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Swedish Legal System

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By ANN NUMHAUSER-HENNING

13.1 Introduction

The basics of current Swedish labour law can be dated back more than a hundred years, to the turn of the nineteenth century. It was then the still dominant social partners were founded: the Trade Union Confederation (*Landsorganisationen*, LO) in 1898 and the Swedish Employers' Confederation (*Svenska Arbetsgivareföreningen* SAF; now Confederation of Swedish Enterprise, *Svenskt Näringsliv*) in 1902. Although industrial actions were frequent, it may be said that the social partners back then had started a social dialogue that later was to become known as 'The Swedish Model', characterized by a high degree of autonomy for the social partners and their social responsibility. Regulatory developments took place mainly in the form of collective bargaining and the signing of subsequent collective agreements on different issues.

An early agreement of special importance is the 'December Compromise of 1906' between LO and SAF. Through this compromise the employees' side was guaranteed protection against dismissals that violated the right of association while the employers' side retained the right to direct and allocate work freely and also 'to hire and fire at will', commonly known as the 'employer prerogatives'. This agreement was followed later on by the important 'Saltsjöbaden Agreement' of 1938.

The principal rules of Swedish labour law were articulated by the social partners themselves, and subsequent legislation was a mere codification of the social practice made generally applicable also to parts of the labour market, e.g., salaried employees, where unionization developed only later. Early regulation by statutes included an act on collective agreements and industrial action (1928) and an act on collective bargaining and the right of association (1936). In 1928 a special tribunal, the Labour Court, was established. Employment conditions – including employment protection – were first and foremost regulated in collective agreements and other instruments developed through collective bargaining.

In the 1970s a 'shift' in union strategies took place. As a consequence of, among other things, industrial restructuring, increased labour-market participation on behalf of women and a fast-growing public sector, unions turned to

the legislator to guarantee both industrial democracy and important labour-market conditions. Later on another shift took place, entailing a certain decentralization of industrial relations.

These historical developments are reflected in current Swedish labour law. There is no such thing as a 'labour code', only a set of different statutes on disparate issues along with numerous collective agreements. This makes it somewhat difficult to come to grips with the regulation.

Collective labour law – or the law of industrial relations and collective bargaining – is now regulated mainly in the Act on Co-determination at Work (1976:580), commonly and hereinafter referred to as the 'Co-determination Act'. The situation of union representatives is regulated in a special Act (1974:358).

As regards individual employment law, there was little or no legislation for a long time. Now, the central statute in this area is the Employment Protection Act (1982:80), which contains rules on the termination of employment as well as certain rules on the entry into an employment relationship. There are also a number of statutes as regards vacation, the right to time-off for different reasons, etc. However, there is still no legislation regarding the central obligations of the employment relationship, e.g. the duty to perform work or the wages to be paid.

There are also a number of statutes in the intersection between private and public law. They contain regulation applicable to employers and employees, but there is also an important intervention on behalf of the State. In this category we have the Work Environment Act (1977:1160), the Working Time Act (1982:673) and the Discrimination Act (2008:567). As regards working environment and working time, the Swedish Work Environment Authority (*Arbetsmiljöverket*) has important controlling functions. As regards non-discrimination the Swedish figure of the ombudsman fulfils a central role.

Employment in the public sector accounts for some 30 percent of total employment in the Swedish labour market. Public employees can be divided into two main groups: state employees proper and municipal employees proper. Ever since the Co-determination Act was introduced, the main principle in Swedish labour legislation has been that the same legal rules should apply to the entire labour market, irrespective of whether the employee is in private or public employment. Some of the previous special regulations for public employees, especially the state employees, have been retained, though. These remaining rules are now mainly to be found in the Public Employment Act (1994:260). The

right to industrial action is a little more restricted in public employment and there are some special rules on hiring.

The normative structure in the field of labour law is thus rather complex. This is due not only to the legal structure as such, but also to the interaction of legislation and contracts/agreements of different tenors. As regards the employment relationship there is the so-called 'double construction' – the employment contract receives its content from both the collective bargaining level and the individual level.

There are some provisions on labour rights in the Constitution. However, the provisions of the Constitution govern, in principle, only the relationship between the individual and the State and, moreover, such rights do not confer any enforceable rights to the individual.

Our membership in the European Union has added to this complexity. However, at EU level labour law is mainly regulated through directives to be implemented by national legal instruments. Since 1995 – and to some extent even before – Swedish labour law has been gradually adapted to EU Law and the case law of the ECJ has become increasingly important.

Swedish labour law is still characterized by the special role assigned to the social partners. The Swedish labour market is characterized by a high degree of organization density; this is true of employees and employers alike. It is difficult to obtain exact figures on the degree of affiliation, but it is roughly 70-80 percent among workers as well as among salaried employees. Furthermore, the organization pattern is firmly established, and there is relatively little inter-trade-union rivalry. The old line of demarcation separating workers from salaried employees has to a certain extent been preserved by those limits, which the organizations have drawn up regarding their recruitment areas. 'Blue-collar workers' are organized in LO, whereas 'white-collar workers' belong to the Swedish Confederation of Professional Employees (TCO) and the Swedish Confederation of Professional Associations (SACO). This classification has no legal standing, however, and Swedish labour legislation makes – with some minor exception – no distinction between different employees in terms of this classification. Employers in the private sector are organized in much the same way and to the same extent. Most of them either belong to an industry-wide organization of employers or they sign a collective agreement of their own. The Confederation of Swedish Enterprises (*Svenskt Näringsliv*) completely dominates the private sector while in the public sector there are the Swedish Agency for Government Employers (*Arbetsgivarverket*) representing the State, and the Swedish Association of Local Authorities

and Regions representing the local governments. There are no statutory regulations governing the formation of these organizations. The organizational structure is reflected in collective bargaining. There are collective agreements at three levels: national, industry-wide and local. In most instances, the relationship between an employer/employers' organization and the union is firm and long-standing. Orderly and peaceful ways for the parties to meet, to bargain and to settle disputes can still be said to characterize 'the Swedish model' for industrial relations.

As we shall see, the law generally assigns to established unions – i.e. unions that uphold a collective agreement with the employer in question – a privileged position. Though Swedish law does not provide for exclusive representation, established unions *de facto* often speak for the entire employee community. The role of the social partners is also reflected in the fact that important issues are still outside the scope of law, for instance wages. There is not even legislation on minimum wages.

Another important feature of Swedish labour law – due to the crucial role played by the social partners and collective bargaining – is the frequent use of what is generally referred to as 'semi-mandatory rules'. Even important statutory rules may be overridden by collective agreements. One example of such semi-mandatory rules can be found in the Employment Protection Act. In general the Act is mandatory to the benefit of the employee. However, important rules like the ones on fixed-term employment and priority rights as regards redundancy dismissals may be complemented or overridden by collective agreements. For a long time, this legal technique presupposed a collective agreement at central (federative) union level. However, since 1996, as regards the Employment Protection Act, in most cases any collective agreement will do as long as there is already a liaison at central collective bargaining level between the contracting parties.

This feature of Swedish labour law is of special importance as regards the implementation of EU law. EU directives often provide individual employees with minimum rights obliging Member States to guarantee at all times the results stipulated in the directives. The technique used most frequently – also when implementing EU law – is the traditional one of 'minimum' legislation in combination with semi-mandatory rules. However, in these cases the statutes do state explicitly that any collective agreement displacing the law must meet the standards of the applicable directive.

The Labour Court is still acting as the supreme instance in labour-law disputes. It is also the first – and thus only – instance in all proceedings filed by an employers' or employees' organization in relation to the application of labour legislation or collective agreements. When the claimant is not a member of a trade union, or if his/her organization has chosen not to represent their member, the case is heard, in the first instance, at a district court with ordinary judges as in other civil cases. The Labour Court, with a special composition comprising both judges with judicial background and members from both sides of the labour market, then serves as the final court of appeal. The procedure in labour disputes is regulated by the Act on Litigation in Labour Disputes (1974:371). Only a minor proportion of disputes go to arbitration.

Recently, some of the crucial discrepancies between the Swedish Model and the logic and principles of EU Law and its implementation were reflected in the so-called 'Laval case' (Case C-341/05). It is (as of 1 January 2010) too early to report on the exact consequences of this judgment for Swedish labour law. A Government Bill (prop. 2009/10:48) with reform proposals was put before Parliament though, and its contents will be touched upon in the following.

13.2 Collective Labour Law. The Law of Industrial Relations and Collective Bargaining

13.2.1 Introduction

The main statute in the field of collective labour law or law of industrial relations and collective bargaining is the Co-determination Act (1976:580).

This Act contains two main sets of rules. One comprises what might be called the basic rules of collective bargaining, which have been transferred, with minor additions or amendments, to the 1976 Act from earlier legislation on peaceful industrial relations (see 13.2.2 below). The second set of rules concerns co-determination at work, first introduced as a result of the Act itself (see 13.2.3 below). Under these headings, we will also look into some other related statutory regulation.

The Co-determination Act covers the relationship between employer and employee or their organizations, including any person who occupies a position of essentially the same kind as an employee. The Act applies to both private and public employees. However, exempted from the provisions of the Act are activities of a religious, scientific, artistic or other non-profit making nature, or which

have cooperative, union, political or other opinion forming aims, so far as it concerns the aim and the direction of that activity. With regard to public activities there are no formal exceptions. However, according to the *travaux préparatoires*, public-sector collective agreements ought not be concluded on matters which impinge on political democracy, defined as the goals, direction, scope and quality of public activities. The public-sector parties at central level also concluded a main agreement committing themselves to peaceful action on matters intruding on political democracy. Moreover, negotiations on such matters are not carried out directly with politically elected bodies but at an earlier stage, when officials are drafting proposals prior to political decision-making.

On the whole, we are here dealing with rules-of-the-game applicable to the collective parties, that is unions on the one side and employers' organizations or a single employer on the other side. Notwithstanding that the Act in principle stipulates that an agreement shall be void to the extent that it involves removal or limitation of a right or an obligation imposed by the Act, it is only natural that many of its regulations are of a semi-mandatory character referred to in 13.1 above. Here we are at the heart of what must be considered to be 'party autonomy'.

Sanctions and remedies for violations of the Co-determination Act and/or collective agreements are primarily damages. There are both financial and punitive damages, the latter a characteristic of Swedish labour law. While financial damages are supposed to compensate for the economic loss suffered by the infringement, the function of punitive damages is to ascertain that 'regard shall be paid to (the aggrieved) person's interest that statutory provisions or provisions in collective agreements be observed and to other factors than factors of purely economic significance'.

13.2.2 Basic Collective Bargaining Law

13.2.2.1 *Freedom of Association. Union Representatives*

A first set of rules in the Co-determination Act concerns the right of association. The right of association refers to the right of individual employers and employees to belong to an organization of employers or an organization of employees, respectively, to take advantage of that membership and to work for the organization, and the right to establish an organization.

A violation of the right of association will occur if anyone on the employer or the employee side takes any action to the detriment of anybody on the other side

by reason of that person having exercised his right of association or inducing that person not to exercise his right of association.

A violation must affect the right of association of an individual employee or employer. It may, simultaneously, constitute an encroachment upon the activity of an organization of employees or employers which cannot be tolerated. Both the individual and the organization may be entitled to damages. If the right of association is violated through termination (or similar legal acts) of an agreement, or by means of a provision in a collective agreement or other contract, the termination (or similar legal acts) or provision shall be void.

The right of association articulated in the Co-determination Act is normally referred to as the 'positive' freedom of association. This is only natural; considering that we are here dealing mainly with rules developed by the social partners themselves in the initial phase of modern labour law. The existence of organizations is a *sine qua non* for collective labour law, and we have already described how the right of association was an important part in the 1906 December Compromise.

The 'negative' freedom of association is regulated in Swedish law only through the adoption of the European Convention (Human Rights) Act (1994:1219). The ECtHR has in a number of cases interpreted Article 11 of the Convention to encompass not only a positive right to form and join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association.

The proper functioning of union activities is important both as regards the right/freedom of association and co-determination at work. To guarantee an appropriate level of union activities at the workplace there is an Act on the position of a trade-union representative at the workplace, the Union Representatives Act (1974:358). This Act refers primarily to union activities in the traditional sense, i.e. negotiations, joint council work etc. So-called contact representatives at smaller workplaces are also covered, while safety delegates are covered by similar rules in the Work Environment Act (1977:1160). There are also special statutes implementing the EU rules on European Work Councils (Act 1996:359) and on employee participation in the case of cross-border mergers in limited liability companies (Act 2008:9). Moreover, there is an Act (1987:1245) on Board Representation in the Private Sector. Concerning the last mentioned acts, see also 13.2.3.3.

The Union Representatives Act applies to trade-union representatives appointed by organizations bound by, or usually bound by, collective agreements

referring to the workplace where the representative is actually employed. The organization makes the Act applicable to its representative by notifying the employer. There is no fixed limit to the number of such representatives at a workplace, but the rules of the Act are phrased in such a way that union activities must bear a reasonable proportion to conditions at the workplace in question.

While the representative has the right to time off as required for the trade-union business, this time must not be longer than what is reasonable considering the conditions at the workplace, and the leave of absence may not be taken at such times as to create serious obstacles to the normal course of work. The scope and disposition of leave of absence are to be determined after consultations between the employer and the local union organization. It may also be settled by collective agreement. In principle, union business concerning the actual workplace as well as courses on union matters of immediate importance to conditions at the workplace may be conducted during paid working hours. Overtime and extra expenses should, in these cases, also be paid insofar as they are occasioned by the employer.

A union representative may not be obstructed by the employer in the discharge of his duties. He has a right to some facilities at the workplace according to the requirements of his union duties and may not be allotted inferior working conditions or inferior conditions of employment on account of his union responsibilities. At the time of conclusion of his term of office, a union representative is assured the same or an equivalent position, as he would have had, had he not held this office. Of course, he must not be dismissed on account of being a union representative. Dismissal on account of being a union representative is not only a violation of the Employment Protection Act but also a violation of the right of association as stated in the Co-determination Act. In case of collective dismissals, a union representative is given priority to continued employment if this can be regarded to be of particular importance to union activities at the workplace.

In a dispute concerning the interpretation of the Union Representatives Act the opinion of the union prevails, pending the settlement of the dispute by the Labour Court.

13.2.2.2 *The General Right of Negotiation*

The right to negotiate or to bargain collectively has always been a key element in the development of collective labour law. The Co-determination Act stipulates that an organization of employees has a general right to negotiate with an em-

ployer on 'any matter relating to the relationship between the employer and any member of the organization who is or has been employed by that employer'. An employer has the corresponding right to negotiate with an organization of employees, as do the organization of employees in relation to any organization to which the employer belongs and the employer's organization in relation to the organization of employees.

This general right of negotiation applies both as regards disputes within the realm of collective bargaining (like wages) and legal disputes, including the interpretation of collective agreements.

The right of negotiation for one party implies a corresponding duty to negotiate for the other. This duty includes the obligation to, personally or through an agent, appear at a negotiation meeting, and, if necessary, to put forward reasoned proposals for a solution of the matter to which the negotiations relate. However, there is no duty to come to an agreement.

13.2.2.3 *The Collective Agreement*

The 'natural' outcome of collective bargaining is a collective agreement.

According to the Co-determination Act a collective agreement is an agreement in writing between an organization of employers or an employer and an organization of employees, on the conditions of employment or otherwise on the relationship between employers and employees. The scope of collective bargaining is, thus, quite broad or as wide as the area of application of the Act itself (in this respect, cf. 13.2.1 above).

Collective agreements are entered into at different levels in the Swedish labour market. Normally there are nation-wide branch agreements complemented by local collective agreements at enterprise level. There are also main agreements on cooperation at top level.

A collective agreement binds within its area of application not only the signatory parties but also any member of such an organization, regardless of whether the member has joined the organization before or after the making of the agreement. A collective agreement has a 'normative effect' on any agreement at lower level – whether a collective agreement or an individual contract – and any provision which is not consistent with the collective agreement is null and void.

However, collective agreements are only binding for the signatory parties and their members, not directly for employees not organized in the union that has signed a collective agreement with the employer or his organization. Although

there is no equivalent in Sweden to the institution of the general extension *de jure* of collective agreements as found in many other countries, *de facto* – due to contractual obligation of the employer towards the contracting trade union – collective agreements affect not only the trade union members, but in principle all employees engaged by the employer within its area of application. Nevertheless, from the viewpoint of private law, the principle of freedom of contract prevails in the relationship between an employer and an individual employee who is not a member of the contracting union. This creates certain difficulties as regards the implementation of EU law, since implementation by way of collective agreement does not comply with the requirement to guarantee ‘at all times’ the results stipulated in a EU directive.

The Co-determination Act also contains a special rule on the validity of collective agreements in the case of transfers of undertakings, implementing Council Directive 2001/23/EC.

13.2.2.4 *Industrial Action. Mediation*

An important feature of the Swedish rules on collective agreements – and a historical explanation to their vast acceptance – is the peace obligation that follows with such a collective agreement.

An employer and an employee bound by collective agreement may not initiate or participate in a stoppage of work (lockout or strike), blockade, boycott or other industrial action, if the action has as its goal to exert pressure in a dispute over the validity of a collective agreement, its existence or its correct meaning, or in a dispute, as to whether a particular procedure is contrary to the agreement or to the Co-determination Act; to bring about an alteration of the agreement; to affect a provision which it is intended will come into operation when the agreement has ceased to apply; or to support some other party who is not himself permitted to take industrial action. There is also a prohibition on industrial actions towards very small companies with no or only family-related employees. A general requirement is that the industrial action be sanctioned by the relevant organization in accordance with its rules. Moreover, according to case law, regardless of there being a peace obligation or not, any industrial action without due support of an organization is regarded illegal. Otherwise, the general rule, supported by the Constitution, is that industrial action is lawful whenever not specifically prohibited. In the public sector some additional limitations still prevail (see Act 1994:260).

From this we may conclude that while a collective agreement is in operation between two parties – and most of the time this is the case in the Swedish labour market – there is very little or no room for industrial action. However, *e contrario*, notwithstanding that a peace obligation generally applies, industrial action is allowed in support of some other party who is permitted to take industrial action. This right to ‘sympathy action’ is of course of utmost importance in an industrial-relations system such as the Swedish one.

An exception from the general peace obligation that follows from a collective agreement was introduced by the Co-determination Act to support the co-determination regulation. When, during negotiations over a collective agreement, one party has requested that a matter within the area of the employer prerogatives be regulated in the agreement, or in a separate agreement, but the matter is not so regulated expressly when the collective agreement is concluded between the parties, that matter shall not, during later negotiations on the regulation of the matter in a separate agreement, be considered covered by the peace obligation that generally applies by virtue of the agreement which has already been reached. This so-called ‘residual right’ of industrial action has not been put into practice to any considerable extent, though.

An organization of employers or an organization of employees may not organize or in any other way induce unlawful industrial action. Nor may such an organization, through support or otherwise, involve itself in unlawful industrial action.

However, this prohibition on unlawful industrial action applies only to actions induced by employment relations to which the Co-determination Act directly applies. This rule was introduced in 1991 in response to case law (see especially AD 1989:120) and goes under the name of *Lex Britannia*. The regulation confirms the Swedish practice to combat social dumping by forcing foreign employers to sign a collective agreement meeting the Swedish standards of the branch in question, if needed by means of industrial action.

These practices are at the heart of the so-called ‘Laval case’ decided by the ECJ (see above 13.1). The case concerned a Latvian company, Laval un Partneri Ltd, in the construction business performing a job in Sweden with its own workers to whom a Latvian collective agreement already applied. Industrial action was taken in order to oblige Laval to sign the main Swedish collective agreement in the construction business in accordance with the *Lex Britannia* rules. The ECJ declared that *Lex Britannia* was not compatible with the EC Treaty. Moreover, the Court did not approve of the Swedish implementation of Council Directive

96/71/EC on the posting of workers through Act (1999:678) on Posting of Workers. The Directive accepts only minimum working conditions to be applied in posting situations. However, there are no statutory regulations on minimum wages in Sweden, and this is where industrial actions and *Lex Britannia* come into the picture! The Government has presented a Bill (prop. 2009/10:48) to Parliament with proposed amendments to Swedish labour law impugned by the 'Laval judgment'. The solution proposed involves changes in Act 1999:678 on posted workers, restricting lawful industrial action to questions concerning minimum conditions as decided in a nation-wide collective agreement (provided that equal or better conditions do not already apply). The Co-determination Act is also amended to ban industrial action in contravention of these new rules as well as to restrict the application of *Lex Britannia* (allowing industrial actions in situations where the Co-determination Act is not directly applicable) to cases where Act 1999:678 does not apply.

Anyone in breach of the peace obligation is liable to pay damages. Individual employees are excused if their union is the organizer. There is no maximum amount of damages anymore even in the case of an individual employee, but in this case the sum normally should not exceed 2,000 SEK. Participation in an illegal industrial action is not a criminal offence and normally does not constitute just cause for dismissal.

A party wishing to take industrial action must give notice and also inform the National Mediation Office (*Medlingsinstitutet*) seven working days in advance of the planned action. The task of the Office is to monitor conditions on the labour market including yearly wage statistics as well as to appoint a conciliator to mediate whenever there is an industrial dispute, which threatens to give rise to or has given rise to industrial action. The main task of the conciliators is to bring about an agreement between the parties. Mediation may sometimes be imposed upon the parties and there is a statutory right for the conciliator to postpone an industrial action for a maximum of 14 days.

13.2.3 Co-determination at Work

13.2.3.1 Primary Negotiations

Despite its name, the Co-determination Act really offers little or no power of co-determination on the employee side. The employee influence on direction and distribution of work and other managerial prerogatives is mainly guaranteed by means of rules strengthening the powers of negotiation. There is a 'primary duty

of negotiation'. The essence of this duty is that the employer must request negotiations before making important alterations in his activities or as regards the employment conditions of employees belonging to a trade union to which the employer is bound by a collective agreement. Moreover, the employer is (apart from exceptional cases) required to defer his decision until negotiations have been completed. This moratorium gives employees an opportunity to convey their viewpoints on the question at issue and thus influence the employer's decision. There is no obligation to reach an agreement on the issues at stake, but if no agreement is reached at the local level the employee side has the right to refer the negotiations to the central level.

The employees' organization is also entitled to take the initiative and request negotiations on any question within the realm of employer prerogatives affecting a member of the organization. Also in these cases the employer is required to defer his decision until negotiations have been completed.

The employer's primary duty to negotiate only applies towards unions to which he is bound by a collective agreement. However, when a decision 'especially concerns' an employee who belongs to an organization in relation to which the employer is not bound by collective agreement, the employer is under the duty to negotiate with that organization. These rules on negotiation also implement Directive 98/59/EC on collective redundancies and Directive 2001/23/EC on the transfer of undertakings. In cases where the EU rules apply and when there is no organization with collective agreement, the employer must negotiate with every union represented at the workplace.

13.2.3.2 *Information Rights, Priority of Interpretation and the Right of Veto*

To be able to influence the employer's decision-making process, the employee-side must be well informed. The Co-determination Act includes a statutory obligation for the employer to keep the organizations in relation to which he is bound by collective agreement continuously informed on how his activity is developing with regard to production and economy as well as regarding personnel policies. If there is no collective agreement, such a duty of information applies towards all workers' organizations with a member at the workplace and there is also a right for the representatives of these organizations to take reasonable time off to receive the information. The rules of information are to be viewed as a continuous system for the reinforcement of employees' influence.

Another component of workers co-determination rights is the so-called 'priority of interpretation'. When a dispute has arisen concerning the interpretation of

a collective agreement or a statutory provision, it is an important question which opinion is to prevail pending settlement of the dispute. The general rule according to the case law gives the employer the priority of interpretation. However, the Co-determination Act has given this priority to the trade union in some important situations, like disputes concerning a member's duty to perform work. These rules serve to strengthen the position of employees. In case the union chooses to exercise the right of priority of interpretation, the employer is faced with the choice of abandoning his standpoint in the dispute or taking the matter to negotiation and, possibly, to court.

The provisions giving unions a veto in certain cases constitute yet another component – and the most far-reaching offered by the 1976 Act – of workers' powers of co-determination. According to these rules, an employer who intends to call on a person to perform work for him without actually employing the person concerned is obliged to negotiate, in advance, with the union with which he has, or usually has, a collective agreement regarding the work in question. If there is reason to believe that some labour-legislation rule or any other regulation pertaining to work (for instance, tax legislation or rules in collective agreements) will be circumvented, then (but only then) the union may prohibit the employer from going through with the intended contract. This gives the unions a chance to influence, and occasionally, to direct the employer's choice of contractors; but the rules do not permit a union to defend job opportunities for the benefit of its own members. In other words, the Act does not authorize unions to veto sub-contracting, it merely confers upon unions the authority to veto illegal practices – to prevent abuses.

13.2.3.3 *Other Forms of Influence*

The Co-determination Act does not contain more far-reaching rules on co-determination than the ones hitherto described. However, one of the aims of the Act is to encourage co-determination agreements. Today almost the whole labour market is covered by such co-determination agreements. Their content is normally only complementary to the rules on information and primary negotiations of the Act and generally does not imply any real co-determination.

An issue sometimes dealt with in co-determination agreements is the right to co-determination in groups of companies. The right of co-determination for the unions according to the Co-determination Act applies only to their 'own' employer and not to group management in another company making decisions concerning their establishment. As compared to the Act, Directive 94/45/EC

on the establishment of European Works Councils provides new and extended opportunities for employees in multinational enterprises to obtain information and to be consulted on activities by the central management. Thus, in order to implement the Directive it has been necessary to introduce special statutory legislation (Act 1996:359). There is also special legislation implementing the EU law regarding employee influence in cases of cross-border mergers and in European Co-operatives (Act 2008:9 and 2006:477, respectively).

There is also another model for worker participation in Sweden, viz. worker participation in management bodies. The regulation – which applies to corporations, banks and economic associations including some European Co-operatives – stipulates that employees in companies with at least 25 employees are entitled to appoint (a minimum of) two members to the board of directors (Act 1987:1245). The local union appoints in a certain order the employee representatives, and these representatives have the same standing as other board members, although the employee side is always to constitute a minority. In practice, the right of board-representation has come to be regarded as a means of keeping the union informed rather than as a means of influencing company decisions. There is a corresponding right to representation on the boards of directors of public entities (Ordinance 1987:1101).

13.3 Individual Employment Law

13.3.1 Introduction

The most important statutory regulation within the area of individual employment law is the Employment Protection Act (1982:80). The Act contains regulation on different categories of employment and on the termination of employment. Some other issues are regulated in a number of special acts. However, on important issues – such as hiring and the principal obligations of employers and employees (including wages) – there is little or no statutory regulation. Non-discrimination legislation is dealt with in 13.4 below.

13.3.2 Hiring

The point of departure in this field is the employer's right to hire at will.

An employment contract does not have to adhere to a formal pattern – it may be oral or written, include detailed regulations concerning the nature of the employment, or contain no specifications whatsoever – and no general legal regula-

tion exists in this field. There are no mandatory provisions concerning the procedure that should be adopted when entering an employment contract. However, there is a provision in the Employment Protection Act implementing the so-called 'Cinderella Directive' (91/533/EEC) and obliging the employer to inform the employee on the terms and conditions of the employment within a month. Just like the former (and current) provisions in collective agreements concerning employment contracts in writing, etc., these obligations are a matter of administrative order and not an absolute contractual prerequisite, i.e. contracts of employment are still valid whether these provisions are observed or not.

Nor does Swedish legislation offer a legal definition of the employment contract, or of the way in which it differs from other kinds of labour contracts, e.g. contract work. In this area, however, the formation of a body of case law concerning the so-called 'employee notion' may be regarded as an initial restriction of the orderer's/employer's freedom, ensuring that the labour-legislation rules – to a great extent protective rules for the benefit of employees – are not circumvented. According to this body of case law, the decisive factor is the degree of dependence – in respect of personal subordination as well as with regard to social and financial considerations – actually prevailing in the relationship between the parties, not the way in which the parties themselves designate the contract.

An explicit restriction on the employer's right to hire at will is the prohibitions against decisions to hire which entail discrimination (see 13.4 below). Another restriction is found in the rules concerning the right to re-employment in the Employment Protection Act.

Furthermore, the Employment Protection Act contains rules on categories of employment, and these are important to the employer when hiring an employee. Permanent employment entails more comprehensive employment protection; therefore, the legislator has to a certain extent restricted the use of fixed-term employment. Even if an employment contract may – as was pointed out above – be made quite freely, these rules mean that the category-of-employment issue must be looked into at the time of hiring. In dubious cases employment contracts are considered to be permanent.

What has been said so far applies to hiring in general, i.e. in the private sector. Unlike the private employer, the State, when acting as employer, does not have the right to hire at will. According to the Constitution, the State employer is obliged to base its choice on strictly objective grounds, such as merit and ability, etc. Also when it comes to the actual hiring procedure, more detailed rules apply (Ordinance 1994:373). The constitutional rule regarding merit and ability as

grounds for an appointment does not apply to municipal employees proper. Still, a constitutional rule with a rather more general tenor applies to them, too: all exercise of public authority shall take place on an objective basis. One consequence of this rule is that it is customary to observe a system of merit evaluation closely akin to the one used by the State even when selecting people for municipal posts.

13.3.3 Categories of Employment. Atypical Work

The category of employment must be determined already at hiring. The categorization of employment is crucial to the protection of employment and the rules on the different categories are found in the Employment Protection Act.

The Act differentiates between 'fixed-term employment' and 'permanent employment'. A fixed-term employment contract ceases without prior notice; and the employer need not state any reasons for its termination whenever the period agreed on has expired, the season is over or the assignment has been carried out. Permanent positions (or employment of indefinite duration), on the other hand, are associated with rather more elaborate employment-protection devices. Against this background – as well as Council Directive 99/70/EC concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP (the Fixed-term Work Directive) – the Swedish legislator decided that it is necessary to impose limits on the permissible use of fixed-term employment, thus balancing business needs with employee needs of security.

According to the first employment protection act, introduced in 1974, fixed-term work contracts were allowed only if the particular nature of the assignments provided a reason, or if the employment involved practical training or a temporary substitute contract. However, the rules have since been changed on a great number of occasions. Implementing the Fixed-term Work Directive, fixed-term employment is since 1 July 2007 permitted as general fixed-term employment, as a substitute, as seasonal employment and/or, as employment for a specified period after retirement age, i.e. 67 years of age (sec. 5). Moreover, probationary employment is allowed for a period not exceeding six months (sec. 6).

General fixed-term employment is automatically transformed into open-ended employment once the employee has been employed for more than 24 months within a five-year period. The same is true for a substitute having been employed by an employer as a temporary substitute for more than two years during the last five years.

The regulations governing categories of employment contained in the Act may be replaced by collective agreements at any level (provided there is a 'collective-agreement relationship' established between the parties). These regulations can then be applied also to non-union employees employed by that employer.

These rules differ from the former attitude of the legislator in the sense that they can be said to permit the use of general fixed-term work as a 'normal' category of employment for a time of up to 24 months within a five-year period. There is also the unrestricted competence of the social partners as regards deviations from the legal rules on fixed-term work.

To be valid, a fixed-term work contract must thus either be directly authorized by law or supported by a collective agreement. If the employer cannot demonstrate such support, the employment may be declared permanent. Furthermore, an employment is to be considered permanent unless other terms have actually been agreed upon. An employer, who is bound by a collective agreement and forms a contract of employment of limited duration for work to which the collective agreement refers, shall notify the relevant local organization without delay. No such notice is necessary, however, if the employment is not to exceed one month.

Apart from adhering to totally different categories of employment with completely different employment protection regimes, there is no tradition in Sweden to differentiate other employment conditions between fixed-term workers and permanent workers. The principle of non-discrimination included in the Fixed-term Work Directive was nevertheless implemented through Act (2002:293) on Prohibition of Discrimination of Employees Working Part-time and Employees with a Fixed-term Employment. The Act was constructed using the same structure as the Swedish non-discrimination acts at the time prohibiting not only direct but also indirect discrimination and calling for a reversed burden of proof once a *prima facie* case of discrimination has been established by the employee side. This makes Swedish regulation go beyond the requirements of the Fixed-term Work Directive.

Part-time work, the concern of Directive 97/80/EC, is in Sweden not considered a special category of employment but can be permanent or fixed-term. There was an early development of part-time jobs already in the 1970s, a development that was staggered in the mid-1980s. In general these developments rested on a voluntary and not legislative basis. Since 1996 there is, however, a priority right for longer working hours on behalf of part-time employees when this meets the employer needs for additional manpower and the principle of

non-discrimination is thus implemented through Act 2002:293 mentioned above.

Finally, something should be said about temporary work agencies and the hiring-out of workers. For a long time, a statute on illegal labour exchange (dating from 1935) outlawed both private employment-exchange enterprises and temporary work agencies for profit. However, in 1992 Sweden withdrew from ILO Convention no. 96 concerning fee-charging employment agencies, and now both private fee-charging agencies and temporary work agencies are permitted with hardly any restrictions (Act 1993:440). The 1993 Act is currently being revised in the process of implementing the European Council's Directive 2008/104/EC concerning Employees of Temporary Work Agencies.

13.3.4 Principal Obligations of Employers and Employees

The core idea of an employment contract is the exchange of labour for wages. As a consequence of collective bargaining practices and the structure of Swedish industrial relations – or shall we say ‘the Swedish model’ – there is no statutory regulation either on the employees' duty to perform work, nor on the wages to be paid by the employer. Both issues are presumed to be settled by agreement.

The labour/work to be performed is thus a matter of contractual agreement and the principle of freedom of contract prevails. When it comes to the quantity of work, this is more clearly the case (albeit within the framework of the regulation on working time, see 13.5 below). When it comes to the quality and nature of work to be performed, the presence of employer prerogatives is also strongly felt. The right to direct and allocate work gives the employer the opportunity to decide what task is to be allotted to an employee and where, when and how this task shall be performed. The employer prerogatives only apply within the limits of the duty to perform work agreed upon, however. The duty to perform work is normally regulated by the applicable collective agreement, though, occasionally, there might be restrictions in the individual employment contract. The general principle holds that employees are obliged to perform all tasks that are covered by the applicable collective agreement (the leading case being the Labour Court judgment AD 1929:29). Most collective agreements are of the industry-wide type and cover all work tasks at the workplace concerned.

Coupled with the duty to perform work is the general duty of employees to obey orders (subject to some qualifications like reasonableness and the absence of immediate physical risks). According to the case law, it is in principle the employer who has the right of interpretation in case there is a dispute on the em-

ployees' duty to perform work. However, this is one of the situations where the Co-determination Act has given the right of interpretation to the trade-union, provided the dispute concerns the duty to perform work of a member according to a collective agreement and underlying general principles (see 13.2.3.2 above). There is also the duty to negotiate prior to more permanent work reassignments (see 13.2.3.1 above), and sometimes in more exceptional cases (see AD 1978:89 on the so-called 'Sauna doctrine'), a just cause requirement.

The employment contract is also presumed to contain a general duty of loyalty towards the employer. This duty implies looking after the employer's interests in general and performing work in a careful and considerate way. It also signifies an obligation to keep secrecy regarding confidential information obtained during work (Act 1990:409).

The wages to be paid in return for the work performed is an issue left completely to the parties. In general wages are set by means of collective bargaining and collective agreements. The overall scope for wages is normally set by a nation-wide branch agreement, leaving the final settlement of the wage of an individual employee to plant level agreement, in order to accomplish the flexible and individual wage setting that is now the general model in the Swedish labour market. The collective agreement as such is binding only upon employees who actually are organized with the signing union. The wages of other employees are set by the individual employment contract, and here the principle of freedom of contract prevails. However, there is a duty on the employer towards the contracting union to pay also non-union-members in accordance with the applicable collective agreement, and branch agreements are generally known to set the standard for employment relations not governed by any collective agreement at all as well. There is no such thing as legislation on minimum wages in Sweden. As a result of the so-called 'Laval case', collective agreements in the future may be expected generally to include rules on minimum wages, though. The trade unions themselves are supposed to have a general control on working conditions and wages, ultimately, by way of industrial actions (cf. 13.2.2.4 above).

Thus, the only legislation on wages – apart from some specific situations related to the protection of employment like wages during notice periods and the like (see 13.3.5 below) – is found in provisions concerning set-off by employers in the Act 1970:215 protecting employee claims on the employer, on preferential rights of wage claims in the case of the employer's insolvency (Act 1970:979) and on pay guarantee upon the employer's insolvency (Act 1992:497) imple-

menting Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer.

13.3.5 Termination of Employment

13.3.5.1 Introduction

Termination of employment is regulated in the Employment Protection Act. The Act applies to all employees, i.e. both in the private and in the public sector. Exempted from the application of the law, however, are employees in managerial or comparable positions, employees who are members of the employer's family, employees engaged for work in the employer's household and certain categories of employees in subsidized schemes such as relief work or sheltered work.

As was already indicated, the category of employment is decisive for the protection that prevails. A fixed-term contract may be terminated without prior notice and without the employer being required to give a reason once the agreed time of employment expires. However, if the period of employment has been long – more than twelve months during the previous three years – the employer is obliged to give the employee notice at least one month in advance that no further employment will be offered. If the reason for this is shortage of work, the employee in these cases has the same right to re-employment during the coming nine months as those permanently employed.

More comprehensive protection rules apply to employment of indefinite duration. The employer must have just cause/objective grounds for dismissal. The rule on just cause is important especially with regard to dismissal due to the employee's personal conditions, while shortage of work is always regarded as just cause for dismissal. There are also rules on immediate (summary) dismissal on behalf of the employer and immediate withdrawal on behalf of the employee in cases of more severe breaches of contract. There is also a special rule on termination of employment when the employee reaches retirement age.

Upon ordinary dismissal by the employer, the statutory notice period with pay is one to six months, depending on the period of service. According to the Employment Protection Act the employee too has a duty to give notice one month in advance. The rule on notice periods is semi-mandatory and collective agreements quite frequently provide longer periods of notice, also in cases where the initiative comes from the employee.

The Employment Protection Act – together with the Co-determination Act – implement Directive 98/59/EC on collective redundancies and 2001/23/EC

on the transfer of undertakings, respectively. With regard to the former Directive, there are also rules on the duty to notify the employment authorities in another statute (Act 1974:13).

13.3.5.2 *Just Cause and Dismissal on Personal Grounds*

Dismissal with notice by the employer must be based on objective grounds. Objective ground for dismissal is never considered to exist where it is reasonable to require the employer to provide other work for the employee. A dismissal on personal grounds may not be based solely on circumstances that were known to the employer for more than two months prior to initiating the dismissal.

Despite a comprehensive bulk of case law there are no general rules on what is to be regarded as objective grounds for dismissal. The point of departure is that dismissal is 'the last resort'. One can also distinguish some elements of general importance, like the size of the workplace at hand, the position of the employee to be dismissed, the length of employment and the immediate cause of dismissal. It is only natural that the size of the workplace is of great importance with regard to the possibilities to provide other work in case the employee is not apt for the work he or she is actually performing, as is the variety of tasks to be performed within the employer's business. The position of the employee is also of importance, the employer being able to demand more from an employee in a chief position or in a position of trust. Misconduct by a recently-contracted employee may soon lead to objective grounds for dismissal while an employer has to be more considerate in regard to long-term employees. On the other hand, there are causes for dismissal so aggravating that even outstanding performance over a considerable period does not make any difference, as is the case of criminal offences at the workplace and the like. Sickness – including being an alcoholic – is generally not regarded as a just cause for dismissal. During sickness the employee may be replaced by a substitute and once recovered, if needed, the employer has far-reaching obligations as regards rehabilitation and adaptation (see 13.4 below).

Disputes as to whether just cause exists are settled by the Labour Court, and pending the Court's decision the employment must continue. If not objectively grounded, the dismissal may be declared null and void. There is also the right to damages, both compensatory and punitive.

There is a possibility for an employer to deny an employee re-entry to the workplace following a dismissal on the grounds of, for instance, misconduct, despite a court having declared the dismissal invalid. In this case damages ac-

according to sec. 39 must be paid. Damages are then paid according to the period of former employment with a maximum of 2.8 years of wages following at least 10 years of employment.

13.3.5.3 *Shortage of Work*

Shortage of work is regarded as being just cause for dismissal. Shortage of work is any situation where the dismissal is based on reasons of business activity and not concerning the performance of a particular employee. It may concern closing down the whole business, a part of the business or only affect the work performed by one or very few employees. Shortage of work does not apply only to situations where it is necessary to cease production for compelling financial reasons; it also applies in cases of reorganization and restructuring. The employer's prerogative entails a right to determine the extent of operations and the number of employees to be employed. The decision as to whether there is a redundancy situation or not thus rests with the employer.

In redundancy cases, employment protection lies mainly within the seniority rules to be applied and in the (temporary) right of priority to re-employment once dismissed. The obligation of the employer to, if possible, provide other work for the employee in his service applies also in redundancy situations.

The seniority rules imply that the order in which employees are dismissed shall be determined according to each employee's total period of employment with the employer according to the 'last-in-first-out' principle. In the event of equal periods of employment senior age priority applies. Priority according to these rules is contingent upon the employee being sufficiently qualified for continued work. However, employers with a maximum of ten employees may – prior to the application of these rules – exempt two employees considered to be of special importance for future activities. The order of dismissals shall be determined separately for each production unit and sector of collective agreement. Disabled employees are especially protected.

The employer is supposed to negotiate the priority of dismissals with the affected unions according to the rules on primary negotiations in the Co-determination Act (cf. 13.2.3.1 above). The rules on priority for dismissals are only semi-mandatory and a local collective agreement is a frequent means to come to terms on the order of dismissals in a redundancy situation.

The right to re-employment entails that any employment opening (regardless of the category of employment and whether part-time or full-time) within nine months from the expiry of the former employment should be offered to employ-

ees dismissed for redundancy reasons, taking into account the total length of their earlier services (applying the seniority rule). There is no freedom of choice among several jobs – if a ‘reasonable’ job offer is turned down, the right to re-employment is forfeited. However, the right to re-employment only applies to employment within the company division, and in the collective-agreement area, where the person in question was employed before; and besides, the employee must possess adequate qualifications for the new job. The rules on priority to re-employment are semi-mandatory, and may thus be replaced by means of collective agreement at any level. Such agreements are common throughout the labour market.

A violation of the seniority rules or, for that matter, the rules on priority to re-employment gives rise to damages only. There is thus no legal possibility to declare a dismissal in breach of the seniority rules null and void or to really obtain re-employment. There are no rights to redundancy payment (apart from the notice period with pay). However, such rights may be stated in special collective agreements at central level.

13.4 Non-discrimination Legislation

13.4.1 Introduction

There is no real tradition as regards non-discrimination legislation in Sweden. To some extent, it can be maintained that the prohibitions on gender, ethnic and racial discrimination are entrenched in the Swedish Constitution, as ch. 2 sec. 15 and 16 Instrument of Government provide that no one may be treated unfavourably on grounds of race, colour, ethnic origin or gender in any legislation. Thus all statutes and other legal regulations in the field of employment – as in other fields – must satisfy this basic requirement of non-discrimination. However, the provisions in the Constitution govern, in principle, only the relationship between individual citizens and the State. On constitutional grounds alone, then, an individual cannot claim against, for example, an employer in the private sector, a general right to non-discriminatory treatment. In public employment, though, there are constitutional requirements leaving no scope for discrimination (cf. 13.3.2 above).

However, Swedish legislation must satisfy the standards set by the EU. Sweden is also bound under international law to observe a variety of conventions, most notably numerous ILO conventions and the ECHR. Swedish legal devel-

opments in the non-discrimination area can be said primarily to have been dictated by EU Law. Notwithstanding, there are now areas where Swedish law goes beyond EU requirements.

Only recently, a new Discrimination Act (2008:567) replaced the hitherto discrimination legislation. The Act entered into force on 1 January 2009 and replaced no less than seven former acts: Act (1991:433) on Equality between Men and Women, Act (1999:130) against Ethnic Discrimination, Act (1999:132) on the Prohibition of Discrimination in Working Life against Persons with Disabilities, Act (1999:133) on Prohibition of Discrimination in Working Life based on Sexual Orientation, Act (2001:1286) on Equal Treatment of Students in Higher Education, Prohibition of Discrimination Act (2003:307) and Act (2006:67) on Prohibition of Discrimination of Pupils.

The new 2008 Discrimination Act covers seven specific grounds of discrimination: sex, ethnicity, religion and other belief, sexual orientation, disability, age and transsexual identity/expression. The two last mentioned are new grounds to be covered – age as demanded by EU law and transsexual identity/expression a domestic initiative. Transsexual identity or expression is defined in the following way: that someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex. That a person who intends to change or has changed the sex they belong to is also covered by sex as a ground of discrimination follows from the case law of the ECJ. – The 2008 Act is considered to have implemented all relevant EU law.

The Act covers no less than ten different areas of society: employment, education, labour-market policy activities and some related issues, the provision of goods and services, health and safety, social services, social protection, study subsidies, national military and civilian service and public employment.

The 2008 Act is thus what can be labelled a ‘single non-discrimination act’ covering a number of different grounds and areas of discrimination and it is truly horizontal in character. Ch. 1 thus contains introductory regulation and definitions, ch. 2 the bans on discrimination for all grounds and in all areas, ch. 3 the rules on active measures, ch. 4 the rules on monitoring, ch. 5 the rules on compensation and invalidity, and, finally, ch. 6 the rules on legal proceedings.

Despite the manifest ambition by the legislator to provide ‘equal protection’ against discrimination no matter what protected group there are still significant differences in coverage between grounds. This is especially true with regard to age in which case the bans on discrimination cover only employment and con-

nected areas and education; however, a public inquiry is currently studying the possibilities to expand this protection to other areas covered by the 2008 Act.

The hitherto Ombudsmen, i.e. the Equal Opportunities Ombudsman, the Ethnicity Ombudsman, the Disability Ombudsman and the Sexual Orientation Ombudsman, were all merged into one new monitoring body, the Equality Ombudsman (*Diskrimineringsombudsmannen*, DO), as of 1 January 2009. The Ombudsman is a public official appointed by the Government, and his or her power, functions and duties are regulated by the Discrimination Act itself and a complementary act on the ombudsman him-/herself (2008:568). The chief function of the Ombudsman is to ensure the proper functioning of the non-discrimination legislation. The Ombudsman shall endeavour, in the first place, to induce those to whom the Act applies voluntarily to comply with it; but the DO may also bring a court action on behalf of an individual who consents to this. There is a duty on those to which the Act apply to provide the necessary information for monitoring purposes and the DO has the power to impose an administrative fine on those who fail to submit the information requested. Such a decision to order a financial penalty may be appealed to the Board against Discrimination. Furthermore, the DO may put forward a request to the Board against Discrimination for the imposition of a penalty on those who do not observe the rules on 'active measures' stipulated in ch. 3 of the Act.

Besides the public law aspects hitherto touched upon, individuals can base claims in private law on the ground that they have suffered from unlawful discrimination. The court to be seized will vary according to the different areas of application. The most important remedy here will be damages (compensatory and punitive), but under certain circumstances conditions of a contract or decisions can be declared void. The Act introduces a new type of indemnification (*diskrimineringsersättning*) making it possible to compensate for the discriminatory treatment as such (and not only economic loss), i.e. punitive damages, in all areas of society. However, in recruitment and promotion cases, the individual does not have a right to obtain the employment or promotion in question.

13.4.2 Discrimination in Employment

Ch. 1 of the 2008 Act thus contains the definitions of concepts applicable to all grounds and regulated areas; such as 'direct discrimination', 'indirect discrimination', 'harassment', 'sexual harassment' and 'instructions to discriminate'. These definitions relate very closely to the very same concepts in the relevant EU directives. Direct discrimination thus implies that someone is disadvantaged by being

treated less favourably, compared with how someone else is treated, has been treated or would have been treated in a comparable situation; whereas indirect discrimination is at hand when someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put persons of a certain sex, etc., at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means employed are appropriate and necessary to achieve that purpose.

Ch. 2 regulates the bans on discrimination on all grounds and in all areas starting precisely with the rules on discrimination in working life. This is the area most thoroughly regulated and the ban cover all grounds, including age.

The ban on discrimination in employment is very generally phrased and covers implicitly all employer decisions and grounds regarding a person who is an employee, is enquiring about or applying for work, is applying for or carrying out a traineeship, or is available to perform work or is performing work as temporary or borrowed labour (sec. 1).

This structure has opened up for some criticism. It is a far from transparent way to implement EU law such as the 'Recast Directive' 2006/54/EC on sex discrimination. There is no explicit mentioning at all of pay discrimination (including occupational pension schemes), for instance, and also discrimination on the grounds of pregnancy and motherhood is not explicitly implemented but tacitly covered by the general ban on (sex) discrimination. On the other hand, in my opinion, the structure of the Swedish 2008 Discrimination Act, with its truly integrated approach concerning the bans on discrimination and the different grounds, may prove to be really useful when multiple discrimination is concerned, as might the requirement of any detrimental treatment being merely 'associated with' any (or various) covered grounds.

There are, however, some explicit exceptions from the prohibition of discrimination in working life. These can be general or related to a special protected ground.

The general exception is differential treatment based on a characteristic associated with any one of the grounds of discrimination if, when a decision is made on employment, promotion or education or training for promotion, by reason of the nature of the work or the context in which the work is carried out, the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose. This is generally referred to as the 'GOR-' (general occu-

pational requirements) or 'Bfoq-defence' (bona fide occupational qualities defence).

A second exception refers to discrimination on the grounds of sex. The prohibition of discrimination does not prevent 'measures that contribute to efforts to promote equality between women and men and that concern matters other than pay or other terms of employment' or what is generally referred to as positive action measures.

Women labour-force participation rate in Sweden almost equals that of men (73.9 for men as compared to 66.7 among women aged 15-74 in 2007). However, the Swedish labour market is highly gender-segregated. It is notable that women dominate the public sector (which includes medical, child and elderly care) whilst the proportion of men in the private sector is higher. Within all professions there is a disproportionate amount of men in top managerial positions and wage differentials still exist. In terms of substantial equality between men and women there is thus room for improvement in terms of positive action, which then has to be carried out within the (considerable) restraints of EU law as interpreted by the ECJ. Notwithstanding, it is also worth mentioning that the previous statement in sec. 1 Equal Opportunities Act (Act 1991:433, now repealed) that the legislation against sex discrimination 'had as its goal to improve first and foremost the conditions of women in working life' was omitted in the 2008 Act.

The rules on so-called 'active measures' contained in ch. 3 of the 2008 Act deserves to be mentioned in this context. A general duty for employers and employees alike to cooperate on active measures to bring about equal rights and opportunities applies for all grounds but age. More elaborated requirements on employers apply to sex, though.

Thus, there is a duty for all employers with 25 or more employees to draw up an equal opportunities plan every three years. The same category of employers also has a duty to carry out a survey of wage differentials between men and women, drawing up an action plan for equal pay. These duties of the employer are not subject to derogation by means of collective agreements.

The employer also has a duty to adapt the working environment for both men and women and to enable an employee to combine parenthood with working life. As for staff policy, the employer shall promote an even distribution of men and women in different types of work and amongst different categories of employees. The employers' duties with regard to active measures do not, however, give rise to individual rights (see above 13.4.1).

Two remaining exceptions from the ban on discrimination in working life concerns age. Firstly, the prohibition of age discrimination does not prevent the application of age limits with regard to the right to pension, survivor's or invalidity benefits in individual contracts or collective agreements, nor does it prevent 'differential treatment on grounds of age, if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'. This implies a considerable weaker protection against age discrimination as compared to any other ground. Direct (age) discrimination may thus be quite widely acceptable. This is, of course, related to the gaps also in the underlying EU law requirements, in turn related to traditionally age-related practices on the labour market. Such practices can be found not least in labour-market policies and working conditions related to employment protection. The Swedish legislator only recently eliminated those rules in the Employment Protection Act that provided employees 45 years of age and above special protection in redundancy cases concerning the calculation of qualifying employment, notice periods, etc. Still, special rules related to age prevail such as the seniority principle (last-in-first-out) to be applied in redundancy cases and the rule on a right for the employer to end the employment when the employee reaches the age of 67. Whether these rules and practices can be upheld in the longer run remains to be seen. For the moment, it is the Swedish legislator's opinion that such rules are compatible with EU law requirements.

The so-called 'reversed burden of proof' applies to all discrimination cases. A *prima facie* case of discrimination is triggered once objective facts have been shown giving reason to presume that – as it may be – an employee has been discriminated against. Which objective facts are to be shown depends on the category to which the alleged discrimination belongs. Once the presumption is established, the employer is required to show that discrimination or reprisals have not occurred. This can be made by reference to any of the explicit exceptions referred to above or to other objectively justifying circumstances not linked to any of the protected grounds.

I have in the above described some characteristics of discrimination on the grounds of sex and age. Some of the other grounds, like disability discrimination, also deserve a special mention. Concerning disabled people, it is important to note that discriminatory treatment is deemed to exist when the employer, by taking reasonable support and adaptation measures, could have seen to it that an employee, a job applicant or a trainee with a disability be put in a comparable situation to people without such a disability. In determining what is reasonable

to require of an employer, various factors should be taken into account such as the cost of the measure, the expected effects, other types of inconvenience for the employer and the expected length of the employment. However, different treatment on grounds of disability frequently relates to a genuine occupational qualification. In many cases the disabled person does not have the same ability to carry out the work as most others. In such a case there is not a similar situation in the meaning of the law and, thus, no discrimination. – A disabled person is according to the legal definition someone with ‘permanent physical, mental or intellectual limitation to his or her functional capacity that as a consequence of injury or illness existed at birth, has arisen since then or can be expected to arise’.

The current Act does not, however, contain any set of rules on active measures apart from the legal obligation on support and adaptation measures. While job applicants are left to active labour-market policies and measures like subsidized schemes of employment and the like of a ‘non-right’ character, employees proper are covered by rather comprehensive guarantees within the Work Environment Act and the Employment Protection Act. The law requires that the work environment should be adapted, allowing disabled persons access to the labour market, and – once employed – helping them to stay on. Disability *per se* does not normally constitute an objective ground for dismissal and people with reduced working capacity may have priority over other employees in cases of lay-offs on ground of redundancy.

Another ground of discrimination covered by the Discrimination Act is ethnicity. The protection covers nowadays the entire recruitment process and does not require a situation where someone is bypassed through the decision to employ someone else. This should prove especially important with regard to ethnic discrimination. The purpose here – apart from implementing EU law – is to make it more difficult to distinguish between job applicants on the basis of irrelevant factors such as a foreign accent or because a person’s foreign-sounding name triggers prejudicial ideas.

The unemployment situation for ethnic minorities is considerably worse than for the average Swedish population. According to the active measures provisions in ch. 3 of the 2008 Act, an employer is required to actively promote ethnic diversity in working life. He is to undertake measures to ensure that ethnic minorities apply for available positions. Employers shall undertake measures to prevent ethnic harassment in the workplace. However, unlike with regard to equality between men and women, there is no requirement to maintain written equality plans.

Civil proceedings under the Discrimination Act in the area of employment are to be dealt with in accordance with the Act on Litigation in Labour Disputes (1974:371). DO can thus bring a case to the Labour Court with the individual's consent, if the Ombudsman considers that the case is of importance for legal practice or for other reasons. However, this privilege of the Ombudsman is subsidiary to that of the trade unions, i.e. the DO can only bring an action if the trade union decides not to do so. And under all circumstances the individual does not have a right to compel the DO to take on a case. In accordance with EU law the 2008 Discrimination Act provides a right to bring an action also to other non-profit organizations than trade unions whose statutes state that it is to look after the interests of its members, if the individual consents to this. To be allowed to bring an action, the association must be suited to represent the individual in the case, taking into account its activities and its interest in the matter, its financial ability to bring an action and other circumstances. Also this right is subsidiary to that of a trade union.

Together with the introduction of the 2008 Act there was a reform on the composition of the Labour Court in employment-discrimination cases according to the Discrimination Act. In such cases the Court will be constituted by five judges whereof only two represent the social partners. Normally there are seven judges, whereof 4 representatives for the social partners. The reform has its background in the difficulties that historically have arisen in relation to equal pay claims due to the role of the social partners and collective bargaining in the wage-setting process.

Finally, something should be said about the reconciliation of work and parenthood, an issue closely related to discrimination on the grounds of sex. EU law in this area is implemented by numerous acts, among them the Parental Leave Act (1995:584). This Act deals exclusively with the employee's right *vis-à-vis* the employer to unpaid leave for reasons of parenthood. The legislation is, however, closely related to the rules on parental benefits related to pregnancy and parenthood in the Social Insurance Act (1962:381, 2010:111 from 1 January 2011), also dealt with in Chapter 6 above. The Pregnancy Directive's rules on a safe environment are implemented by the Work Environment Act (1977:1160), more specifically ch. 4 sec. 6, also related to the special rules on sickness benefits for pregnancy-related reasons in the Social Insurance Act. To the extent pregnancy and maternity discrimination amounts to sex discrimination according to EU law such discrimination is also – however tacitly – covered by the general bans on discrimination in the Discrimination Act as indicated above.

The Parental Leave Act was recently amended so as to increase considerably the protection of parental (including maternity and paternity) rights in working life, see 13.5.2 below. Of special interest with regard to discrimination in employment is the rule in sec. 16 containing a general ban on differential treatment disfavours job applicants or employees on grounds related to parental leave when the employer decides on an employment issue, decides on promotion or vocational training, applies pay or other terms of employment, manages or distributes work, or gives notice of termination, etc. This rule goes considerably beyond the requirements of EU law. – The Equality Ombudsman has the power, too, to represent a victim at court in allegations based on the Parental Leave Act. The reform implied moreover amendments to the Employment Protection Act. According to an amendment in sec. 11 in the Employment Protection Act, a dismissal of an employee on parental leave in accordance with (i.e. for other reasons than the pregnancy or leave as such) the Parental Leave Act is not ‘effective’ until the employee is back on duty (or, according to the original information available at the moment of dismissal, should have been back on duty). This means that the notice period starts to run only when the employee is or should have been back on duty.

13.5 Work Environment and Working Time

13.5.1 Work Environment

The Work Environment Act (1977:1160) has been amended on several occasions. However, when it was introduced, it meant a radical change as to the concept of work environment. Until 1977 work environment legislation had mainly dealt with health hazards and accident risks. With the 1977 Act the law introduced a concept of work environment that included both physical and mental health and was concerned with adapting working conditions with a view to promote not only safety but also job satisfaction. The general objectives of the Act are for the work environment to be satisfactory with reference to the nature of work and social and technical development in the community at large, for working conditions to be adapted to the physical and mental attitudes of different human beings, and for work to be organised in such a way that the individual employee can influence his or her working situation.

However, the provisions of the Act on the quality of various environmental factors are very general. This is a legislation that needs supplementing. The legis-

lator has chosen two complementary ways: on the one hand, supervision and additional statutory regulations and, on the other hand, cooperation between the social partners and, eventually, collective agreements.

Supervising authority is the Swedish Work Environment Authority (*Arbetsmiljöverket*). The Authority is empowered to elucidate the rules of the Act by issuing implementing regulations of a generally binding nature, often with a penal sanction. The Authority is also authorized to issue injunctions and prohibitions at the individual workplace level in order to ensure compliance with the law and additional regulations.

Cooperation between the social partners is institutionalized by the Act itself. At workplaces with at least five employees, one or more safety delegates must be appointed from among the personnel. Such a delegate is entitled to leave of absence with pay for the time occupied by his duties and must not be given inferior working conditions on account of his duties. A safety delegate should be kept informed of all changes having bearing on the work environment and is empowered to immediately stop work that implies serious danger. At workplaces with 50 or more employees, there is to be a safety committee consisting of management and employee representatives. The safety committee has no special powers entrusted to it, but is supposed to plan and supervise safety at work and work environment in general. It is also to cooperate in rehabilitation activities with regard to individual employees. Additionally work environment matters may be dealt with in collective agreements. However, the responsibility for work environment ultimately rests with the employer who has a duty to systematically and by way of a working environment action plan organize and monitor working conditions.

The Act and additional statutory regulation implement the European Community rules on work environment.

13.5.2 Working Time, Paid Vacation and Time-off

Working time is regulated by the Working Time Act (1982:673). The Act applies to employees in general with the exception of work carried out under such circumstances that it is not for the employer to monitor its organization, employees in leading positions or in positions of trust, those employed in the employer's household (Act 1970:943), ship-employment (Act 1998:958) and certain transport work (Act 2005:395).

According to the Working Time Act regular working hours may not exceed 40 hours per week or, possibly, 40 hours per week on an average for a period of four

weeks. In some activities a maximum of 50 hours stand-by duty can be demanded every month.

General overtime is allowed only when special need arises for work input over and above regular working hours and stand-by hours and may not be ordered for more than 50 hours a month or 200 hours a year. 200 hours a year is also the maximum time permitted for so-called 'additional time', i.e. overtime in addition to agreed regular working hours in part-time employment. There is also a right to order overtime in case of emergency.

The Act also includes regulations concerning entitlement to time off for daily and weekly rest and concerning rest intervals and breaks at work. Special rules regarding work of minors are given in the Work Environment Act (13.5.1). Apart from these rules the disposition of working hours is – in principle – part of the managerial prerogatives.

The Working Time Act is not mandatory but may be overridden – or partly displaced – by collective agreements at the national federation level. Such rules may then be applied to all employees working under the agreement, regardless of union membership. The rules on overtime, additional time and daily rest may also be waived through a collective agreement at the local level and special permission can be obtained from the supervising authority, the Swedish Work Environment Authority (*Arbetsmiljöverket*). In addition, the adjustment of certain rules is to some extent left to the employer's discretion. The regulation thus offers a legal framework of considerable flexibility. However, as the Act implements Directive 2003/88/EC on working time, an agreement to substitute or complement the Act must meet the standards of this Directive.

According to the Paid Vacation Act (1977:480), all employees are in principle entitled to 25 working days, i.e. five weeks, of annual vacation with pay that equals (with some over-compensation) earnings during a corresponding period of work. However, payment is related to a qualifying period of employment the year before whereas the entitlement to five weeks' leave is absolute and unaffected by the receipt of pay. (A person who has taken up employment after the month of August one year will only be entitled to five days of vacation leave that very year, however.) There is a right for the employee to save holiday time with pay over and above the first four weeks' vacation for up to five years. The Paid Vacation Act is semi-mandatory.

The differences between regular working time and actual working time in Sweden are, apart from part-time, to a considerable extent due to absence from work based on statutory rights to leave for a variety of reasons. The most im-

portant of these acts is the Parental Leave Act (1995:584), but the Study Leave Act (1974:981) can also be mentioned, as well as the Act on Allowance and Leave for the Caring of Closely-related Persons (1988:1465) and the Act on the Right to Leave for Urgent Family Reasons (1998:209) implementing parts of Directive 96/34/EC. Generally speaking, the Swedish legislator has endeavoured to facilitate the reconciliation of work and private life as formal legislation is concerned. Legislation is however also complex and there are recent initiatives to simplify it, albeit without substantial changes (Ds 2009:15). As described in the following there are relatively far-reaching rights to leave of absence not only for parental and pregnancy reasons but also for the care of sick relatives and for public assignments, life-long learning, etc. The general social security schemes are also quite far-reaching, especially as regards parental leave. With regard to parenthood, day-care facilities for children one year of age until well beyond the initial school-age are guaranteed, and provided at a subsidized maximum cost.

First, some general remarks. All of the mentioned acts apply both to the public and the private sector, are applicable to all sectors of the labour market and are applicable to all undertakings regardless of the number of employees, etc. It is a question of legal rights; so, generally speaking, there is no or little room for influences by the unions (the Swedish labour market does not have work councils) by negotiations, etc. All rights are provided in a gender neutral way.

The Parental Leave Act, as was pointed out above in 13.4.2, deals exclusively with the employees' right to unpaid leave of absence for reasons of parenthood *vis-à-vis* the employer, whereas the right to subsidies is regulated by the rules on parental benefit in the Social Insurance Act, see further Chapter 6 above. Many collective agreements contain provisions concerning supplementary parental leave pay, though.

The Parental Leave Act provides a right to fourteen weeks of maternal leave implementing Directive 92/85/EEC. The Act also provides a right to full-time leave until the child reaches 18 months as well as a right to shortened hours of work until the child reaches 8 years of age. The right applies to mothers and fathers equally. There is also a right to leave of absence for the care of sick children corresponding to the rules on parental benefit.

13.6 Bibliography

There are, as one could expect, numerous textbooks on Swedish labour law written in Swedish. For long, the most commonly used by law students were un-

doubtedly the classic textbooks of Folke Schmidt, *Facklig arbetsrätt* and *Löntagarrätt*. *Facklig arbetsrätt* (rev. ed. by Ronnie Eklund and Håkan Göransson, Juristförlaget, Stockholm 1997) is still in use whereas *Löntagarrätt* can be said to have been replaced by Kent Källström and Jonas Malmberg, *Anställningsförhållandet* (2nd ed., Iustus, Uppsala 2009). The leading handbook on the Co-determination Act is Olof Bergqvist–Lars Lunning–Gudmund Toijer, *Medbestämmandelagen, lagtext med kommentarer* (2nd ed., Publica, Stockholm 1997). The leading handbook on the 1982 Employment Protection Act is Lars Lunning and Gudmund Toijer, *Anställningsskydd* (10th ed., Norstedts, Stockholm 2010). Since the late 1970s a number of monographs (many of them in the form of a doctoral thesis) on different issues have been published. Some recent titles (all with summaries in English) are: Mia Rönmar, *Arbetsledningsrätt och arbetsskyldighet – En komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext* (Juristförlaget, Lund 2004); Andreas Inghammar, *Funktionshindrad – med rätt till arbete?* (Juristförlaget, Lund 2007), Jenny Julén Votinius, *Föräldrar i arbete: En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning* (Makadam, Stockholm 2007), Annika Berg, *Bemanningsarbete, flexibilitet och likabehandling* (Juristförlaget, Lund 2008) and Carin Ulander-Wänman, *Företrädesrätt till återanställning* (Iustus, Uppsala 2009).

Nowadays, English language contributions on Swedish labour law are *legio* in the European context, be it in research reports or legal journals such as *The Comparative Journal of Labour Law and Industrial Relations*. A recent and quite comprehensive introduction to Swedish labour law in English is the entry on Sweden in *International Encyclopaedia of Laws* edited by R. Blanpain and M. Colucci (Wolters Kluwer 2009) written by Axel Adlercreutz and Birgitta Nyström. There is also an introductory book by Reinhold Fahlbeck and Bernard Johann Mulder; *Labour and Employment Law in Sweden* (Juristförlaget i Lund 2009). Here should also be mentioned vol. 43 Sc.St.L. (2002) under the title 'Stability and Change in Nordic Labour Law'. There are also a number of doctoral theses written in English such as Gabriella Sebardt, *Redundancy and the Swedish Model: Swedish Collective Agreements on Employment Security in a National and International Context* (Iustus 2005) and Laura Carlson, *Searching for Equality, Sex discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* (Iustus 2007). *Swedish Labour and Employment Law: Cases and Materials* (Iustus 2008) by Ronnie Eklund, Tore Sigeman and Laura

Carlson provides, besides an introduction to Swedish labour law, a number of commented Labour Court cases and collective agreements in English.