent the parties from having to resort to industrial action too quickly, and gives unique powers to the appointed impartial umpires to enforce good intentions of the agreement.⁸⁹ The 1997-98 wage round was therefore concluded without resort to industrial action.

4. Evaluation of the current deregulation and labour law reforms

Even though the Swedish labour market has become more flexible, the countervailing forces have been even stronger.⁹⁰ Two features are conspicuous, namely the re-regulation of the existing norms, or the introduction of new norms in the light of the *current flow of E.C. legal acts*, and the introduction of *new domestic statutes*, quite apart from the impact of the E.C. development.

The list of re-regulations of Swedish labour law applied to E.C. legal acts could be made quite long. Did not someone say once that the E.C. was only a peace project? Isn't it instead Fortress Europe that is emerging? Suffice to say that the Swedish labour law was amended in response to the following E.C. Directives, partly due to the E.E.A. Agreement which came into force on 1 January 1994, and partly due to Sweden's entry into the E.U. on 1 January 1995: equal pay, E.C. Directive 75/117,⁹¹ transfers of undertakings and collective dismissals, E.C. Directives

⁸⁸ See the evaluation made by the two impartial umpires in their report to the industrial committee set up by the contracting collective parties, see *Industriavtalet i 1998 års förhandlingar*, September 1998, p 64 (mimeographed).

⁸⁹ The aftermath of the agreement is that a Government Commission has suggested similar rules to be elevated by law, SOU 1998:141. *Medling och lönebildning*.

⁹⁰ The same observation in R. Fahlbeck, *Flexibility. Potentials and Pitfalls for Labour Law*, 1998, pp 12, 14.

⁹¹ Prop 1990/91:113 (indirect discrimination and job evaluation were affected).

77/187, 75/129 and 92/56,⁹² insolvency, E.C. Directive 80/987,⁹³ health and safety of atypical workers, E.C. Directive 91/383,⁹⁴ information about the essentials of the terms and conditions of the employment relationship, E.C. Directive 91/533,⁹⁵ pregnant workers, E.C. Directive 92/85,⁹⁶ working time, E.C. Directive 93/104,⁹⁷ European works councils, E.C. Directive 94/45⁹⁸ and parental leave, E.C. Directive 96/34.⁹⁹ There are more E.C. Directives waiting in the pipeline: posting of workers (96/71),¹⁰⁰ burden of proof in sex discrimination disputes (97/80), part-time work (97/81) and the amendment to Directive 77/187 on transfers of undertakings (98/50). Mention must also be made of the “four freedoms” – the free movement of workers as set forth in Article 48 of the Treaty of Rome, and Regulations 1612/68 on equal treatment of migrant workers and 1408/71 on the social security rights of migrant workers, which were replicated into Swedish law already in the context of the E.E.A. Agreement.

New domestic acts relate to the right to take time-off in order to try to be self-employed,¹⁰¹ amendments to the Sex Discrimination Act on sexual harassment,¹⁰² and a three-fold non-discrimination legislation coming up: on sexual orientation,¹⁰³ on disabled persons in working life¹⁰⁴ and (a revised statute) on ethnic discrimination.¹⁰⁵

A discussion concerning the evaluation of the deregulation issue and labour law reforms would not be complete if the private employers' organization's (SAF) campaign during the entire 1990s, almost akin to waging a “war” against the existing labour law framework, was left out. SAF's activism is *unprecedented*, causing their counterparts in the labour market to retreat to defensive positions. A special concern for SAF has been the *smaller enterprises* and the vexing volume of rules. SAF has argued that the amount of regulation which companies have to assimilate act

⁹² Prop 1994/95:102. The two issues were treated together. The legislative scheme on the transfers of undertakings was entirely amended. The amendments on collective dismissals were less dramatic.

⁹³ Prop 1996/97:102 (qualifying period to be entitled to wage guarantee abolished). See also EFTA Court opinion, E-1/95 wherein the Swedish rule was disapproved.

⁹⁴ Prop 1993/94:186 (related to the status of contract labour at the actual workplace).

⁹⁵ Prop 1993/94:67 (no such provisions were formerly found in Swedish labour law).

⁹⁶ Prop 1994/95:207 (only minor adjustments).

⁹⁷ SOU 1995:92, prop 1995/96:162 (implementation probably unsatisfactory).

⁹⁸ Prop 1995/96:163 (an entirely new statute was enacted, but the domestic precursor was partly found in the 1982 Development Agreement between the SAF, LO and PTK related to the 1976 Joint Regulation Act).

⁹⁹ Prop 1997/97:81 (a separate statute was enacted related to time-off for urgent family reasons).

¹⁰⁰ Implementation suggested in SOU 1998:52. Utstationering av arbetstagare.

¹⁰¹ Prop 1997/98:27.

¹⁰² Prop 1997/98:55, partly inspired by E.C. Resolution 29 May 1990 on the protection of the dignity of women and men at work and E.C. Recommendation 27 November 1991 on the protection and dignity of women and men at work.

¹⁰³ SOU 1997:175, prop 1997/98:180 (not yet law).

¹⁰⁴ SOU 1997:176, prop 1997/98:179 (not yet law).

¹⁰⁵ SOU 1997:174, prop 1997/98:177 (not yet law).

as a brake on entrepreneurship and the job-creating process.¹⁰⁶ It is indicative that a catalogue of proposals to reform labour law, submitted by SAF in 1997, was bluntly rejected by LO.¹⁰⁷ In one of the many pamphlets, SAF has summarized the view of the employers:

"Instead of allocating billions of crowns to the labour market policy, we need active support for creating new jobs. A decentralized wage formation process, balanced rules applied to industrial action, a reform of the unemployment insurance system and labour law, more flexible working time, lower taxes and forceful deregulation – such are the measures which create growth and new jobs."¹⁰⁸

SAF's reform proposals concerning labour law refer to, inter alia:¹⁰⁹ the employee concept in the labour laws should not be apprehended as a mandatory concept by the courts, employers should be free to contract for regular, job or fixed-term employment at-will, a more lenient "objective cause" standard should apply to dismissals, abolition of the seniority rules and the recall right in connection with redundancies, abolition of the trade union veto right when job contractors are engaged, more balanced rules in industrial conflicts, e.g., members' voting, prohibition of sympathetic industrial action (secondary boycotts) and – finally – a modification of the binding force of the collective bargaining agreement (members should give proxy to the union, or voluntarily accede to the agreement).

One comment only as regards the last proposal. The weakening of the most central regulatory instrument used in Swedish industrial life, i.e. the collective bargaining agreement, seems to be tainted by ideas fetched from the general principles of contract law. It is questionable whether such a proposal is an adequate tool in the "flexibilization" context. It is widely known that the collective bargaining

¹⁰⁶ The Social Democratic Government appointed a "small enterprise delegation" in 1996 to cope with issues related to obstacles to the establishment and growth of smaller enterprises. Several reports have been issued, see SOU 1997:186. *Bättre och enklare regler*, SOU 1998:64. *Bättre och mer tillgänglig information*, SOU 1998:77. *Kompetens i småföretag*, SOU 1998:78. *Regelförenkling för framtiden*, SOU 1998:92. *Goda idéer om småföretag och samverkan*, SOU 1998:93. *Kapitalförsörjning till småföretag* and SOU 1998:94. *Förslagskatalog*. The dismal lesson seems to be that the volume of rules has steadily increased in spite of the fact that various governments long before have attempted to limit the flow of regulation, see SOU 1998:78, p 20.

¹⁰⁷ SOU 1997:186, pp 69–74. See "SAF:s svar på Småföretagsdelegationens uppdrag", dated 1997-08-14, p 6 (mimeographed). In the final report, the "small enterprise delegation" concludes that it has chosen not to dig deep into the areas of labour law since "the area is complex, controversial and has been subjected to comprehensive investigations", see SOU 1998:94, pp 17–18, 29–30 (two innocuous suggestions relate to the simplification of the Vacation Pay Act and the Labour Inspectorates' services).

¹⁰⁸ "En arbetsmarknad utan AMS." SAF, 1997, p 63.

¹⁰⁹ See the following pamphlets: "Arbete utan anställning. Om de förändrade relationerna på arbetsmarknaden." SAF, 1996, pp 22–27, "En arbetsmarknad utan AMS." SAF, 1997, p 36, "Från krig till fred på arbetsmarknaden – Balansera konfliktreglerna!" SAF, 1997. Most of the suggestions date back to the beginning of the 1990s, e.g., "SAF:s uppfattning om den framtida arbetsrätten", SAF, 1991. A critical appraisal of the SAF proposals is found in two books written by a trade union lawyer, K. Junesjö, *En ny arbetsrätt. Tankar och förslag*, 1995 and *Strejk – en demokratisk rättighet för bättre arbetsförhållanden*, 1998.

agreement is a landmark invention in the contractual theory with respect to its legal effects. The ingenuity of such agreements is that they reduce the *transaction costs* of passing on their content to the employment contracts (cf. the idea of standard contracts). The alternative mode of action, as propounded by SAF, would imply that every single employee would have to contract individually for the same terms and conditions of work. This would be not only burdensome, but it would also involve astronomical costs, if tens of thousands of employees were affected.¹¹⁰ Which employer is prepared to engage in such fruitless endeavours?

The discussion on deregulation would be incomplete if the *seniority issue* was left out. No other issue has haunted the labour market parties so much and caused so many political stalemates as the seniority rules laid down in the Employment Protection Act. The status of the law is clear. The “last-in-first-out” principle applies in redundancy situations (Section 22 of the Act). The length of the employment period thus prevails. However, seniority is not strict in that attention must also be paid to the fact that the affected employee must have sufficient qualifications to be transferred to another job which is already occupied by another employee. The point here is that if the employee holding the stated post is more qualified he must nevertheless yield his post to the employee who has sufficient qualifications and higher seniority.¹¹¹ Furthermore, in the case when two employees have the same seniority, the older employee has priority. The seniority principle also applies to recall situations, when the employer is about to take in new personnel. The recall right applies only after the employee has been dismissed due to redundancy and during nine months after the employment has ceased to have effect.

The seniority rules were introduced in the 1974 Employment Protection Act. This implied the breaking away from the earlier, “softer” seniority rules as provided for in the master agreement between LO and SAF which gave priority to the “efficiency” principle.¹¹² No amendments were made in the 1982 Employment Protection Act, though the issue was widely discussed.¹¹³ As a result of the non-socialist Government bill in 1993/94 the employers were entitled to exempt two employees (“key persons”) from the seniority list.¹¹⁴ The exemption was abolished with the change of Government after the national elections in 1994.¹¹⁵ The seniority

¹¹⁰ Cf. J. Malmberg, *Anställningsavtalet*, 1997, pp 374–375. The employers’ sought-for flexibilization may very well end up in rigidity, argues Malmberg. Likewise: “To some extent, the legal system can assist to making available devices which serve to reduce the transaction costs”, says A. Ogus, *Regulation. Legal Form and Economic Theory*, 1994, p 17.

¹¹¹ It is questionable whether such a standard is an adequate one in redundancies when there is a competition for jobs among the payroll employees. However, the standard is used because it is held in both the legislative history and in court practice that the employer should apply the same standard in those instances as when the employer engages new personnel. In such cases there is usually a schooling-in or training period before the employee is fit for the job.

¹¹² Prop 1973:129, pp 154–155.

¹¹³ Prop 1981/82:71, pp 54–64.

¹¹⁴ Prop 1993/94:67.

¹¹⁵ Prop 1994/95:76.

rules are semi-mandatory and may thus be derogated from by a collective bargaining agreement. Derogations are frequent, but, in the employers' view, too costly.¹¹⁶ The trade unions have fought for the maintenance of the statutory rules since they were introduced in the 1974 Act, while the employers, likewise, have fought the law, but failed to attain a sustainable amendment. One reason for the present stalemate is that during the 1970s the bulk of the new labour legislation was introduced at the intervention of the legislator. The social partners never had to act as "godfathers" or "sweat" in order to reach a joint agreement. The shadow of the labour-statute-prone legislator of the 1970s is unquestionably a major cause of the controversy among the parties today.¹¹⁷

5. The role of labour law in the 21st century: Do we need a new concept of Labour Law?

In my view it is not realistic to expect that the labour law will change dramatically in the future. Nothing like the fall of "the Berlin wall" is going to happen. The inertia of the present legal framework and among the major actors must not be underestimated. The E.C. will continue to produce legal acts. Even if the externalization of the labour force will probably continue, it requires that all persons become self-employed in order to dissolve the labour law from within. Not even the age of the information society/revolution will make the basic rules of labour law obsolete.¹¹⁸ It is another matter that management style may have to change.

Even though we haven't yet seen the last imprints of the individualized labour law norms or felt the effects of the flow of E.C. legal acts, *individualization* of collective labour law as suggested by the Swedish employer organisation (SAF) must be rejected – for economic and efficiency reasons. Transaction costs for concluding, for example, wage contracts will only increase if the effects of a collective bargaining agreement are made conditional upon the contractual approval of the affected employees. This does not exclude the possibility that the agreement be subject to trade union members' voting, which is not practiced in Sweden, however, and the continued applicability of the principle of individual and differentiated wages. It is obvious that the "war" against the existing labour law launched by

¹¹⁶ The seniority rules no doubt give the union leverage in such negotiations, see R. Eklund, *Bolagisering – ett mode eller ett måste?*, 1992, p 226.

¹¹⁷ Cf. the 1982 Development Agreement between SAF, LO and PTK – a joint regulation scheme which provides basic rules for daily operations of the employer's business in his relations with both the employees and the trade unions. The agreement is an application of the 1976 Act on Joint Regulation. It took the parties six years to iron out the 1982 Agreement, but it was worth it. This agreement has a greater legitimacy than any other statutory solution on the same issues would have had. In the agreement the parties have, e.g., paved the way for far-sighted solutions related to the many facets found in groups of companies, see R. Eklund, *Bolagisering – ett mode eller ett måste?*, 1992, pp 294–296.

¹¹⁸ Cf. R. Fahlbeck, "Ett revolutionerat arbetsliv? Informationssamhället och arbetslivets omvandling", in JT 1997–98 No 4, pp 1016–1033.

SAF has met with failure if one looks of the result achieved: no major inroads on the protective legislation have taken place. On the other hand, SAF and its member employer organisations have been more successful in achieving concessions within the general framework of the various collective bargaining agreements, though the SAF campaign has pointedly been directed towards the reform of the statutory labour law.

Also, the *non-discrimination principle*, in its broadest sense, will probably call for solutions where the social/moral dimension will have a definite impact on the labour law norms in the future. The impact of the E.C. law is here discernible.

It is also my view that much legal work can be devoted to the *simplification* of the labour law rules in order to avoid a multi-faceted technique in areas which could be regulated in a uniform way. A small enterprise should not be required to employ a personnel director or a legal counsel to master daily operative challenges. From the Swedish point of view one is inclined to question, for example, the extent to which the various types of short-term employment forms found in the Employment Protection Act, not to mention the ensuing provisions of the various collective bargaining agreements, can be a pedagogical way of giving the employers a choice of schemes when one type of employment overlaps another. The same can probably be said with regard to many other issues, such as those found in the non-discrimination and the leave-of-absence legislation. To succeed in the simplification efforts the legislator must be prepared, however, to give up something in one area of law, in order to attain something in another. This may, in fact, turn out to be more difficult, than first thought, since it may mean providing a platform for lobbyists from which to bassoon for the preservation of the status quo in the respective areas of law.