SCHOOL OF ECONOMICS AND MANAGEMENT

In Exchange for Employment Protection

An Analysis on Sweden's Managerial Position and the UK's Employee Shareholders

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Bachelor's Thesis in Labour Law

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Abbreviations

EAT	Employment Appeal Tribunal
EPA	The Employment Protection Act
ERA	The Employment Rights Act
ES	Employee Shareholder
ET	Employment Tribunal
MP	Managerial or comparable position
SLC	The Swedish Labour Court
UK	United Kingdom

Abstract

This essay describes which categories of employees that are exempted from employment protection in Sweden and the United Kingdom. The focus of the essay will be the UK's employee shareholders and Sweden's employees in a managerial or comparable position, since these two categories give up their protection and receive some form of compensation, and/or some other form of protection in return. The essay describes what protection these categories are missing and what they receive instead. The employee shareholder status has a clearer definition in the law than managerial position has, which leaves less room for uncertainties, while there have been many cases in the Swedish Labour Court regarding who has a managerial position. In exchange for their employment protection, employees in a managerial position receive salary- and employment benefits equal to or greater than the law, as well as still being covered by the law, if the Swedish Labour Court considers the benefits being equal to or less than what the Employment Protection Act provides. Employee shareholders receive shares worth at least £2,000 in the company. However, unlike company managers, they will remain exempted from the law no matter what happens to their benefits (i.e if their shares lose value).

1. Introduction

1.1 Background

Sweden and the United Kingdom (henceforth UK) both have legislation providing the working force with employment protection. In Sweden, the Employment Protection Act (*Lag 1982:80 om anställningsskydd),* (henceforth EPA) covers almost all employees in public or private service, it stipulates five categories of employees that are fully or mostly excluded from the law's application. The UK has three main categories of workers; employees, workers and those who are self-employed. The UK's Employment Rights Act 1996 (henceforth ERA) covers all who belong to the category of employee. There is a relatively new sub-category of employees, called employee shareholders, that give up some of the employment protection that normally accrues employees. In exchange they receive at least £2,000 worth of shares in the company.

One of Sweden's exempted categories of employees are those in managerial or comparable positions. This category is of special interest to compare to the employee shareholders, since they both receive certain compensation (a quid pro quo). Both categories do not have protection against dismissal and termination, amongst other things, which are key aspects of the protection of one's employment. The aim of employment protection is to assure employees that they will not be dismissed without a reasonable cause. An interesting question then arises – what applies to those who do not have legislative employment protection?

1.2 Purpose and research questions

The purpose of this bachelor thesis is to give an overall account of who is exempt from employment protection in Sweden, respectively the UK. The focus is on Sweden's managerial position and the UK's employee shareholder, where the essay intends to specify whom this applies to, what employment protection they do not receive and what they receive in exchange for their employment protection. Emphasis is on managerial positions and employee shareholders, and the procedure of termination and dismissal of those without protective legislation. Finally, the essay also aims to compare managerial position and the employee shareholder.

In order to investigate this, the following questions have been formulated:

- Who does not have employment protection in Sweden and the United Kingdom?
- Under which circumstances is an employee considered to be in a managerial position in Sweden?
- Under which circumstances is an employee an employee shareholder in the United Kingdom?
- What do those in managerial positions and employee shareholders get in exchange for employment protection?

1.3 Delimitations

The aim of the essay is to firstly give a broad, overall account on the exemptions in Sweden and the UK, before delimiting and focusing on managerial positions and employee shareholders. These two categories are the focus of the essay, since there are similarities between the two such as that they are both a category of employment that an employee chooses to enter knowing that all or most of their employment protection will be lost, and they also get compensated for this. The remaining excluded categories are mentioned and explained in short, but no further discussion is presented for those categories.

We have limited ourselves by only focusing on what applies in the event of termination and dismissal. The starting point for both countries is employees in the private sector. When giving an account on the termination of employment, it is based upon an employment of indefinite duration, and not covered by a collective agreement.

The EPA is Sweden's main form of protective employment legislation. Other laws are also generally not relevant to the application of the EPA. For example, it is no obstacle for the EPA that an employee is also covered by the Public Employment Act (*Lag (994:260) om offentlig anställning*). The essay will therefore only concern the EPA and those exempted from its legislation, with the exception of when it is helpful to explain or of relevance to a provision, legal case or otherwise.

Regarding legislation in the UK, only the ERA will be taken into account, since it is the UK's main protective legislation for employment. There are other acts of relevance, however, the

ERA is already broader than its Swedish counterpart (the EPA), and it would therefore not be of relevance to include other acts and further broadening the UK scope.

1.4 Methodology and material

To achieve the purpose, the legal dogmatic method and the comparative method has been used. The legal dogmatic method is used to examine countries' already established legislation to determine the applicable law (lex lata), and also how the law and legal system should be instead (de lege ferenda). The applicable law will act as the foundation for the comparative comparison. With this method, it will be determined which legal rules exist through interpretation and analysis of legal text, preparatory work, case law and doctrine.[1] The legal dogmatic method is well suited for this essay since a jurisprudential analysis of exception categories and the consequences of being exempted from employment protection is made.

Within comparative law, one is interested in comparing how the different legal systems regulate a problem occurring in both countries – in this case the applicability of employment protection to certain groups. However, this presupposes that the legal rules being compared deal with the same matter. One should therefore strive to compare such rules which regulate the same situations.[2] Due to the fact that the two countries belong to different families of law, the main emphasis will be spread differently across each country's sources of law. Preparatory work is of great importance in Sweden, however, it does not exist in the UK and therefore cannot be used as a source for the UK. Instead, greater emphasis is placed on legal text when presenting the legal situation of the UK.

Case law is used to highlight and see how the exceptions have been assessed in legal rulings, and to further build up the definition of managerial position and employee shareholder. For Sweden, the selection of case law has been made in regards to those frequently mentioned in literature, and by reading through all cases regarding managerial positions. There has only been one case to this date regarding the employee shareholder. This case was found by searching through industrial cases law reports, and the Employment tribunal's decisions with relevant search words and filters. The other British cases are taken from the literature. Where wages from cases are presented, a footnote has been added, showing what the wages would

[1] Papadopoulou, Frantzeska - Skarp, Björn., 2nd edt., Juridikens nycklar - introduktion till rättsliga sammanhang, metoder och verktyg. Stockholm, Norstedts Juridik AB, 2021, p. 157-159.
[2] Bogdan, Michael 2:8 edt., Komparativ rättskunskap. Stockholm, Norstedts Juridik AB, 2003, p. 57.

have been in October 2022. This is to give the reader a clearer view of how high or low a salary has been deemed to be by the Swedish Labour Court (henceforth SLC). The conversion has been done with the Swedish Central Bureau of Statistics' (*Statistiska centralbyrån)* price converter.

The literature regarding Sweden was chosen since we knew of it or the authors beforehand. The authors are influential in their field and their literature is frequently quoted and used in jurisprudential essays. Regarding the UK, we were more dependent on receiving help in choosing literature and sources since we had no previous knowledge of UK labour law. The choice of literature was made with the help of Andreas Inghammar,[3] as well as going through course literature from previous courses[4]. An EU directive is accounted for in the essay since it has had an impact on the EPA. Since the UK has left the union, other EU-law is not of any relevance to answer our questions.

The comparative method has been considered to be so new that it cannot be expected to offer a fully developed and established methodological base on its own – which is why it is used as a complementary method in this essay.[5] This involves comparing the legal framework and finding differences and similarities between the Swedish and the British exemptions.[6] The application of the comparative method presupposes that certain practical factors, such as language skills, are taken into account[7]. Therefore, when translating the names of legislation and other judicial concepts from Swedish to English, we have when possible used a glossary from the Swedish court for the sake of consistency and correctness. Nonetheless, the language always poses a risk that something has been misunderstood or misinterpreted. As we have previously mentioned in this chapter, there are difficulties when working with a subject in a country that you previously have limited knowledge of. It is important to be aware of one's own knowledge gaps and to be even more critical of the sources that are used.

[3] Andreas Inghammar is a Doctor of Law and a university lecturer in commercial law at the Department of Commercial Law, School of Economics, Lund University. His main research is in the field of labour law, with both European and comparative perspectives.

[4] HARG16 - Handelsrätt: Internationell och komparativ arbetsrätt. HARG06 - Handelsrätt: Arbetsrätt II.

[5] Papadopoulou, Frantzeska - Skarp, Björn., 2nd edt., Juridikens nycklar - introduktion till rättsliga sammanhang, metoder och verktyg. Stockholm, Norstedts Juridik AB, 2021, p. 165-166.

[6] Bogdan, Michael 2:8 edt., Komparativ rättskunskap. Stockholm, Norstedts Juridik AB, 2003, p. 21-28.

[7] Ibid, p. 27.

1.5 Disposition

The essay is divided into five chapters with the aim of giving the reader an easy-to-understand and clear outline. The arrangement is adapted so that the reader can easily understand the subject and be able to understand who is covered, and more importantly, who is not covered by each countries' respective employment protection legislation. The first chapter aims to capture the reader's interest and to explain the background and the purpose of the essay. Then follows the delimitations made in the essay and the method and material used to investigate the questions.

To help the reader understand and distinguish between Swedish and British legislation, the countries are divided into separate chapters. The second and third chapters follow the funnel model, where the essay starts broad, but gradually narrows to focus on the answer to the research questions. This is done to give the reader as broad a base of knowledge as possible.

Chapter two begins by giving an introduction to who has employment protection in Sweden. The idea of first discussing who has employment protection is to later better understand who does not have employment protection. Here, it is described which categories are fully or partially exempt from employment protection, before focusing on the category of managerial position, as well as the consequences that arise from not being covered by the application of the law. The focus is on dismissal and termination and the employment protection that these workers have, and lack.

The same arrangement applies to chapter three. Although, due to the common law system's lack of preparatory work, greater weight is instead placed directly on the legislation here.

An analysis follows where the research questions are answered, as well as a discussion of the ambiguities and problems presented in previous chapters. The authors' own thoughts and suggestions are also presented here. The purpose of the chapter is to answer the questions, highlight any problems and to give our own reflections. Finally, the essay ends with a conclusion.

2. Legal framework: Sweden

2.1 The scope of the Employment Protection Act

If you are an employee you are covered by the scope of the EPA, as long as you are not defined as one of the five exception categories. You are covered by the EPA no matter what form of employment you have; if you work part time, full time, probationary or under a fixed-term contract for example.[8] The EPA includes provisions on, among other things, the employment contract, termination, and dismissal.[9]

2.2 The exemptions from the Employment Protection Act

Members of the employer's family, employees with special employment support and employees in a managerial or comparable position (henceforth MP) are exempted from most of the paragraphs in the EPA. Domestic workers and individuals employed in upper secondary school apprenticeships are fully exempted from the EPA. The three categories that are not fully exempted from the EPA; members of the employer's family, employees with special employment support and employees in a MP, are still covered by paragraph 2, 3, 6 c-6 e, 6 h, 6 i, 21, 38 and 41-43 §§ the EPA. In summary, they have the right to the same salary and other employment benefits if laid-off and all employees have the right to receive written information about their employment. An employment contract is not valid if it invalidates or restricts the employees' rights according to the EPA and the employee has a right to damages if the EPA has not been followed.[10]

2.2.1 Domestic workers

Employees working in the employer's home are exempted from the EPA. The motives to the law suggest that this position is of such special character that the protection can not be the same as for other employees.[11] There is a special law that regulates domestic work, The Domestic Work Act (*lag 1970:943 om arbetstid med mera i husligt arbete).* This law differs from other labour legislation regarding working hours, employment protection, supervision,

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[8] Åhnberg, Lars - updated by Öman, Sören., *LAS-handboken: lagtext, kommentarer, AD-domar,* 9th edt. Stockholm: Lars Åhnberg AB, 2020, p. 18.

[9] Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.

[10] 1, 2, 3, 6 c-6 e, 6 h, 6 i, 21, 38 and 41-43 §§ Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.

[11] Proposition 1973:129 med förslag till lag om anställningsskydd, p. 195.

sanctions, prescription periods and the requirement of written information about the employment.[12] The motive for this exemption is that the privacy of family life and one's right to privacy in one's own home is valued higher than the employment protection of domestic workers.[13]

2.2.2 Upper secondary school apprenticeships

Employees who are employed in upper secondary school apprenticeships are fully exempted from the EPA.[14] There is a special law that regulates the relationship between employer and employees in upper secondary school apprenticeships, Act on high school apprenticeship employment *(Lag (2014:421) om gymnasial lärlingsanställning)*[15]

2.2.3 Managerial or comparable position

This exemption takes aim at employees which, regarding work duties and terms of employment, are considered to have a MP. There have been many cases in the SLC where it has been assessed if someone is considered to have a MP. In every case, the SLC takes the surrounding circumstances into consideration when concluding. The EPA does not specify how to make the assessment or which circumstances that imply that someone is in a MP. Each case must be assessed individually, factors that can have a great impact on the judgement is the size of the company and the individual employment contract.[16] However, sales managers, production managers, school principals and heads of departments have all been deemed to be MPs in some instances.[17]

According to preparatory work to the EPA the motive for these employees to be exempted is that they also have an employer function towards the other employees, they typically also have salary benefits and other employment benefits that does not make it necessary for them to also be covered by the EPA.[18] This category and the motives for this exemption will be covered in more detail in chapter 2.3.

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[12] Calleman, Catharina ., *Ett riktigt arbete? : om regleringen av hushållstjänster*, Säter: Pang, 2007, p 195-196.
[13] Ibid, p. 200-205.
[14] 1 § 2 point Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[15] Act on high school apprenticeship employment (Lag (2014:421) om gymnasial lärlingsanställning) SFS 2014:421.
[16] Lunning, Lars - Toijer, Gudmund., *Anställningsskydd: en lagkommentar*, 11th edt., Stockholm: Wolters Kluwer, 2016, p. 60.
[17] Glavå, Mats - Hansson, Michael. Arbetsrätt, 4th edt. Studentlitteratur AB: Lund, 2020, p. 335.
[18] Proposition 1973:129 med förslag till lag om anställningsskydd, p. 230.

2.2.4 Members of the employer's family

Employees who are part of the employer's family are exempted from a majority of the paragraphs of the EPA.[19] The motives of the law specify that "*the relationship between them and the employer are of such a special character that their employment should not be made subject to legal regulation*".[20] Concerning more distant relatives (other than spouse, child or parent), it is of importance if the parties in question are living in the same household or not. If they are not living together, that is an implication that this exception from the EPA should not be applicable for the employee.[21]

Regarding partners that live together, the SLC describes what applies in such cases in AD 2000:97. The SLC states that the exception for family members was supposed to have a broad interpretation according to the motives of the law. The meaning of the exception needs to adjust according to how society changes over time, and therefore it is reasonable that partners who are living together, without being married, can be subjected to this exception. The court also mentions that other laws showed the same interpretation of the relationship of partners living together, for example the Cohabitees Act (*Lag (1987:232) om sambos gemensamma hem*). The Cohabitees Act applies to two people living together under marriage-like circumstances.[22] Regarding the family members exemption, the SLC has applied the same interpretation as in other laws; that two people living together under marriage-like circumstances can fall under the same category as spouses. However, the court makes an individual assessment if a relationship is to be seen as marriage-like, if that is the case, the employee falls under the scope of the exemption.[23] Noteworthy, is that even though two people are undergoing divorce, the employee can still fall under the exemption.[24]

The reason for this exception of family members is not solely to make it easier to terminate their employment. However, there can be an advantage for the family member, if the employer must lay off several employees, the employer can for example choose to keep family members as employees before others.[25]

[19] 1 § Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[20] Proposition 1973:129 med förslag till lag om anställningsskydd, p. 195.
[21] Glavå, Mats - Hansson, Michael. Arbetsrätt, 4th edt. Studentlitteratur AB: Lund, 2020, p. 335.
[22] 1 § The Cohabitees Act (*Lag (1987:232) om sambos gemensamma hem*) SFS: 1987:232.
[23] Ibid, p. 336.
[24] AD 2020:15.
[25] Glavå, Mats - Hansson, Michael. Arbetsrätt, 4th edt. Studentlitteratur AB: Lund, 2020, p. 338.

2.2.5 Special employment support

Employees with special employment support, in protected work or with wage subsidies for development in employment, are exempted from most of the paragraphs of the EPA.[26]

2.3 More on managerial or comparable position

Through the application of the EPA, *"employees who, with regard to work tasks and terms of employment, may be considered to have a managerial position or comparable position"* are exempted.[27] The law does not further specify under which circumstances an employee is considered to have a MP. The answer to how the assessment is made, and which circumstances that point to someone being in a MP, is found in case law. The question of the applicability of the exception has been tested in the SLC in several cases over the years, with different outcomes depending on the circumstances of the individual case.[28]

The concept of managerial position was introduced as an exception to the application of the 1971 Employment Protection Act. The concept has since been transferred to the current Employment Protection Act over the years, with little to no change. The motives for the exemption are found in the preparatory work. There it says that this category of employees also has an employer function, and since they usually have higher salary and employment benefits, they would almost have a 'double protection' if they were also covered by the scope of the EPA. There must also be a strong trust between the employer and the employee in a MP – the relationship between them is so special that from a social protection point of view there is no apparent need for legislation to provide employment protection.[29] The motive is therefore that they cannot be said to be in need of further employment protection, both regarding their individual employment benefits, and considering their special role of being both employees and representing the employer.[30]

In the bill (1981/82:71) to the current EPA, the previous definition of 'managerial position or comparable position' remains, with the addition that the employee must be insured salary

[26] 1 § the 3rd point Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[27] 1 § Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[28] AD 1973:27, 1975:42, 1977:223, 1979:60, 1979:146, 1979:154, 1980:92, 1983:182, 1989:133, 1991:86, 1995:23, 1996:37, 1997:148, 1998:22, 1998:65, 2001:62, 2006:20, 2011:84, 2013:4, 2014:12 and 2014:62.
[29] Proposition 1973:129 med förslag till lag om anställningsskydd, p 194. See also: AD 2014:12.
[30] Ibid, p. 194-195.

benefits and other employment conditions that normally accrue to executives.[31] In addition to employees being assured salary benefits and other terms of employment that are normal for a MP, the individual must also have managerial duties for the employment to be considered a MP.[32] What follows is a description and summary of case law from the SLC where it has been assessed who has or has not a MP.

2.3.1 The size of the organisation

The size of the organisation is of great importance when deciding if someone is in a MP or not. The bigger the company, the more MPs there can and should be. The main rule according to legislative history is that in a smaller company there can only be one person in a MP.[33] In AD 1996:3, an employee acquired 49 percent of the shares in the company and became a member of the board. The SLC found that she had not entered a MP in practice, and another person was CEO. Considering the smaller size of the company, and the other surrounding circumstances, there was no reason to believe there was more than one company manager.[34] There are exceptions from the main rule that only one person can be a company manager in a small company. In AD 2013:4, two people were judged to have MPs in a smaller company with only a few employees; both had an indirect ownership interest in the company, worked independently without supervision from each other, and had decision-making rights that highly differed from other employees.[35]

In medium-sized companies the exception should only apply to the CEO, his deputy and possibly another employee with special independent responsibility. In larger corporations the exception should refer to the CEO, board members and – especially in the absence of a board – employees with an independent position as head of a larger branch of the company's operations.[36] In the state sector the exemption ought to involve directors-general, heads of departments and senior directors. Important to note is the 32 § in The Public Employment Act *(Lag (1994:260) om offentlig anställning*) which states that the EPA does apply for the employees in MPs in the state sector regarding the paragraphs of dismissals, terminations,

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[31] Proposition 1981/82:71 Regeringens proposition om ny anställningsskyddslag m.m., p. 94.

[32] Ibid, p. 112.

[33] Lunning, Lars - Toijer, Gudmund., *Anställningsskydd: en lagkommentar*, 11th edt., Stockholm: Wolters Kluwer, 2016, p. 60.

[34] AD 1996:37.

[35] AD 2013:4.

[36] Lunning, Lars - Toijer, Gudmund., *Anställningsskydd: en lagkommentar*, 11th edt., Stockholm: Wolters Kluwer, 2016, p. 60.

order of terminations and right to re-employment if they are permanently employed. On a municipal level, exemptions are made for heads of administration, and in larger municipalities also for heads of departments.[37] In AD 1997:148 the court stated that a head of administration of one of the municipality's thirteen administrative offices was not considered to have a MP. This against the background that the municipality's organisation was relatively small; only a few people could thus have a distinct employer function and the manager in question only exercised leadership over five people.[38]

2.3.2 The authority that is exercised

The SLC emphasises the authority that a company manager can exercise in practice in the assessment of who is a company manager. In AD 2014:12, a former CEO had remained in the company as senior advisor. As a senior advisor, he had the same terms of employment as he had as a CEO, pointing to the fact that he should be exempted from the EPA. However, the SLC did not find that he had managerial functions (no board work, subordinate staff, or budget responsibility) and could therefore not be considered to have a MP.[39] Another case of interest is AD 1998:22, where it can be inferred that the highest employed executive does not necessarily need to have a MP. A school principal, which the government's bill clearly states should be considered a MP, was still found to not have a MP. The court found that even though he was the highest paid official in the school, was head of personnel and that he was responsible to the board for the teaching at the school, his authority was limited both formally and in reality. For instance, the principal had limited responsibility for the school's finances, nor could he make decisions about hiring staff on his own.[40]

2.3.3 Limited Companies

Case law has shown that a main rule in limited companies is that the CEO is exempted. Furthermore, an employee who essentially has the same authority as a CEO should be exempted. The main rule that a CEO in a limited company should be covered by the exception was stated in AD 1979:146. The SLC took a position in the question of whether a CEO, who does not have the work duties or the financial benefits that typically correspond with what normally accrues to executives of this type, should be considered to have a MP.

[37] Lunning, Lars - Toijer, Gudmund., *Anställningsskydd: en lagkommentar*, 11th edt., Stockholm: Wolters Kluwer, 2016, p. 60.
[38] AD 1997:148.
[39] AD 2014:12.
[40] AD 1998:22.

With regard to the legal status that the Companies Act (*Aktiebolagslagen 2005:551)* gives, the court stated that the main rule must be assumed to be that a CEO in a limited company is exempt from the EPA.[41] In AD 1980:92, the SLC also states that even in cases where employees have essentially the same authority as a CEO, they should be exempted from the EPA. In this case, an employee had the same authority as a CEO. She was also the highest paid official and was a board member with company signature rights.[42]

2.3.4 The importance of employment conditions

The SLC attaches great importance to the employment conditions and the salary of the employee. Case law states that an employee with an atypically low salary for a manager must be compared to other employees' salaries in the company. The salary of a company manager can be relatively low, as long as it is considerably higher than most other employees'. In AD 2011:84 the SLC showed the importance that the employees' salary and other conditions have for the assessment. The operations manager of an NGO was not considered to have a MP. His terms of employment did not contain any special, beneficial terms regarding notice period, severance pay or pension which usually accrues MPs. His salary of 23 000 SEK[43] a month, though higher than that of other employees with 18 000 SEK[44] a month, was not considered to be so much higher that he could be considered to have special salary benefits. Collective agreements applied to his employment, as it did to other employees. These circumstances combined did not point to him having a MP.[45] An interesting case, showing that the employment conditions must be put into perspective of the surrounding circumstances is AD 1991:86. The CEO in a limited company was considered a company manager, and therefore excluded from the EPA, even though his salary was only 20 000 SEK[46] per month. The CEO still had a higher salary than the other employees and had more beneficial terms of employment such as a company car.[47]

A recurring statement in the legislative work is that the exception for MPs should be given a restrictive interpretation and narrow application.[48] In its legal application, the SLC has taken

[41] AD 1979:146.
[42] AD 1980:92.
[43] 23 000 SEK at the time corresponds to roughly 29 000 SEK in 2022.
[44] 18 000 SEK at the time corresponds to roughly 23 000 SEK in 2022.
[45] AD 2011:84.
[46] 20 000 SEK at the time corresponds to roughly 38 600 SEK in 2022.
[47] AD 1991:86.
[48]Proposition 1981/82:71 Regeringens proposition om ny anställningsskyddslag m.m., p. 112.

note of the statement several times.[49] It also appears that the decisive factor is how company management has been organized and exercised in practice.

In his study on employment protection for MPs, Reinhold Fahlbeck summarizes his review of case law and contracts: "*seen from the employees' point of view, it matters less whether LAS applies or not. In principle, benefits according to LAS constitute a minimum level for all managerial positions. In general, it can be said that if an employee in a managerial position is not insured benefits, in a separate agreement, that in any case do not fall below what follows from the EPA, then EPA applies*".[50]

2.3.5 Transparent and Predictable Working Conditions

The *EU directive 2019/1152 on transparent and predictable working conditions* is partly implemented in 6 c § EPA.[51] The directive applies to all employees such as domestic workers, company managers and platform workers. The directive forces employers to give all employees written information about the essential aspects of their work, amongst other rights.[52] 6 c § specifies which information is to be given to employees through 13 detailed requirements. In summary, the written information should include; a description of the employee's duties, form of employment, notice periods, the salary and other benefits, information about the working hours, information on the right to training provided by the employer, details about paid holidays, which regulations apply if one party wants to end the employment relationship and which collective agreement applies. This information has to be provided to the employee as soon as possible, within seven days from the starting day of employment or within one month for an exception of the paragraphs.[53]

A similar proposal for those in MPs was brought up in the ministerial memorandum in 1981 (DS A 1981:6). The proposal meant that the conditions that must be met for an employee to be considered to have such a MP should be specified already in the legal text. It should also be expressly agreed – at least initially – between the parties that the EPA shall not apply to the company manager. A rule on an expressed exception to the law would mean that

[49] AD 1996:37, AD 1997:123, AD 2011:84 and AD 2013:84.
[50] Fahlbeck, Reinhold., Editorial committee: Eklund Ronnie., Festskrift till Hans Stark., "Firing the Boss" - Om anställningsskydd för företagsledare, Stockholm: Jure, 2001, p. 130.
[51] En reformerad arbetsrätt – för flexibilitet, omställningsförmåga och trygghet på arbetsmarknaden Ds 2021:17, p. 139.
[52] Clause 1, DIRECTIVE (EU) 2019/1152 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on transparent and predictable working conditions in the European Union.
[53] 6 c § Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.

situations do not arise where it only becomes clear to the employee when the employer wants to give notice that he has no protection from the law.[54] Nevertheless, the proposal did not make it into the final version of the EPA.

2.4 Ending the employment – managerial or comparable position

Employees in a MP are, as discussed, not covered by the EPA. The most fundamental protection of employment that they do not have is the right to try unfair termination and dismissal. The 7-10 §§ of the EPA regulates terminations, a termination has to be based on factual reasons (*sakliga skäl)*, the paragraph includes the right to redeployment and what applies when someone is terminated because of personal reasons.[55] The 11 § of the EPA regulates how long notice period employees are entitled to.[56] The 18-20 §§ of the EPA regulates dismissals, an employer may only dismiss an employee that has grossly breached his or her commitments towards the employer.[57]

2.4.1 General principles

The fact that an employee is exempt from the EPA and its protective legislation does not mean that the employer has a completely free right of termination and dismissal.[58] All employees have the right to trial regarding the principle of good practice (*god sed).* The SLC can try if a termination has occurred in violation of good practice, even if the employee is not covered by the EPA. Good practice is defined as "*a general actually practiced behavior that represents a certain professional ethical or general moral level*".[59] However, the SLC has not mentioned the good practice principle in relation to MPs, therefore it cannot be said if the principle has had any meaningful impact.[60]

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[54] Promemoria sammanställd inom arbetsmarknadsdepartementet på grundval av anställningsskyddskommitténs (A 1997:01) arbete - Ds A 1981:6, p. 245.
[55] 7-10 § Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[56] 11 § Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[57] 18-20 § Employment Protection Act (Lag (1982:80) om anställningsskydd) SFS: 1982:80.
[58] Åhnberg, Lars - updated by Öman, Sören., *LAS-handboken: lagtext, kommentarer, AD-domar,* 9th edt. Stockholm: Lars Åhnberg AB, 2020, p. 80.
[59] Calleman, Catharina., Editorial committee: Mannelqvist, Ruth - Ingmanson, Staffan - Ulander-Wänman, Carin., Festskrift till Örjan Edström., När strider en uppsägning mot god sed på arbetsmarknaden? Umeå: Juridiska institutionen, Umeå universitet, 2019 p. 55. with reference to Tore Sigeman i *Löntagarrätt*, Juristförlagen, Stockholm 1994, p. 27.
[60] Ibid, p. 322.

Furthermore, all employees are protected from discrimination by the Discrimination Act *(Diskrimineringslag 2008:567).* No one can be dismissed because of their gender or any of the other grounds of discrimination.[61]

2.4.2 Termination and notice period

The ministerial memorandum 1981 (DS A 1981:6) proposed a rule that those in MPs must be assured of a minimum notice period of six months, against the background that company managers generally have a more vulnerable position than other employees. They risk ending up in at least as difficult a situation as other workers if they lose their job. It is important that a company manager – who is also outside the EPA protection rules – is compensated for this. It should therefore be considered reasonable that the length of the notice period must not be less than the longest notice period that applies according to law, i.e. six months.[62] The SLC has based several rulings on the proposed six-months-minimum-notice-period; see AD 1989:133 and AD 1991:86 below.

The SLC has accepted longer notice periods as reasonable without justification. This has also been the case when the notice periods have long exceeded those in the EPA; in AD 1997:3 the notice period was 18 months[63] and in AD 1988:20 two years (even though, the employer stated that, the notice period should be considered to have provided an undue advantage against the Companies Act).[64]

AD 1989:133 is of significant interest as the judgment is (partially) based on the now established rule about the minimum notice period for employees in MPs who are not covered by the EPA. The dispute concerned a sales manager with three months notice in the event of a dismissal by the employer. SLC had not previously investigated what usually applied to MPs in terms of notice period. The court instead referred to proposals which meant that the exception would be applicable only if the employee was assured of at least six months notice with retained employment benefits and, in addition, a severance pay. The court therefore considered it highly doubtful whether the sales manager's notice period met the requirements that should be set to be exempted. Notice periods shorter than six months, when the employer

[61] Discrimination act (Diskrimineringslag (2008:567)) SFS 2008:567.
[62] Promemoria sammanställd inom arbetsmarknadsdepartementet på grundval av anställningsskyddskommitténs (A 1997:01) arbete - Ds A 1981:6, p. 245-246.
[63] AD 1997:3.
[64] AD 1988:20.

dismisses a company manager, were unusual as far as SLC were concerned. The court's conclusion was, against that background, that the sales manager did not have a MP.[65]

What applies in cases where the parties have not reached any special agreement on notice period can be found in AD 1991:86. A company went bankrupt. When the company was acquired, one of the employees (who had been with the company for a year) became CEO of the company after restructuring. Barely two months later, the CEO was dismissed with immediate effect. There was no written employment agreement between the parties.[66] The SLC denied the dismissal, which made the company obligated to observe the notice period. "*In the absence of an agreement between the parties, according to the opinion of the SLC, the CEO must be considered to have been entitled to a reasonable notice period... the notice period must be determined taking into account that* [name] *was the CEO*".[67] The SLC referred to its statement from AD 1989:133, that notice periods shorter than six months, when the employer dismisses a company manager, are unusual. The fact that he was only employed for two months does not diminish his need for protection. Furthermore, he also had employment in the old company. The SLC therefore found that the notice period should be six months.[68]

2.4.3. Dismissal

The long notice periods that come with the dismissal of those in MPs generate significant costs (employer's fees, etc.) for the company. Therefore, it happens that companies try to free themselves from this cost by canceling the employment contract, instead of terminating it, if a settlement cannot be reached. The dispute that then arises is usually resolved in an arbitration procedure. In doing so, customary civil law principles are applied that cancellation of contract as a rule presupposes gross breach of contract (similar to 18 § EPA). In the assessment, accounts must also be taken of, for example, the Companies Act's regulations on the duties of the CEO.[69]

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[65] AD 1989:133.
[66] AD 1991:86.
[67] Ibid.
[68] Ibid.
[69] Lunning, Lars - Toijer, Gudmund., *Anställningsskydd: en lagkommentar*, 11th edt., Stockholm: Wolters Kluwer, 2016, p. 63.

AD 1993:56 indicates when a CEO can be deemed to have grossly breached his or her contract. A CEO had been employed for 15 years, of which 4 years as CEO, in a concern when he was dismissed with immediate effect. There was no written employment contract. The CEO claimed financial damages after a reasonable notice period of one year and referred, among other things, to his long employment. The SLC examined whether the company "*had the right to thus terminate the employment contract... or, with the terminology used in labor law, to dismiss him*". The SLC found that the CEO, by, among other things, being "*engaged in a not insignificant way in an activity which was ultimately aimed at competition with the* [current] *operation*", must be considered to have "*grossly disregarded his... obligations and in so greatly forfeited the trust that the company and its owners must be able to place in*" a CEO that the company "*had the right to dismiss the CEO*".[70]

In AD 1986:22, a CEO of a haulage company was dismissed with immediate effect. A written employment contract existed, with a provision for a six-month notice period in the event of termination. However, there was no provision on what applies in the event of dismissal. The SLC examined whether the company had the right to terminate the employment contract and whether thi action was objectively justified or whether the company was thereby guilty of breach of contract. The SLC found that the company was entitled to terminate the employment agreement with the CEO. This is against the background that the CEO designed an incorrect profit forecast that was the basis for the board's decision on his royalty advance, and partly by receiving payment from the buyer and extracting a promise of additional payment upon the sale of one of the company's crushing plants. The SLC also points out that within this board there was no real expertise in bookkeeping, accounting, and business management. The company has thus been completely dependent on the CEO's competence and judgment in that regard. Against this background, the court found that there is no doubt that these measures, at least when considered together, are of such a nature that the company was entitled to terminate the employment contract.[71]

In AD 1997:3 the court assessed the permissibility of dismissing a CEO and determined how a dismissal should be evaluated. In this case, the CEO of a food company was dismissed with immediate effect. There was a written employment agreement, with a provision for 18

[70] AD 1993:56.
[71] AD 1986:22.

months notice with pay. The court stated that the permissibility of dismissing a CEO must be assessed "*with the application of general principles on the right of parties to cancel an agreement that is valid until further notice in the event of a breach of contract*".[72] According to the SLC, these principles mean that "*an employment contract may be terminated by the employer in the event of a significant breach of contract by the employee, i.e. with the terminology of the EPA when the employee has grossly disregarded his obligations towards the employer*".[73] This assessment must take into account the position of trust that a CEO holds "*with which follows a far-reaching requirement of loyalty towards the company*".[74] In this case, AD rejected the dismissal, which meant that the CEO had the right to severance pay according to the employment contract.[75]

[72] AD 1997:3.
[73] AD 1997:3.
[74] AD 1997:3.
[75] AD 1997:3.

3. Legal framework: The United Kingdom

3.1 The scope of the Employment Rights Act 1996

There are generally three categories of employment statuses in the UK. An individuals' employment rights will depend on his or her employment status. This chapter describes the various categories of employment status in the legislation of the ERA, mainly (I) employee (and employee shareholder), (II) worker and (III) self-employed.[76]

A person's status of employment is of importance in the UK, since different employment statuses have different degrees of employment protection from the ERA. Employees can enjoy the full protection that the ERA provides. On the other hand, those who are self-employed only have protection from discrimination. Workers sit in between, enjoying rights such as national minimum wage, protection from unlawful deductions from wages and paid annual leave, but not rights such as maternity-, paternity-, adoption leave and pay, and minimum notice periods.[77]

Since one's rights depend on one's employment status, it is therefore relevant to clarify each category and for the British people to acknowledge which category they belong to.

3.1.1 Employee

The status of employee is narrower and more distinct than the status of worker. The legal relationship derives from a contract of employment.[78] The statutory definition of employee, according to the ERA, is "a*n individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*.[79] A contract of employment is sequentially defined as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"*.[80] Noteworthy, whilst the definition in ERA is the most important for determining entitlement to the primary employment protection (such as the right to not be unfairly dismissed), it is only to be used in

[76] Department for Business Innovation and Skills., Consultation: zero hours employment contracts, December 2013, p. 7.
[77] Department for Business Innovation and Skills, Consultation: zero hours employment contracts, December 2013, p. 8.
[78] Jones, Benjamin - Prassl, Jeremias, edited by Waas, Bernd - Heerma van Voss, Guus., Restatement of labour law in Europe. Volume I, The concept of the employee, Oxford: Hart Publishing, 2017, p. 750.
[79] Employment Rights Act 1996 section 230 (1).
[80] Employment Rights Act 1996 section 230 (2).

the context of employment. It should not be mistaken for an umbrella definition, since a definition in one statue cannot be used to construct the term in other statues.[81] Different definitions can be found in other fields, such as in the field of taxation, but the ERA's definition is the key rule definition for employment protection.[82]

The foremost rights which apply to employees concern unfair dismissal protection, minimum notice upon termination, guaranteed pay, redundancy compensation, the right to paternity, maternity and parental leave, and the right to return to work after taking such leave. Until recently, the right to a written statement of employment particulars was confined to employees only, but now applies to all from the first day of employment.[83]

3.1.2 Employee shareholder

A new provision came into force on September 1, 2013. This provision makes it possible for an employee to bargain away their key employment rights in exchange for at least £2,000 shares in the company or parent company.[84]

The status of employee shareholder (henceforth ES) is conferred to an employee, when both the individual and the company, agree that this status should be applied. The employee should be given shares with a value, on the day of allotment, of no less than £2,000 in consideration of this agreement.[85] Existing employees are free to take up the ES status. Nonetheless, employers are entitled to offer only employee-shareholder-contracts to new recruits. Employees cannot be forced by their employer to undergo this type of contract, it is the employee's free choice.[86]

In exchange for shares, ESs no longer enjoy the following rights that the ERA otherwise provides for employees:[87]

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[81] Tyne and Clyde Warehouses Ltd v Hamerton [1978] ICR 661.

[82] Jones, Benjamin - Prassl, Jeremias, edited by Waas, Bernd - Heerma van Voss, Guus., Restatement of labour law in Europe. Volume I, The concept of the employee, Oxford: Hart Publishing, 2017, p. 751.

[83] Adams, Zoe. - Barnard, Catherine. - Deakin, Simon. - Fraser Butlin, Sarah., Deakin and Morris' labour law, 7th edt. Oxford, UK; New York, NY: Hart Publishing, 2021, p. 109.

[84] Prassl, Jeremias., Dismantling the Contract of Employment? The new Employee Shareholder Status in the United Kingdom, European Labour Law Network - Working Paper Series, 2013, p. 3.

[85] Employment Rights Act 1996 section 205A (1)(a) and (b). The Secretary of State may by order increase this amount: Employment Rights Act 1996 section 205A(11).

[86] Adams, Zoe. - Barnard, Catherine. - Deakin, Simon. - Fraser Butlin, Sarah., Deakin and Morris' labour law, 7th edt. Oxford, UK; New York, NY: Hart Publishing, 2021, p. 115.

[87] Employment Rights Act 1996 section 205A (2) (a) – (d). Note the exception in section 205A (8).

(I) The right not to be unfairly dismissed.[88]

(II) The right to statutory redundancy pay.[89]

(III) The entitlement to request a variation of the contract of employment in order to implement flexible working arrangements.[90]

(IV) The entitlement to request to undertake study or training.[91]

The ES status will be further discussed in chapter 3.2.

3.1.3 Worker

The ERA defines worker as "*an individual who has entered into or works under* (a) *a contract of employment, or* (b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract who is not a professional client or customer of the individual's profession or business*".[92]

Workers fail to satisfy the common law tests of employee status. Although they may not own and operate their own business, and are still economically dependent on one (or more) employer(s), similar to an employee, they might for example enjoy a degree of freedom regarding how to organise their work and working time that does not conform with common law conceptions of subordination and control. The law treats workers as equivalent to employees for certain purposes, such as getting minimal national wage, but not for others, creating, in effect, a two-tier system of protection.[93]

Workers are granted rights of basic and fundamental labour standards. Those rights include minimum wages, protection against arbitrary deductions from pay, and protection from excessive working hours.[94]

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[88] This is limited to 'ordinary' unfair dismissal protection under section 94 ERA and will be further discussed in chapter 3.3.

[89] Employment Rights Act 1996 section 135.

[90] Employment Rights Act 1996 section 80F.

[91] Employment Rights Act 1996 section 63D.

[92] Employment Rights Act 1996 section 230 (3).

[93] Adams, Zoe. - Barnard, Catherine. - Deakin, Simon. - Fraser Butlin, Sarah., Deakin and Morris' labour law, 7th edt. Oxford, UK; New York, NY: Hart Publishing, 2021, p. 137.

[94] Adams, Zoe. - Barnard, Catherine. - Deakin, Simon. - Fraser Butlin, Sarah., Deakin and Morris' labour law, 7th edt. Oxford, UK; New York, NY: Hart Publishing, 2021, p. 137. See also: *Cotswold Developments Construction Ltd. v Williams (2006)* IRLR 181, at (53).

3.1.4 Self-employed

In 2019, 15.3 percent of workers in the UK were self-employed. A self-employed person is, in effect, their own manager. Employment legislation therefore does not cover them. Nonetheless, there are some exceptions.[95] If a person is self-employed, they have:[96]

(I) protection of their health and safety,
(II) protection of their rights against discrimination (in some cases),
(III) the rights and responsibilities set out by the terms of the contract they have with their client.

3.2 More on employee shareholders

The ES status was enacted as section 31 of the Growth and Infrastructure Act 2013 and entered into force by the Secretary of State, on September 1, 2013.[97] Section 205A of the ERA regulates the employment relationship between an ES and the employer and which rights they do and do not have.[98]

The first paragraph of section 205A the ERA states that an employee can become an ES if both the employee and the company agree that the individual should be an ES. The employee must receive no less than £2,000 worth of shares in the company or its parent undertaking. The company must give the employee a written statement with information about the ES status and the employee should not give any remuneration or such for entering into the agreement.[99] Section 47G of the ERA regulates that an employee can not be subjected to detriment for refusing to become an ES. This section furthermore makes dismissals for the same reason automatically unfair.[100]

Section 205A of the ERA states that the agreement of becoming an ES is invalid if the employee has not been given the correct information according to section 205A, before the agreement was made. The employee should receive advice from a relevant and independent

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95 Department for Business Innovation and Skills, Consultation: zero hours employment contracts, December 2013, p. 24.
96 The United Kingdom Government, Employment status, Retrieved 2022-11-30 at: https://www.gov.uk/employment-status/selfemployed-contractor
97 Growth and Infrastructure Act 2013, section 35(1). And: HM Treasury, Budget 2013 (London, March 2013) 1.133.
98 Employment Rights Act 1996 section 205A.
99 Employment Rights Act 1996 section 205A (1).
100 Employment Rights Act 1996 section 47G.

adviser and seven days must pass before they enter the agreement. The cost for the individual to receive advice should be paid by the employer, regardless of the employee's decision.[101]

Section 205A the ERA also describes the rights that the employee loses after becoming an ES. He or she no longer has a right to not be unfairly dismissed, the right to statutory redundancy pay, the entitlement to request a variation of the contract of employment in order to implement flexible working arrangements or the entitlement to request to undertake study or training.[102]

When someone becomes an ES, the company is obligated to give the employee written information about the new contract. This statement must include detailed information about what the ES status means and which rights the employer loses. The information needs to include details about which conditions the shares are issued under, such as voting rights, rights to dividends, redemption options, restrictions on transferability, and more detailed information about the shares if the company has more than one class of shares.[103] The law does not regulate the substance of these stipulations, instead it is solely regulated that the ES shall receive information about what applies.[104]

3.3 Ending the employment – Employee shareholder

If an employee's contract is terminated by the employer, the employee is treated as dismissed for the purposes of unfair dismissal and redundancy law. By giving a reasonable period of notice, the employer is entitled to terminate a contract of indefinite period. If the length of notice is not specified by the contract expressly or by custom, then the length of a reasonable period of notice is defined in section 86 of the ERA.[105] The length varies from one to twelve weeks, depending on how long one has been employed.[106]

[101] Employment Rights Act 1996 section 205A(1) and (6).
[102] Employment Rights Act 1996 section 205A(2).
[103] Employment Rights Act 1996 section 205A(5).
[104] Prassl, Jeremias., Dismantling the Contract of Employment? The new Employee Shareholder Status in the United Kingdom, European Labour Law Network - Working Paper Series, 2013, p. 11.
[105] Butler, Mark., Great Britain, Wolters Kluwer, 2018, p. 181.
[106] Employment Rights Act 1996 section 86.

An employee can also be dismissed without a notice period. This is the case if the employee has disregarded an essential term of the contract.[107] Each case depends on the circumstances and will not be further discussed in this essay.

After it has been established that an employee has been dismissed, the reasons for dismissal must be presented by the employer. It must then be determined whether the reason given for the dismissal is fair or unfair. Some reasons are automatically unfair, for example: pregnancy, (including all reasons relating to maternity), joining or not joining a trade union and whistleblowing[108], while other reasons are simply unfair. Determination for whether a dismissal is fair or unfair is stated in section 98 (4) of the ERA. No matter the size and administrative resources, it depends on if *"the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case".*[109]

The right not to be unfairly dismissed is provided by section 94 in the ERA.[110] That right applies to employees (as defined by section 230).[111] Nevertheless, there are some who are excluded; for example, those who have insufficient qualifying service (less than two-years of employment)[112] and ESs.[113]

The consequences of receiving a minimum of £2,000 worth of shares and becoming an ES, is no longer enjoying recourse to some rights found in the ERA.[114] Significant to this essay, an ES loses his or her right to not to be unfairly dismissed. Although, this is limited to 'ordinary' unfair dismissal. ES remain protected against termination of employment in contravention of the Equality Act 2010[115], and dismissals for automatically unfair reasons[116]. As previously

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[107] Butler, Mark., Great Britain, Wolters Kluwer, 2018, p. 182.
[108] Butler, Mark., Great Britain, Wolters Kluwer, 2018, p. 195-196.
[109] Employment Rights Act 1996 section 98 (4).
[110] Employment Rights Act 1996 section 94.
[111] Employment Rights Act 1996 section 230.
[112] Employment Rights Act 1996 section 108.
[113] Employment Rights Act 1996 section 205A.
[114] Employment Rights Act 1996 section 205A(2) (a) – (d). Note the exception in section 205A(8).
[115] Employment Rights Act 1996 section 205A (9)(a) and (b).
[116] Examples of such automatically unfair reasons: being a trade unionist (Employment Rights Act 1996 section 103) or whistleblowing (Employment Rights Act 1996 section 103A).

mentioned, ES has the right not to be subjected to a detriment in employment for refusing to become ES.[117] Dismissals motivated by that reason are to be deemed automatically unfair.[118]

Another right that an employee opt-out of when becoming an ES, is the right to statutory redundancy pay.[119] When an employee has been dismissed, he or she can claim a redundancy payment.[120] An employee must, however, have had two-years' continuous employment up to the relevant date to be eligible for a statutory redundancy payment.[121] The payment is calculated as a function of the seniority, age and weekly pay of the employee.[122] However, a maximum of 20-years of employment can be taken into account. The employee receives half a week's gross pay for each year of employment in which he or she was below the age of 22; one week's pay for each year between the age of 22 and 41; and one-and-a-half week's pay for each year when he or she was not below the age of 41.[123] The statutory ceiling, as of April 2020, on the gross weekly wage is £538. The maximum payout one might receive therefore stands at £16,140.[124] Meaning, by opting to become an ES, one loses his or her right to a redundancy payment worth up to £16,140.

In the Employment Appeal Tribunal (*EAT*) case *Barrasso v New Look Retailers Ltd [2019],* an ES was still considered to be an ES, even though he had, simultaneously as entering into the employee-shareholder-agreement, also entered into a separate agreement *"which gave him a contractual means of seeking equivalent remedies should he subsequently consider he had been unfairly dismissed or was entitled to a redundancy payment"*[125]. The Employment Tribunal, and later her honour judge Eady Qc in the EAT, came to the same conclusion: "*given the particular agreements between these parties, and the purposive construction of section 205A*[126] *... the Claimant was an employee shareholder for the purposes of section*

[117] Employment Rights Act 1996 section 47G.
[118] Employment Rights Act 1996 Section 104G.
[119] Employment Rights Act 1996 Section 135.
[120] Employment Rights Act 1996 Section 136 (1).
[121] Employment Rights Act 1996 section 155.
[122] Employment Rights Act 1996 section 162.
[123] Employment Rights Act 1996 section 162(3).
[124] Adams, Zoe. - Barnard, Catherine. - Deakin, Simon. - Fraser Butlin, Sarah., Deakin and Morris' labour law, 7th edt. Oxford, UK; New York, NY: Hart Publishing, 2021, p. 532.
[125] Barrasso v New Look Retailers Ltd [2019] UKEAT 0079_19_2208 (22 August 2019).
[126] Clause 52, Barrasso v New Look Retailers Ltd [2019] UKEAT 0079_19_2208 (22 August 2019).

205A Employment Rights Act 1996 and was thus excluded from the right to claim unfair dismissal".[127]

Whether this means an ES's lost right cannot be re-implemented through a separate agreement, or if this was only the case in this instance "*given the particular agreement between these parties*"[128] will remain unsaid.[129]

Lastly, it is noteworthy that the written statement with particulars is solely obligated to contain information and details about the contract, there is no regulation on what the substance of the stipulations ought to be.[130] No regulations on minimum requirements has been proposed, although there is a residual power for the Secretary of State to do so[131]. Therefore, it is possible for the employer to stipulate a mandatory share buyback for when the ES leaves the company.[132] Nonetheless, if the agreement does not specify a buyback, and the shares have not been sold, the shares will remain in the ES's possession after leaving the company.[133]

[127] Barrasso v New Look Retailers Ltd [2019] UKEAT 0079_19_2208 (22 August 2019).
[128] Clause 52, Barrasso v New Look Retailers Ltd [2019] UKEAT 0079_19_2208 (22 August 2019).
[129] A definitive conclusion cannot be made since no other case has been brought to trial regarding this matter.
[130] Prassl, Jeremias., Dismantling the Contract of Employment? The new Employee Shareholder Status in the United Kingdom, European Labour Law Network - Working Paper Series, 2013, p. 11.
[131] Employment Rights Act 1996 section 205A(12).
[132] Prassl, Jeremias., Dismantling the Contract of Employment? The new Employee Shareholder Status in the United Kingdom, European Labour Law Network - Working Paper Series, 2013, p. 11.
[133] The United Kingdom Government, Guidance - Employee shareholders, Retrieved 2022-12-05 at: https://www.gov.uk/guidance/employee-shareholders

4. Analysis

4.1 Who does not have employment protection in Sweden and the United Kingdom?

The Swedish EPA applies to employees in general or individual service; there are, however, five categories of employees who are excluded from the application of the EPA. (1) Workers employed for work in the employer's household and (2) employees who are employed in high school apprenticeships are completely excluded from all provisions.

Furthermore, (3) employees who are considered to have a managerial or comparable position, (4) employees belonging to the employer's family, and (5) employees who are employed with special employment support, in protected work or with wage subsidies for development in employment are mostly exempted, although, some provisions still apply.

An individuals' employment rights in the UK will depend on his or her employment status. Employees may enjoy the full protection provided by the ERA, while those who are self-employed may only enjoy the protection from discrimination. ESs and workers sit in between, enjoying some provisions, while also being excluded from others.

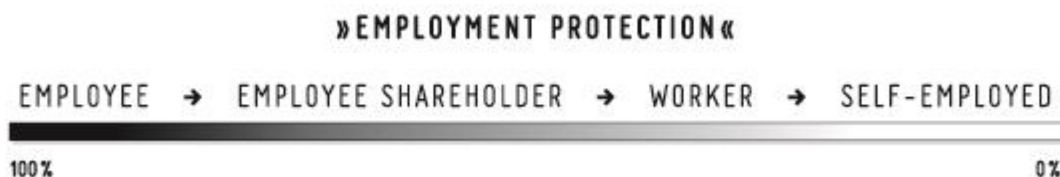

Figure 1: *A visual explanation of which category has the most vs. the least employment protection.*

4.2 Under which circumstances is an employee considered to be in a managerial position in Sweden?

The SLC has in numerous cases defined which circumstances should exist for an employee to be counted as a company manager. An employee has a MP if his or her salary and employment benefits correspond to that of a MP. It cannot be concluded that there is a minimum benefits requirement for a MP. For example, as we can deduce from the court cases, the salary benefits in itself can be rather low. What is important is the salary of the MP in relation to the other employees in the company. For instance, a salary of 23 000 SEK (29

000 SEK 2022) was found to not correspond to that of a MP, since it was not considered that much higher than the other employees' salary. On the other hand, an employee with a salary of 20 000 SEK (38 600 SEK 2022) was considered to have a MP, since his salary was considerably higher than the other employees' in the company and he had employment benefits which also showed that he had a special position. There have been multiple cases where the employee in question was found to not have a MP, even though they had the highest salary, because his or her role lacked the authority that a MP should have.

Company managers are exempted from the EPA because they have an employer function, which can be expressed through a certain authority. Even in cases where categories who are expressly stated in the preparatory work as categories that have MP, and thus should be exempted, the SLC have found that if the authority is limited, the employment cannot be considered to have a MP. Furthermore, it is not of importance how the authority and management could be exercised, but rather how company management actually has been organized and exercised in practice.

There can only be so many MPs at a company, depending on its size. Larger companies allow for more MPs, while in smaller companies the main rule is that there can only be one with a MP, although, there have been cases where two employees (with equal ownership and authority) have been considered to have MPs. However, regardless of size, a CEO is always considered to have a MP.

4.3 Under which circumstances is an employee an employee shareholder in the United Kingdom?

Unlike Sweden, the UK has clearly structured the circumstances for an employee to become an ES in the legal text. Expressed conditions in the legal text mean that situations do not arise where it is uncertain whether someone is an ES, and thus has limited protection from the law's rules. This might be one of the reasons why we can only find one case regarding the uncertainty of ES, whereas we can find multiple regarding MPs. However, this might be because MPs have been around for far longer than ES.

The six condition that must be met to become an ES are:
(I) The individual and the company must agree that the individual will be an ES.

(II) The employer must give the individual fully paid-up shares – in the company or parent company. The shares must be worth at least £2,000 on the day of allotment.
(III) The individual must not pay for the shares in any way
(IV) The employer must provide the individual with a written statement of the particulars of the status of ES.
(V) The individual must get advice from a relevant independent adviser on the terms and effect of the written statement. This must be paid by the company, whether the individual accepts the status or not.
(VI) The individual cannot accept or agree to an ES job until seven days have passed following receipt of the advice.

4.4 What do those in managerial positions and employee shareholders get in exchange for employment protection?

Case law has made it clear that a requirement for a MP, is that the employee has the same, or better, employment and salary benefits as the EPA would give. In cases where for example employees' benefits have not been seen as high or good enough by the SLC, they have not been considered to have a MP. Even in cases where a notice period of less than six months has been agreed upon, company managers still have the right to a minimum of six months notice – which is the longest notice period provided by the EPA. This shows that the law acts as a minimum for MPs when their employment comes to an end. However, important to note is that company managers are not covered by the paragraphs in the EPA concerning the requirements for factual reasons (*sakliga skäl*) of dismissal. An employer therefore has great freedom in dismissing a company manager.

On the other hand, it is clearer what ESs get in exchange for giving up part of their protection, as it is written in the ERA. They are to receive shares worth at least £2,000 on the day of issue or allotment in the company or parent company, in exchange for giving up some of their most important employment protection. Unlike company managers, ESs are not ensured benefits equal to, or greater than, the law. Their new minimum protection limit is the protection provided by the few remaining provisions that they have not given up.

Company managers cannot be said to give up something in exchange for their employment protection. Instead, they typically gain more protection and benefits. ESs on the other hand, give up some of their most important protection for £2,000. Noteworthy, is that while those

£2,000 worth of shares could grow to millions, they could also be worth nothing the very next day. Furthermore, ESs do not have the right to statutory redundancy payment. This means that even though the ES receives at least £2,000 worth of shares, he or she might still be at a financial loss of up to, depending on the individual's age and years of employment, £16,140 in redundancy payment. Therefore, it might not be economically worth it for an employee to become an ES, unless his or her redundancy payment currently amounts to less than £2,000.

4.5 Final thoughts and suggestions

The purpose of this essay is to compare the regulation of the employees exempted from employment protection in the UK and in Sweden, and to examine what ESs and company managers receive in exchange. Regarding Sweden there is, as often, more than meets the eye. The exemptions may at first glance appear to be self-evident and without question marks, but as practice shows, there is often confusion about who has a MP, and what applies to termination and dismissal for this category. A possible solution regarding the ambiguities surrounding knowing whether an employee has a MP or not, could be to take inspiration from the regulations regarding ESs.

The regulation of ESs in the ERA is detailed and extensive. This reduces the risk of ambiguities in the assessment of who is or is not an ES. It is of great importance for both the employee and the employer to know if the employee is covered by employment protective legislation. There is only one court case in the UK concerning the position of an ES, whilst Sweden has an extensive amount of court cases regarding who is or is not a company manager – although the managerial position category has existed far longer than the employee-shareholder-category. A solution for these ambiguities in how the term 'managerial position' should be interpreted, could possibly be to have more detailed legislation, similar to the UK's employee-shareholder-section. Recently, the EU Directive on Transparent and Predictable Working Conditions was implemented through the 6 c § of the EPA, stating that an employer must provide written information to employees about all conditions that are of essential importance to the employment. Since this paragraph was added, company managers now have the right to receive notably more information about their employment. This paragraph has opened up the possibility for those exempted to receive more regulations of their employment relationship.

The idea of making the legislation on MPs more extensive and detailed has been brought up in the past in a ministerial memorandum. It was proposed that the certain conditions that must be met for an employee to be considered to have a MP, would have to be specified in the legal text. The proposal did not make it into the final version of the EPA, perhaps because of the difficulties of specifying the certain conditions. It would, for instance, be difficult to stipulate a minimum salary for a MP, since the SLC takes into account other factors, such as the salary of the other employees, to determine if a certain salary is deemed to correspond to that of a MP.

Instead, we suggest adding a 14th clause to the 6 c §, detailing that an employee who might have, or is to sign a contract to enter into a MP, has the right to receive legal advice from an independent advisor. This advisor could for instance be a lawyer with the knowledge and training to determine whether the position offered to the employee could be considered a MP. The advisor could also look over if the terms of the employment ought to be acceptable to that of a MP or not. The idea is that the employer has to offer this to the employees that they consider to have a MP, or, by the request of the employee themself. This idea is similar to the regulation of ESs, where the employer must also pay for the cost of the advisor. The aim is not for the consultation to determine who does or does not have a MP, but rather to, to make the employee aware of the nature of agreement that they might be entering. Perhaps, if more employees were made aware from the start that their position might count as a MP, and what this means, there would be less court cases on the matter. If the employee from the start considers his or her employment to have such benefits that corresponds with a MP, they are less likely to have any uncertainties that would have to be brought to court.

To make sure this proposed consultation is actually given to the employee, an employer cannot claim that the employee in question has a MP in court, unless he or she has offered the employee the consultation before entering into an employment agreement. Furthermore, an employee may also request to get consultation, to prevent the employer from not giving the offer of consultation for the purpose of excluding the employee from the ‘managerial position exemption’. If the employee requests the consultation, the employer may still claim that the employee has a MP in court.

5. Conclusion

Sweden has five categories of employees that are partly or fully exempted from the EPA. Only employees can enjoy full employment protection in the UK, whilst other categories only have some, or no employment protection at all.

In Sweden, various factors determine if an employee has a MP. Such factors are: salary- and employment benefits, level of authority that is exercised and the size of the company. The amount of court cases concerning MP speaks for the uncertainty regarding who has a MP. In contrast, in the UK, the circumstances which determine if someone is an ES are clearer. The ERA stipulates six conditions that must be met for someone to become an ES. The absence of court cases regarding the ES concept shows that it is clear who is or is not an ES. Since the ERA specifies exactly who is considered an ES and how to become an ES, it limits the risk of uncertainty. This also makes it clear for the employee who becomes an ES exactly which rights they do or do not have. Sweden's EPA does not specify who is a company manager which affects the uncertainty regarding the definition of the concept. Since the surrounding circumstances in each individual case must be assessed, it is difficult to specify conditions or a definition in the law, like the ES concept has in the ERA.

However, what is clear is that these two categories receive compensation for the absence of employment protection. In exchange for employment protection, ESs receive £2,000 worth of shares in the company. Noteworthy, is that ESs still are covered by most provisions of the ERA, they do, however, give up the right to statutory redundancy payment and the right to claim unfair dismissal – two of the ERA's most important provisions. On the other hand, employees in a MP have to be given contracts that provide them with terms that are equal to, or better than the protection that the EPA gives.

Neither employees in MPs or ESs enjoy the right to claim unfair dismissal/factual reasons for dismissal. Although, after termination or dismissal, a company manager then has the law to fall back on as a minimum protection.

Sammanfattning

Denna uppsats beskriver vilka kategorier av anställda som är undantagna från anställningsskydd i Sverige och Storbritannien. Fokus för uppsatsen är Storbritanniens 'employee shareholder' och Sveriges anställda i en företagsledande eller jämförbar ställning, eftersom dessa två kategorier ger upp delar av sitt anställningsskydd och får någon form av ersättning eller kompensation för detta. Uppsatsen beskriver vilket skydd dessa kategorier har, vilket skydd de saknar och vad de får för kompensation. 'Employee shareholder' har en mycket tydligare definition i lagen vilket ger mindre utrymme för osäkerheter, samtidigt som det har varit många mål i Arbetsdomstolen om vem som har en företagsledande ställning. I utbyte mot sitt anställningsskydd får anställda i en företagsledande ställning löne- och anställningsförmåner som är lika med, eller bättre än lagen, samt omfattas fortfarande av lagen, om dessa förmåner någonsin skulle understiga lagen. Å andra sidan får anställda aktieägare aktier i företaget till ett värde av minst 2 000 pund. Men till skillnad från företagsledare förblir de undantagna från lagen oavsett vad som händer med deras förmåner.

Bibliography

Sweden

Litterature

Bogdan, Michael 2:8 edt., *Komparativ rättskunskap*. Stockholm, Norstedts Juridik AB, 2003

Calleman, Catharina., *Ett riktigt arbete?: om regleringen av hushållstjänster*, Säter: Pang, 2007

Calleman, Catharina., Editorial committee: Mannelqvist, Ruth - Ingmanson, Staffan - Ulander-Wänman, Carin., *Festskrift till Örjan Edström., När strider en uppsägning mot god sed på arbetsmarknaden?* Umeå: Juridiska institutionen, Umeå universitet, 2019

Fahlbeck, Reinhold., Editorial committee: Eklund Ronnie., *Festskrift till Hans Stark., "Firing the Boss" - Om anställningsskydd för företagsledare*, Stockholm: Jure, 2001

Glavå, Mats - Hansson, Michael. *Arbetsrätt*, 4th edt. Studentlitteratur AB: Lund, 2020

Lunning, Lars - Toijer, Gudmund., *Anställningsskydd: en lagkommentar*, 11th edt., Stockholm: Wolters Kluwer, 2016

Papadopoulou, Frantzeska - Skarp, Björn., 2nd edt., *Juridikens nycklar - introduktion till rättsliga sammanhang, metoder och verktyg*. Stockholm, Norstedts Juridik AB, 2021

Åhnberg, Lars - updated by Öman, Sören., *LAS-handboken: lagtext, kommentarer, AD-domar,* 9th edt. Stockholm: Lars Åhnberg AB, 2020

List of legal cases

AD 1973 nr 27

AD 1975 nr 42

AD 1977 nr 223

AD 1979 nr 60

AD 1979 nr 146

AD 1979 nr 154

AD 1980 nr 92

AD 1983 nr 182

AD 1986 nr 22

AD 1988 nr 20

AD 1989 nr 133

AD 1991 nr 86

AD 1993 nr 56

AD 1995 nr 23

AD 1996 nr 3

AD 1996 nr 37

AD 1997 nr 3

AD 1997 nr 123

AD 1997 nr 148

AD 1998 nr 22

AD 1998 nr 65

AD 2000 nr 97

AD 2001 nr 62

AD 2006 nr 20

AD 2011 nr 84

AD 2013 nr 4

AD 2013 nr 84

AD 2014 nr 12

AD 2014 nr 62

AD 2020 nr 15

Public print

En reformerad arbetsrätt – för flexibilitet, omställningsförmåga och trygghet på arbetsmarknaden Ds 2021:17

Promemoria sammanställd inom arbetsmarknadsdepartementet på grundval av anställningsskyddskommitténs (A 1997:01) arbete - Ds A 1981:6

Proposition 1973:129 med förslag till lag om anställningsskydd

Proposition 1981/82:71 Regeringens proposition om ny anställningsskyddslag m.m.

The European Union

Public print

DIRECTIVE (EU) 2019/1152 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on transparent and predictable working conditions in the European Union

The United Kingdom

Internet sources

The United Kingdom Government, *Employment status*, Retrieved 2022-11-30 at: https://www.gov.uk/employment-status/selfemployed-contractor The United Kingdom

Government, *Guidance - Employee shareholders,* Retrieved 2022-12-05 at: https://www.gov.uk/guidance/employee-shareholders

Litterature

Adams, Zoe. - Barnard, Catherine. - Deakin, Simon. - Fraser Butlin, Sarah., *Deakin and Morris' labour law*, 7th edt. Oxford, UK; New York, NY: Hart Publishing, 2021

Butler, Mark., *Great Britain*, Wolters Kluwer, 2018

Jones, Benjamin - Prassl, Jeremias, edited by Waas, Bernd - Heerma van Voss, Guus., *Restatement of labour law in Europe. Volume I, The concept of the employee,* Oxford: Hart Publishing, 2017

Prassl, Jeremias., *Dismantling the Contract of Employment? The new Employee Shareholder Status in the United Kingdom*, European Labour Law Network - Working Paper Series, 2013

List of legal cases

Barrasso v New Look Retailers Ltd [2019] UKEAT 0079_19_2208 (22 August 2019)

Cotswold Developments Construction Ltd. v Williams (2006) IRLR 181

Tyne and Clyde Warehouses Ltd v Hamerton [1978] ICR 661

Public print

Department for Business Innovation and Skills, *Consultation: zero hours employment contracts,* December 2013

HM Treasury, Budget 2013 (London, March 2013)