

Some Commercial Aspects on Labour Law

Sören Öman

1 Introduction	542
2 Protecting the Investment in the Employment Relationship	543
3 Winding up the Investment in Employment Relationships	548
4 Changing the Content of the Employment Relationship	552

1 Introduction

A company's decision to employ a person can be viewed as an investment-decision. A decision to educate or train an employee to improve his or her skills can also be regarded as an investment-decision by the company.

All investments involve risk. A successful investment can gain considerable profit for the company, and it constitutes a valuable asset. The company therefore has an interest in protecting its investments. An asset which from one day to another can vanish from the company or – which is worse for the company – can be transferred free of charge to a competitor provides a high risk. If, on the other hand, an investment for some reason proves to be a failure in one way or the other, the company usually wants to reallocate its investments as soon as possible to reduce its losses. An investment which is not profitable or which generates losses provides a high risk, when the company has few options to bring the investment to an end.

When an investment constitutes of or is based on a mutual business contract, the normal way of handling and calculating risk for both parties is by contractual provisions. Through provisions in their contract, supplemented by the legal framework the society provides, they distribute the risk that is involved in the investment. Freedom of contract makes it easier to distribute and thereby calculate and manage risk.

The employment relationship in the private sector is in Sweden founded on contract, the employment contract between the employer and the employee. That contract is supplemented by collective agreements, concluded by the employer or an organisation in which the company is a member and a labour union, and labour law, i.a. labour legislation.

Labour law, labour legislation in particular, has generally a distinct social-protective character. Labour legislation normally restrains freedom of contract. The legislation is not primarily aimed at promoting and protecting companies' investments and their use of capital, but rather to protect the employee and create a balance between the parties in the employment relationship that is considered fair. There is in countries like Sweden a wide consensus that the employment contract for social and humane reasons should not entirely be governed by the principle of freedom of contract. There is, however, in Sweden no general legislation on employment contracts. Instead, the social-protective character of the legislation is in focus in that legislation is normally restricted to areas where protection of the employee is deemed necessary, termination of the employment contract, non-competition clauses, non discrimination, involvement in the employer's decision making process etc.

A company, i.e. the employer, must pay attention to the restrictions laid down by labour legislation in order to calculate and manage the risk that an investment in an employment relationship entails. Labour legislation of a social-protective character therefore has also a commercial impact.

This paper deals with some commercial aspects of the impact of labour legislation on primarily small and medium sized companies' possibilities to calculate and manage risk. Focus is on companies in the service sector with highly skilled

employees. Labour legislation is a broad concept.¹ This paper concentrates on legislation aimed at protecting employment and promoting worker's participation in the employer's decisions. I have for the purpose of this paper not felt the need for a more precise definition than that. The perspective is that of the company, but it should be borne in mind that the difficulties for the company to calculate the economic risk arising from labour legislation can be – and often is – justified and balanced by advantages of social and humane nature that the legislation provides the employees.

In this paper the employment relationship is, from the perspective of the company, viewed as an investment. The possibilities and restrictions regarding the protection, the winding up and change of that investment are discussed.

2 Protecting the Investment in the Employment Relationship

The procedure to employ the right person can take a long time and cost a lot of money for the company. To employ a person can, especially in small companies, be a very important decision, a decision which must be thoroughly prepared.

If the employed person does not show up when the employment starts or if he or she quits soon after he or she has entered into the employment relationship, the effort and money that were laid down in finding that person are immediately lost.

A regular, open-ended employment contract is a long-term contract. The tasks that an employee has to perform over the years in accordance with the employment relationship vary due to, for example, technical, organisational or economic reasons. The company therefore normally has to train and educate the employee in the course of the employment relationship. A newly employed person also needs some introduction and training before he or she can perform his or her tasks effectively. Training and education can be expensive for the company. The money put up by a company to train and educate an employee can at the same time increase the employee's "market-value" and make him more attractive to the company's competitors.

The company has an interest in keeping the employee until at least the investment in the employment-procedure and/or training and education is paid off by the fruits of the work the employee has performed for the company. If the employee quits before the "pay-off-period" has elapsed, the investment has been a financial failure. Even if the "pay-off-period" has elapsed, the company has, in order to keep a competitive edge, an interest in keeping its trained and educated employees in its services and from transferring to a competitor.

In Sweden, an employee who is employed under an open-ended contract can quit anytime he or she likes. The employee must not have or state any valid reason for the termination of the employment contract, but he or she has to observe a period of notice. Only if the employer has to a considerable extent disregarded his or her obligations to the employee is the employee free to leave his or her

¹ See regarding Nordic labour law in general *Stability and Change in Nordic Labour Law – Legal Abbreviations*, Scandinavian Studies in Law, Volume 43, Stockholm 2002.

employment immediately. If the employee does not show up at the work place, the employer can not by legal means force the employee to come back and finish the work, not even for the applicable period of notice; the courts or the police can not be used to force an employee to actually perform the agreed work.

If the employment contract is one of fixed duration or for a specific task, the main rule is that the employee is free to leave only when the agreed period has elapsed or the task is finished. For that period the employer can be fairly sure of having access to the employee. Only under special circumstances may the employee (or the employer) bring the employment relationship to an end before the agreed period has elapsed.

It is, however, also possible to conclude an employment contract that has a definite end-point, but for other purposes runs until further notice and therefore can be terminated after a period of notice by either party anytime before the maximum-period has elapsed; the contract is then open-ended with a definite end-point.

In Sweden, it is allowed to conclude an employment contract for a fixed duration only in those cases enumerated in the legislation²; through collective agreements it is possible to limit or extend the right to conclude an employment contract of fixed duration. The company therefore normally has to use open-ended employment contracts, and, when it is allowed, the contract for a fixed duration represents only a temporary investment for the company. Employment contracts of fixed duration can, however, be used as a means to secure the services of the employee for the agreed period. An employment contract for a fixed duration can also be used as the first step towards an investment in an open-ended employment contract, as a way of testing the employee thereby reducing the risk involved in the open-ended employment contract. It is for that purpose also according to the legislation allowed to agree on an initial probation period of up to six months during which period the employer or the employee may, if there is no agreement to the contrary, terminate the contract at any time without having or stating any reason.

The provisions in the legislation on when it is allowed to conclude an employment contract for a fixed duration have been amended over the years. The trend has been to reduce the requirements for special material reasons for the contract – such as the special character of the work or the need to substitute an employee on leave of absence – in favour of time limits for the maximum duration of such contracts concluded with one employee. It is today, for example, allowed to conclude employment contracts of fixed duration for a total period of two years in a five year period with the same employee without having any material reasons for such contracts.

Apart from using employment contracts of fixed duration the company can use different strategies to minimise the risk that the investment in an employment relationship is brought to nothing due to the fact that the employee is using his or her right to terminate the employment relationship at will. One strategy is,

2 See § 4 of the 1982 Employment Protection Act (Sw: Anställningsskyddslagen, SFS 1982:80). See for a general description Numhauser-Henning, *Fixed-term Work in Nordic Labour Law*, in *Stability and Change in Nordic Labour Law – Legal Abbreviations*, Scandinavian Studies in Law, Volume 43, Stockholm 2002, p. 277–310.

of course, to satisfy the employee in various ways in order to keep the employee from exercising his or her right. One example is the use of unilateral bonus schemes. A bonus (*ex gratia*) that is based on the performance one year but not paid out until the end of next year if the employee is still in employment then, will provide an incentive for the employee, who has by that time put in the effort necessary to receive a bonus the following year, to keep his or her employment. Such a bonus scheme would at the same time make it more expensive for competitors to recruit the employee, since the employee would probably demand compensation from the new employer for the “lost” bonus sum.

Another strategy is to minimise the amount of the investment for the company in order to reduce the company’s financial risk. The key here is to get someone else to pay the bill. The company can try to attract well educated and productive employees from other companies. A popular way of reducing the costs for employment and training and education is to let the state pay. Hiring-costs can be reduced by using free public employment services. There are also often various state programmes for training and educating young or unemployed persons.

The employee must normally observe a period of notice when he or she wants to quit. According to the Swedish legislation the period of notice is at least one month.³ But the employer and the employee can agree on a longer period of notice⁴; it is also possible to prescribe a longer (or shorter) period of notice in a collective agreement. One way of, temporarily, protecting the investment in the employment relationship is hence to use a long period of notice in the employment contract. Another mechanism to achieve the same result is to agree that an open-ended employment contract may not be terminated by the employee until a certain period of time has elapsed; such a provision is probably valid according to Swedish law. The effect of provisions on the length of the period of notice or on a minimum length of service can be strengthened by prescribing certain (high) penalties for breach of such provisions.⁵

In Sweden, such provisions as those now mentioned seem to be in use to some extent. The length of the “binding-period” seems, however, to be rather short in most cases, a couple of months rather than a year or more. The provisions have not generated any case law worth mentioning.⁶ It must be regarded as uncertain whether a very long binding-period – or very harsh penalty-provisions – will be upheld. It can be argued that provisions on a longer binding-period are more likely to be accepted if the provisions are justified by and connected to a specific action on the employer’s side, for example a substantially increased salary or an expensive and attractive education paid for by the employer. It is probably of importance whether the binding-period is mutual or unilateral.

3 See § 11 of the Employment Protection Act (Sw: Anställningsskyddslagen, SFS 1982:80).

4 See the Bill 1973:129 p. 134 *f.*, 234 and 246.

5 Compare for instance AD 1993 nr 184.

6 Compare for a special case (air-force pilots) AD 1991 nr 38 and 1992 nr 67.

During the time when the employment relationship is in effect the employee has to be loyal to his or her employer.⁷ This is one of the characteristics of the employment relationship. The employee must not engage in any activity in competition with the employer's activities, and if he or she does the employer is entitled to terminate the employment relationship, at least if the employer observes the applicable period of notice. It is clear that the company during the time when the employment relationship is in effect, including the period of notice, has a legal right – emanating from the contractual relationship itself – to prevent its employees from using their skills for the benefit of competitors. But if the employee quits, the main rule is that the employer can not, after the employment relationship has ended, prevent the employee from using his or her acquired skills for a competitor. Non-competition provisions are, however, allowed in employment contracts. The provisions may not be extended further than what can be deemed as reasonable.⁸ In order to determine what is reasonable the courts seek – in accordance with the legal history – guidance in an agreement concluded in 1969 by the largest employer's organisation and three leading trade unions for privately employed white-collar workers. There must be a specific need for non-competition provisions, and the binding-period shall not normally exceed two years. The penalty for breach of the provisions shall normally be restricted to the equivalent of six month's pay. A non-competition provision, temporarily restricting the employee's possibilities to use his or her particular skills on the appropriate section of the labour market, can in itself make the employee refrain from quitting.

Also provisions on trade secrets and a duty of secrecy may serve as a protection for the investment in the employment relationship and prevent employees and former employees from using and divulging information to the detriment of the employer. The Swedish 1990 Act on the Protection of Trade Secrets (Sw: Lagen om skydd för företagshemligheter, SFS 1990:409) has a long and complicated legislative history. The main issue discussed during the preparation of the Act was the effect of the Act on the freedom of expression for employees. It was, reluctantly, clarified during the legislative process that the duty of loyalty inherent in every employment relationship in the private sector encompasses a duty of secrecy; the employee may not divulge any information that may cause harm to the employer. Later, the Swedish National Labour Court confirmed that this in fact was the state of the law.⁹ There may be explicit provisions in the individual employment contract or in applicable collective agreements on secrecy during the employment relationship. It may seem as a contradiction that the Act on the Protection of Trade Secrets contains a provision which is intended to rule out contractual provisions on secrecy, namely contracts that prevent employees from making public information on suspected offences punishable by imprisonment or other serious misconduct in the course of the employer's business ac-

7 See Fahlbeck, Reinhold, *The Duty of Loyalty – Employee Loyalty in Sweden*, in *Comparative Labor Law & Policy Journal*, Volume 20, No. 2, 1999, p. 297–319.

8 See § 38 of the 1915 Act on contract (Sw: Lagen om avtal och andra rättshandlingar på förmögenhetsrättens område, SFS 1915:218).

9 See AD 1994 nr 79.

tivities (§ 2, second paragraph). This provision can be viewed as a political compromise. The rest of the Act deals with the protection of trade secrets.

The Act protects trade secrets from unwarranted infringements. Trade secrets are any information concerning the business or industrial activities of the employer which the employer wants to keep secret and the divulgence of which would be likely to cause damage to him or her from the point of view of competition. Customer files are typical examples of trade secrets from case law. Even a discovery made by an employee in the course of his or her employment which is unknown to the employer can constitute a trade secret of the employer. The duty of secrecy inherent in every employment relationship in the private sector covers clearly all trade secrets but may cover also other information.

An employee who, wilfully or through negligence, exploits or reveals trade secrets of the employer of which he or she has been informed in the course of his or her employment under such circumstances that he or she understood, or ought to have understood, that he or she was not allowed to reveal it is liable to pay compensation to the employer (§ 7). If a former employee exploits or reveals such trade secrets after the termination of the employment relationship, he or she is only liable to pay compensation to the former employer if there are extraordinary reasons for it. A company, for instance a new employer, that in bad faith exploits the trade secrets may be liable to pay compensation to the former employer (§ 8). Compensation according to the Act on the Protection of Trade Secrets includes not only compensation for economic loss but also general damages for the infringement of the interest that the trade secret not be exploited or revealed without authorization (§ 9). If there are difficulties to provide evidence as to the damage incurred, the court may decide on the damages at its own discretion.

For acts committed during the employment relationship, including the period of notice, several different provisions on damages may be applicable to a breach of the duty of loyalty inherent in every employment relationship or explicit provisions on secrecy or non-competition. The general act on damages (Sw: Skadeståndslagen, SFS 1972:207) will be applicable in case of a breach of the duty of loyalty inherent in every employment relationship or explicit provisions in individual employment contracts on secrecy or non-competition. The act limits the employee's liability for damage resulting from acts committed in the course of the employment relationship to situations where there are extraordinary reasons. This limitation is, however, not applicable when an employee exploits trade secrets or competes outside the course of the employment relationship. The general act on damages does not provide for general damages in the situations now discussed, and consequently only economic loss can be compensated. If, however, there are explicit provisions on the duty of loyalty in an applicable collective agreement, the provisions on damages in the 1976 Act on Joint Regulation of Working Life (Sw: Lagen om medbestämmande i arbetslivet, SFS 1976:580) will instead be applicable. That Act provides for also general damages and it prescribes strict liability, i.e. it is not necessary to prove even negligence on the part of the employee.

Summary: Freedom of contract is not generally restricted with respect to the company's possibilities to prevent employees from quitting and thereby protecting the investment in the employment relationships. Provisions that in effect prescribe a certain binding-period for the employee seem in principle to be le-

gally valid, but the provisions, or the sanction for a breach of the provisions, must not be unreasonable. The same is the case with respect to non-competition provisions.

3 Winding up the Investment in Employment Relationships

Restrictions concerning the company's possibilities to terminate employment relationships provide a risk for the company. If the market situation changes or if the work that an employee performs is no longer needed or profitable for the company, it can be vital for the company to quickly terminate employment relationships. Labour-costs are often a major part of the company's total costs.

In Sweden, the employer must have a valid reason to terminate an open-ended employment contract and the employer must, in those cases relevant here, observe a period of notice.¹⁰ According to the legislation the length of the period of notice vary between one and six months depending on the length of service.¹¹ Collective or individual agreements can prescribe a longer period of notice, and for employees on maternal or paternal leave at the time of notice especially favourable rules may apply.

The valid reasons for terminating an open-ended employment contract can be divided into two categories, which follow different rules: i) dismissal for reasons related to an individual employee and ii) dismissal for economic or other reasons not related to an individual employee. If there in fact are economic reasons for the dismissal – i.e. a redundancy situation – then the dismissal follows the rules on such dismissals even if the employer also has reasons related to an individual employee for the dismissal of the employee being made redundant.¹²

The fact that an individual employment contract is not profitable but gives rise to a loss for the company is probably not in itself a valid reason for terminating that employment contract (for reasons related to an individual employee¹³), at least not if the employer is a bigger company. A reduction in performance due to old age or sickness, including alcoholism and mental illness, is for example normally not a valid reason for terminating the employment contract; the employment contract may not be terminated until it is entirely clear that the employee is permanently unable to perform work of any importance for the employer.¹⁴ There are, however, a couple of examples from case law where the courts have taken into consideration in the overall assessment the fact that

10 See Sigeman, Tore, *Employment Protection in Scandinavian Law*, in *Stability and Change in Nordic Labour Law – Legal Abbreviations*, Scandinavian Studies in Law, Volume 43, Stockholm 2002, p. 257–275.

11 See § 11 of the Employment Protection Act (Sw: Anställningsskyddslagen, SFS 1982:80).

12 See for example AD 2000 nr 31.

13 This case is classified as a dismissal for reasons related to an individual employee, although the reasons are of a purely economic nature, See AD 1994 nr 122 and AD 1995 nr 40.

14 See the Bill 1973:129 p. 126 f.

the employment contract gives rise to a loss for the company in order to determine whether there is a valid reason for termination or not.¹⁵

The validity of a dismissal for reasons related to an individual employee can be contested in a court of law by the employee (or his or her organisation). In such a case the employment relationship is in full force until the question of validity is finally settled by the court or otherwise. This means i.a. that the employer normally has to pay wages and other benefits to the dismissed employee during the court proceedings even if they extend beyond the prescribed period of notice (which they often do). The right to remain in employment if the validity of the dismissal is challenged does not apply if the employer has terminated the employment relationship by a summary dismissal (without observing a period of notice). The court may declare an illegal dismissal null and void thereby in a sense reinstating the employee. The employer, however, has in that case a possibility to dissolve the employment contract by paying the employee a lump sum of up to 32 times the monthly salary depending on the length of service.¹⁶

Termination of the employment contract for economic or other reasons not related to an individual employee is in Sweden called dismissal for shortage of work. The main rule here is that it is the employer's prerogative to decide if there is a shortage of work, i.e. a redundancy situation. The employer may for instance decide to make the work subject to outsourcing. The employer's decision to reduce the work-force can, as a rule, not be contested in a court of law. But before the employer is allowed to make that decision he or she must, at his or her own initiative, take up – and bring to an end – joint-regulation negotiations with the local trade unions at the workplace. There is no time limit for the duration of the negotiations, and if the trade union so requests the employer is obliged to negotiate a second time with the central (national) trade union before he or she is allowed to decide on collective redundancies. The employer must also in advance notify the Regional Labour Market Board of projected redundancies.

The employer is hence free to decide – after negotiations – if he or she should resort to collective dismissals, but he or she is, when he or she decides on collective dismissals, not free to choose whom to dismiss and whom to keep of his or her staff.¹⁷ According to the legislation a strict seniority-rule is as a matter of principle applied; the employer must retain the employees with the longest period of service and he or she is not allowed to choose the most effective or profitable employees. The employer's interest in having access to a competitive workforce after the reduction is respected by a rule to the effect that the remaining employees must have "sufficient qualifications" for the work to be carried out after the reduction, but this normally means only that the employees must be able to learn to perform the work adequately within a reasonable period of time. Small employers with up to ten employees may also irrespective of the senior-

15 See AD 1978 nr 13 and 161 and compare AD 1994 nr 122.

16 § 39 of the Employment Protection Act (Sw: Anställningsskyddslagen, SFS 1982:80).

17 See Sebardt, Gabriella, *Redundancy and the Swedish Model – Swedish Collective Agreements on Employment Security in a National and International Context*, Stockholm 2005, p. 47–66.

ity-rule keep two employees who the employer considers are of particular importance for the continuance of business. There is no severance pay due to employees made redundant, but they are as stated before entitled to a period of notice.

The rules on the selection of the employees to be made redundant can be overridden by a collective agreement, which means that the employer – or an organisation of employers – and a competent trade union can through collective agreement decide on other selective criteria or just decide which employees are to be dismissed in a particular redundancy situation. Such a collective agreement is often concluded in connection with the joint-regulation negotiations preceding the decision on collective dismissals.

Even if the employment contract has been terminated for economic reasons, or a contract of fixed duration has not been renewed due to shortage of work, the contract has some after-effects which must be taken into consideration. There is for employees with more than one year of service during a three year period a priority right to re-employment which is in effect until nine months after the end of the employment relationship. The employer is thus during that period not free to choose among available job applicants but has to re-employ former employees with sufficient qualifications for the job at hand according to the seniority-rule or other criteria laid down in advance by collective agreement. One prerequisite for the priority right to re-employment is that the employee has notified the employer that he or she invokes the priority right.

What has been said so far indicates that the company has limited possibilities to quickly terminate open-ended employment contracts that are not profitable for the company and that the entry into such an employment contract therefore constitutes a certain economic risk for the company that is difficult to calculate beforehand. One way of reducing the risk is to test the worker before entering into an open-ended employment contract. Many measures aimed at promoting employment in the field of state labour market policies have provided possibilities for the company to test workers, often at a low initial cost for the company. Temporary employment contracts (of a fixed duration) can, in those cases such employment contracts are allowed, also provide a way for the company to find out the qualifications of workers. According to the Swedish legislation an employment contract can also be concluded with an initial probation period not exceeding six months.¹⁸ Furthermore, the company can use a temporary employment agency to try out the performance of workers in the company's activities.¹⁹ The agency may not prevent an employee from taking up employment with a customer.²⁰

18 § 6 of the Employment Protection Act (Sw: Anställningsskyddslagen, SFS 1982:80).

19 See Eklund, Ronnie, *Temporary Employment Agencies in the Nordic Countries*, in *Stability and Change in Nordic Labour Law – Legal Abbreviations*, Scandinavian Studies in Law, Volume 43, Stockholm 2002, p. 311–333, especially at p. 316, and Eklund, Ronnie, *Public Employment Exchange and the Use of Temporary Employment Agencies in the Nordic Countries*, in *Recht in Europa – Festschrift für Hilmar Fenge zum 65. Geburtstag*, Hamburg 1996, p. 183–205.

20 § 4 of the 1993 Act on Private Employment Agencies and the Hiring Out of Manpower (Sw: Lagen om privat arbetsförmedling och uthyrning av arbetskraft, SFS 1993:440).

A thorough recruitment procedure may also reduce the risk for the company. The job applicant is not required to disclose at his or her own initiative negative information about him or her which is of importance for the employment decision by the company. Non-disclosure of such information will not normally lead to the invalidity of the employment contract²¹, and the employer has instead to ask the applicant for any information considered important. If the applicant in response to such explicit questions provides false or incomplete information, a subsequent employment contract will probably at the request of the employer be declared invalid.

There are today few restrictions on what questions the employer may ask and what information the employer may collect about job applicants. The antidiscrimination legislation prevents for instance the employer from asking questions in a way that is harassing on certain grounds.²² Another example is a recent ban on asking for, or using, genetic information in employment situations.²³ Legislation on the protection of the personal integrity in working life has been considered in Sweden for a while. A recent inquiry will make a new review of the issues involved and consider legislation on restrictions regarding drug testing or medical testing of job applicants and regarding the practice of requiring excerpts from criminal records or social insurance records.²⁴

Another way for the company of handling the risk that is involved with open-ended employment contracts is not to use such employment contracts and instead seek other ways of getting the job done. Temporary employment contracts can, when they are allowed, be used. Another possibility is to contract out specific tasks to a subcontractor. The company can also hire personnel from another company.²⁵ The trade union has, subject to certain conditions, a right to veto the employer's contemplated decision to use non-employed labour for his or hers activities.²⁶ An organisational trend seems to have been for companies to concentrate on their core activities and buy peripheral services needed from companies specialised on those services. Furthermore, some labour market policy state programmes can in reality provide a possibility for the company to use labour without entering into an employment contract with full employment protection.

From what has been said follows that there are several restrictions regarding the termination of open-ended employment relationships which pose a risk for the company. If it is difficult and expensive for the company to terminate open-ended employment relationships, the possibilities to change the contents of those

21 See AD 2000 nr 81.

22 Compare AD 2007 nr 16.

23 Act on Genetic Integrity (Sw: Lagen om genetisk integritet, SFS 2006:351).

24 See the terms of reference Dir. 2006:55.

25 See the 1993 Act on Private Employment Agencies and the Hiring Out of Manpower (Sw: Lagen om privat arbetsförmedling och uthyrning av arbetskraft, SFS 1993:440) and the references in footnote 19.

26 See §§ 38–40 of the 1976 Act on Joint Regulation of Working Life (Sw: Lagen om medbestämmande i arbetslivet, SFS 1976:580).

employment relationships can be of importance for the company in order to manage the risk that is involved.

4 Changing the Content of the Employment Relationship

If the company has economic difficulties, reducing the wages or increasing the working-hours (but not the salary) can be an alternative to the termination of employment relationships. In Sweden, the employer is not obliged to consider such measures before resorting to collective dismissals. And in most cases collective agreements prevent the employer from bringing about such changes even if he or she gets consent from the employees concerned. But sometimes the employer can withdraw some additional benefits that are not protected by collective agreement and have not been agreed with the individual employees. If the benefit, or the salary, is not protected by collective agreement but constitutes only a part of the individual employment contract, the employer has technically to terminate the contract and offer a new contract without the benefit. There seems in practice to be limited possibilities for the company to unilaterally influence the cost per hour for employees with open-ended employment contracts.²⁷

Normally the company has greater opportunities to unilaterally change other aspects of the employment relationship. One of the characteristics of the employment relationship is that the employee is subordinate to the employer. The main principle is that it is up to the employer to unilaterally decide what work is to be performed where, how and when.²⁸ The right for the employer can be limited by provisions in the individual employment contract regarding, for example, where work is to be performed. A white-collar worker is often regarded to have a certain position according to the employment contract, and he or she is then, as a main rule, not obliged to perform tasks that are not in accordance with that position. Restrictions can also be laid down by collective agreements. An example is the collective agreement for the municipal sector prescribing that the employer must have “manifest reasons” to permanently transfer an employee.

The employee is not obliged to perform work that falls outside the scope of the relevant collective agreement. But the scope of a collective agreement is normally very wide and encompasses all tasks for the employer that are naturally connected with the tasks that the agreement primarily is aimed at regulating, provided that the employee has the occupational skills to perform the task.²⁹ Legislation regarding, for example, working time and working environment pro-

27 See Rönmar, Mia, *Mechanisms for Establishing and Changing Terms and Conditions of Employment in Sweden*, in *The Mechanism for Establishing and Changing Terms and Conditions of Employment/The Scope of Labor Law and the Notion of Employees – 2004 JILPT Comparative Labor Law Seminar*, The Japan Institute for Labour Policy and Training, JILPT Report No. 1, 2004, p. 95–107.

28 See Rönmar, Mia, *The Managerial Prerogative and the Employee’s Obligation to Work: Comparative Perspectives on Functional Flexibility*, in *Industrial Law Journal*, Volume 30, No 1, 2006, p. 56–74.

29 See , for example, AD 1929 nr 29. This principle applies to collective agreements for white-collar workers as well, See AD 1995 nr 31.

vides the scope for the employer's right to unilaterally decide on the content of the employment relationship. Also principles developed through case law can restrict the employer's prerogative. The employer must according to case law have a valid reason to permanently transfer an employee for reasons related to the individual employee, if the transfer has far-reaching consequences for the employee.³⁰

In disputes regarding the extent of an employee's contractual obligation to perform work the employee's trade union has what is called a priority right of interpretation. Before the court decides on the dispute the employee is, temporarily, relieved from his or her obligation to obey the employer if he or she instead follows the interpretation advocated by his or her trade union. This means that the employer normally can not get the disputed work done without going to court.³¹

Furthermore, the employer's execution of his or her right to unilaterally decide on the working conditions is generally restricted by legislation and collective agreements on joint regulation, i.e. the right for trade unions to influence the employer's decision-making process. An employer, who is (or at least usually is) bound by a collective agreement, must at his or her own initiative take up and bring to an end joint regulation negotiations with the local trade union at the workplace before he or she is allowed to decide on a more important change of his or her activities or of the working or employment conditions for a union member. The joint regulation procedure can make it difficult for the company to take necessary and speedy decisions. But it can on the other hand also bring about a better acceptance and understanding among the employees for the decisions and changes and thereby promote necessary changes. A survey in Sweden shows that joint regulation in general is accepted and appreciated by the companies and the shop stewards as well.³²

30 See , for example, AD 1978 nr 89.

31 The rule on the trade union's priority right of interpretation is laid down by § 34 of the Act on the Joint Regulation of Working Life (Sw: Lagen om medbestämmande i arbetslivet, SFS 1976:580).

32 See Sören Wibe, *Medbestämmandelagen och samhällsekonomin*, appendix 1 to the report Arbetsrättsliga utredningar, SOU 1994:141.