

# The Personal Scope of Labour Law and the Notion of Employee in Sweden

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## 1. Introduction

The personal scope of Swedish labour law is defined by use of *the notion of employee*. While employees are covered by labour law and the protection it affords, independent contractors and self-employed workers are, in principle, covered (only) by the provisions of general civil law.<sup>1</sup> In short, an employee can be described as a person who, on the basis of a contract, personally performs work for someone else, under his or her direction, in return for remuneration.

The outline of the paper is as follows. Section 2 supplies an account of the notion of employee in Swedish labour law, and its content and extent. Section 3 deals with the notions of employee in other areas of law. Section 4 discusses the existence of categories of ‘quasi-employees,’ as a way of extending the personal scope of Swedish labour law. Finally, in section 5, I relate to the ongoing debate on the need for redefining the personal scope of labour law, *inter alia* in the light of the flexibilisation of working life.

## 2. The notion of employee in labour law

The function of the notion of employee is to demarcate the personal scope of Swedish labour law. The so-called *civil law notion of employee* (*det civilrättsliga arbetstagarbegreppet*) has the same meaning in all areas of labour law, as in general civil law.<sup>2</sup> The notion of employee is not statutorily defined. Instead its content and meaning have been described and developed by the courts in case law and the legislator in preparatory works.<sup>3</sup> The development during the 20<sup>th</sup> century has gone towards a uniform and far-reaching notion of employee. Swedish labour law in general is characterised by its uniform and extensive personal scope, and a traditionally high degree of equal treatment of different categories of employees, for instance of blue- and white collar workers and public and private sector employees. During the 20<sup>th</sup> century the extent of the notion of employee has continuously widened, aiming at providing additional groups of workers with the ‘safety net’ afforded by labour law and labour law legislation.<sup>4</sup>

The notion of employee is a mandatory concept. In order to prevent the contract parties from circumventing labour law legislation and depriving the employee of protection, the courts are not bound by the description or definition of the relationship given by the parties themselves, for example, in a written contract. The court makes an independent assessment of the legal nature of the relationship on the basis of the actual situation at hand. However, the contract parties are, in principle, free to organise their relationship, and the ways in which the work will be carried out, in practical terms. A court may then find that these practical arrangements, and the overall situation of the worker, best fit the description of an ordinary self-employed worker.<sup>5</sup>

In order to determine whether or not a specific person is an employee the court makes an

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<sup>1</sup> The *notion of employee*, which is the main focus of this paper, is a well-known and relatively uniform legal concept. By contrast, the term *self-employed worker* is a broader, multi-faceted and not primarily legal notion, encompassing persons who work for a living without being employees. *Independent contractors* can be described as individuals living off selling their labour to private and public employers, while a *worker* is anyone who performs remunerated work personally. In this paper I will mainly use the term self-employed worker, when discussing persons, other than employees, performing work. Cf. Engblom 2003, p. 13 and Ds 2002:56, pp. 80 ff.

<sup>2</sup> For a classical and comprehensive study of the notion of employee see Adlercreutz 1964.

<sup>3</sup> See Adlercreutz 1964, Schmidt *et al.* 1994, pp. 59 ff., Källström 1999 and SOU 1975:1, pp. 721 ff.

<sup>4</sup> See Ds 2002:56, p. 82 and Engblom 2003, pp. 141 ff.

<sup>5</sup> See Ds 2002:56, pp. 112 f., Lunning and Toijer 2002, pp. 22 f. and Labour Court judgement AD 1990 No. 116.

overall assessment of the situation, taking all the relevant factors of the individual case into consideration. The multi-factor test applied by the courts focuses on the individual person in question, and on whether the overall situation of this particular person is similar to that of an ordinary employee or an ordinary self-employed worker. An employment relationship must be based on a contract, and only natural persons can be employees. If the principal/employer has concluded a contract with a juridical person it is, however, possible for the courts to 'see through' this arrangement and find the individual actually performing the work. According to Swedish law employment contracts can be entered into freely, and without any formal requirements. Employment contracts concluded orally or through the actions of the parties are therefore as valid as written employment contracts.<sup>6,7</sup>

The courts take the following factors into consideration when making their overall assessment: (1) a personal duty to perform work according to the contract, (2) the actual personal performance of work, (3) no predetermined work tasks, (4) a lasting relationship between the parties, (5) the worker is prevented from performing similar work of any significance for someone else, (6) the worker is subject to the orders and control of the principal/employer concerning the content, time and place of work, (7) the worker is supposed to use machinery, tools and raw materials provided by the principal/employer, (8) the worker is compensated for his expenses, (9) the remuneration is paid, at least in part, as a guaranteed salary,<sup>8</sup> and (10) the economic and social situation of the worker is equal to that of an ordinary employee.<sup>9</sup>

The above-mentioned factors all indicate that the person in question is an employee. However, no single factor is considered necessary or sufficient for the existence of an employment contract.<sup>10</sup> By the courts explicitly taking the person's economic and social situation, the 'social criterion,' into consideration a worker's dependence and insecure position can grant him or her employee status. In three similar cases concerning a lease, common within the hairdressing business, whereby a hairdresser rents a work space at a hairdressing salon owned by another hairdresser, the Labour Court applied the 'social criterion.' The Labour Court found in favour of an employment relationship in one case where the hairdresser was young and inexperienced and had previously been dismissed when working as an apprentice of the owner of the hairdressing salon, and it also found in favour of self-employment in two cases where the hairdressers were experienced, had built their own stock of clients and had established a reputation.<sup>11</sup>

Modifications of the 'general' notion of employee, resulting from established custom in a specific branch of business or regulation in collective agreements, are respected by the Labour Court, and often prove decisive for the overall assessment of a person's status.<sup>12</sup> This is understandable given the 'Swedish Model' of industrial relations, characterised by a high degree of autonomy of the social partners and collective bargaining as the main instrument for regulation of employment conditions and employment relationships.

The Labour Court is sensitive to attempts trying to circumvent labour law legislation, and will many times find in favour of an employment relationship if the person in question has gone from being an employee of the employer to an 'alleged' self-employed worker.<sup>13</sup>

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<sup>6</sup> Cf. Ds 2002:56, pp. 110 ff., Engblom 2003, p. 149 and Källström 1999.

<sup>7</sup> As a result of the so-called 'Cinderella' Directive (91/533/EEC) an employer is, however, obliged to notify the employee of the essential aspects of the contract or employment relationship, cf. section 6a of the 1982 Employment Protection Act.

<sup>8</sup> The payment of remuneration is not a formal or necessary requirement for the existence of an employment relationship. However, the fact that the work is unremunerated strongly indicates that the relationship in question is not an employment relationship, cf. Ds 2002:56, p. 111. Against this background there is also no particular discussion regarding persons working for non-profit organisations or unpaid workers.

<sup>9</sup> Cf. SOU 1975:1, pp. 721 ff., SOU 1993:32, pp. 216 ff., SOU 1994:141, pp. 74 ff. and Källström 1999, p. 167.

<sup>10</sup> Cf. Engblom 2003, p. 149. Cf. also Labour Court judgements AD 1978 No. 7, AD 1982 No. 134, AD 1990 No. 116, AD 1998 No. 138 and AD 2002 No. 40.

<sup>11</sup> Cf. Labour Court judgements AD 1978 No. 7, AD 1979 No. 12 and AD 1982:134 and Källström 1999, pp. 181 f.

<sup>12</sup> Cf. Engblom 2003, pp. 154 f. and Ds 2002:56, pp. 120 ff.

<sup>13</sup> Cf. Ds 2002:56, pp. 118 ff.

In a recent comparative study of Sweden, the United Kingdom, France and the United States Engblom concludes that the Swedish notion of employee is the most far-reaching. Furthermore, in Sweden less emphasis is put on the subordination of the worker, traditionally a fundamental criterion for the existence of an employment relationship.<sup>14</sup> The far-reaching notion of employee in Swedish labour law, and the multi-factor test applied by the courts, has proved to provide adaptability and flexibility with regard to changing labour market conditions and organisational changes.<sup>15</sup>

Nowadays only a few cases from the Labour Court involve questions regarding the notion of employee and the distinction between an employee and a self-employed worker.<sup>16</sup> There is therefore no need for specific mechanisms to avoid such disputes. This does not mean, however, that these questions are entirely undisputed. Disputes may exist, but be resolved before they reach the courts. The Swedish Labour Court (*Arbetsdomstolen*) was established in 1928, originally aiming at resolving disputes relating to the collective bargaining system and promoting industrial peace. Nowadays the jurisdiction of the Labour Court is the widest possible, and encompasses all kinds of labour disputes concerning the application of labour law legislation or collective agreements. The Labour Court is a tripartite body comprised of judges with judicial background and of members representing both sides of the labour market. The representatives of the social partners constitute the majority of the court. The Labour Court acts as the Supreme Court in labour disputes. It is also the first instance in all proceedings filed by an employers' organisation or a trade union. That is to say, in the absolute majority of cases the Labour Court serves as the first and only instance, leaving no room for an appeal.<sup>17 18</sup> The Labour Court only tries about 200 cases each year, for which reason only a small proportion of all Swedish labour disputes reaches its courtroom. The main reason for this is that in order for the Labour Court to try a case all possibilities to solve the dispute by way of negotiation must have been tried and ruled out. Thus, negotiations both at local and national level have to have been conducted, and failed in order for the case to be admitted to the Labour Court. As a result many disputes – probably also some disputes concerning the distinction between an employee and a self-employed worker – are settled out of court.

### 3. The notion of employee in other areas of law

Traditionally the courts applied two clearly different notions of employee in civil and social law respectively. While the civil law notion of employee was narrow and contract-based, the social law notion of employee was far-reaching and encompassed social factors. In 1949 in a landmark decision, the Supreme Court reshaped the content of the civil law notion of employee, putting more emphasis on the economic and social situation of the worker (see section 2 above).<sup>19</sup> Since then the legislator has intended the notion of employee to be uniform and coherent in all areas of law. Despite this, however, different notions of employee have developed in civil and labour law on the one hand, and in social security law and tax law on the other.<sup>20</sup>

Today the existence of (at least somewhat) different notions of employee in labour law, social security law and tax law is generally acknowledged.<sup>21</sup> Källström argues, however, that case law of recent years indicates an increased coordination between labour law, social security law and tax law regarding the notion of employee.<sup>22</sup>

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<sup>14</sup> Cf. Engblom 2003, pp. 206 ff.

<sup>15</sup> Cf. Ds 2002:56, p. 131.

<sup>16</sup> Since 1998, in principle, only three or four cases have concerned questions regarding the notion of employee.

<sup>17</sup> When the applicant is not a member of a trade union, or his or her organisation has chosen not to represent their member, the case is heard, in the first instance, in a general district court with ordinary judges as in other civil cases. The Labour Court then serves as the final court of appeal. The same rules apply to employers who are not bound by a collective agreement.

<sup>18</sup> The procedure in labour disputes is regulated by the 1974 Act on Litigation in Labour Disputes.

<sup>19</sup> Supreme Court judgement NJA 1949 p. 768. Cf. Adlercreutz 1964.

<sup>20</sup> Cf. Källström 1999, pp. 161 ff.

<sup>21</sup> Cf. Ds 2002:56, p. 124.

<sup>22</sup> Cf. Källström 1999, p. 163.

In social security law and tax law the notion of employee is used primarily to determine whether a particular person is an employee or a self-employed worker, and whether the employer or the self-employed worker him- or herself is liable for paying tax and social contributions. As a result the authorities apply a rather standardised assessment. However, the importance of the notion of employee is diminishing in these areas of law. Nowadays the distinction between an employee and a self-employed worker is often made with reference to the person holding (or not) a so-called Business Tax Certificate (*F-skattsedel*), preliminary stating that the person in question fulfils the requirements for conducting operations as a businessman, in other words being a self-employed worker.<sup>23</sup>

EC law contains a separate and autonomous notion of employee. This notion of employee ('worker' in Article 39 of the EC Treaty) has been developed for the purpose of promoting and ensuring freedom of movement for workers. The notion of employee in EC law is far-reaching. The European Court of Justice (ECJ) has declared that it has a Community meaning, and must be interpreted broadly. It may not be interpreted differently, and restrictively, according to the law of each Member State.<sup>24</sup> In *Lawrie-Blum*<sup>25</sup> the ECJ stated that: '(t)hat concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. The ECJ has, for example, irrespective of the notion of employee in the national law in question, found that on-call-workers and trainees have been employees.<sup>26</sup>

EC law in the areas of non-discrimination and health and safety also applies to large groups of workers. Non-discrimination law, in principle, applies to both employees and self-employed workers, while health and safety law often applies to more than merely employees. In other areas of EC labour law, for example, regarding information and consultation, collective dismissals and transfers of undertakings, the point of departure is the different national interpretations of the notion of employee.<sup>27</sup>

#### 4. 'Quasi-employees' and extensions of the personal scope of labour law

The personal scope of labour law can also be extended to different categories of 'quasi-employees.'<sup>28</sup> The only such category in Swedish labour law is the so-called *dependent contractors* (*jämställda/beroende uppdragstagare*). This category of 'quasi-employees' was introduced in collective labour law in the 1940s. Today section 1 paragraph 2 of the 1976 Co-determination Act states that: 'the term "employee" as used in this Act shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer.' The 1976 Co-determination Act is the legislative centre-piece of collective labour law in Sweden and encompasses rules regarding *inter alia* freedom of association, collective agreements, rights to information, negotiation and co-determination and industrial action, and in all these respects dependent contractors are afforded the same rights (and duties) as employees.<sup>29</sup>

However, as the extent of the notion of employee has widened, the importance of the

<sup>23</sup> Cf. Källström 1999, p. 163, Ds 2002:56, pp. 78 ff. and pp. 124 f. and Engblom 2003, p. 156.

<sup>24</sup> Cf. Nyström 2002, pp. 151 ff., Ds 2002:56, pp. 107 ff. and C-53/81 Levin v. Secretary of State for Justice [1982] ECR 1035.

<sup>25</sup> C-66/85 Lawrie-Blum v. Land Baden-Württemberg [1986] ECR 2121.

<sup>26</sup> Cf. Nielsen 2000, pp. 251 ff., Nyström 2002, pp. 151 ff. and Ds 2002:56, pp. 107 ff.

<sup>27</sup> Cf. Ds 2002:56, pp. 108 f. and Nyström 2002, pp. 151 ff.

<sup>28</sup> Compare, for example, the concepts *worker* in the United Kingdom and *arbeitnehmerähnliche Personen* in Germany, cf. Engblom 2003, pp. 226 ff., Ds 2002:56, pp. 95 ff. and the contributions by Barnard and Wank in this publication. Cf. also Engblom 2003 for a general discussion of different techniques for extending the personal scope of labour law.

<sup>29</sup> Cf. Edström 2002.

category dependent contractor has diminished. Most of the workers that the legislator originally intended to protect are nowadays covered by the notion of employee and labour law in general. Many argue therefore that the category of dependent contractors lacks practical relevance, or even is obsolete. Others suggest that the category of dependent contractors can be interpreted in new and extensive ways, in order to extend the personal scope of collective labour law to new workers in need of protection, for example, to persons working in the franchising business.<sup>30</sup>

The personal scope of Swedish labour law is also in some other respects extended to self-employed workers. The personal scope of the 1977 Work Environment Act, safeguarding the health and safety of employees, is far-reaching, and in fact encompasses dependent contractors described above, and in some cases also other self-employed workers.<sup>31</sup> Furthermore, self-employed workers increasingly become members of trade unions. Some professional unions, organising, for example, dentists and architects have high rates of self-employed workers among their members, and some white-collar unions, for example, in the engineering sector, witness a rapid increase in the number of self-employed members.<sup>32</sup>

The Swedish social security system has (like the labour law system), a very homogenous and uniform character, and covers not only all categories of employees but also self-employed workers. Self-employed workers can therefore be recipients of unemployment benefits as well as receive compensation for work injuries (cf. the 1976 Work Injury Insurance Act and the 1997 Unemployment Benefit Act).<sup>33</sup>

## 5. Redefining the personal scope of labour law?

The ongoing flexibilisation of working life is often described as an increase in adaptability and allocative flexibility, and as a shift from traditional to atypical employment.<sup>34</sup> As important background reasons for this flexibilisation process the increasing globalisation of economy and commerce, new technology, international competition and the emergence of the Knowledge and Information Society are frequently mentioned.<sup>35</sup> Atkinson's model of *the flexible firm* is often referred to in this context, as are the concepts numerical, functional and financial flexibility. Numerical flexibility relates to both the form and duration of the employment contract and to working-time arrangements, and it primarily serves the purpose of achieving greater flexibility in the numbers of workers employed. In focus are, for example, self-employment, fixed-term and part-time work. According to Atkinson employers use 'distancing strategies' in relation to external groups of workers. Work traditionally performed by employees is replaced by work performed by self-employed workers or temporary agency workers.<sup>36</sup> Functional flexibility is a matter of adaptability and versatility within permanent relationships, and it primarily affects the so-called core group of workers. The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. In order to achieve functional flexibility, the employer can widen job descriptions and the obligation to work in general, and invest in training and education. Financial flexibility, finally, is concerned with making wages more adaptable to circumstances such as the profit of the business or the employee's knowledge and efficiency.<sup>37</sup>

Since the 1990s the Swedish labour market has witnessed an increase in atypical employment and working arrangements and numerical flexibility. The number of fixed-term

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<sup>30</sup> Cf. Bergqvist, Lunning and Toijer 1997, pp. 45 ff., Engblom 2003, p. 143 and Schmidt et al., 1994, p. 70.

<sup>31</sup> Cf. Engblom 2003, pp. 265 ff.

<sup>32</sup> Cf. Engblom 2003, p. 32.

<sup>33</sup> Cf. Christensen 2000.

<sup>34</sup> Traditional employment can be described as wage labour in a secure full-time permanent employment with one employer, at a workplace which belongs to this employer, and with working conditions typically decided collectively within certain legal frames, see Numhauser-Henning 1993, pp. 255 f.

<sup>35</sup> See Numhauser-Henning 1993 and van den Berg, Furåker and Johansson 1997.

<sup>36</sup> Collins describes how this *vertical disintegration of production* places many workers outside the personal scope of labour law. He concludes that a mandatory imposition of employment rights by reference to social and economic criteria, reducing as far as possible the influence of the employer's choice of organisational form, is required, see Collins 1990.

<sup>37</sup> See Atkinson 1984, Atkinson and Meager 1986 and Numhauser-Henning 1993.

workers increased from approximately 300 000 in 1989 to 500 000 in 1999. Temporary agency work increased five-fold during the 1990s (though only accounting for about 1 percent of total employment in 1999). In 2001 self-employment accounted for about 6 percent of total employment. In line with the general trend in Europe, however, there was no increase in self-employment, instead the development represented a qualitative change with self-employment decreasing in the agricultural sector and increasing in the service sector.<sup>38 39</sup>

These developments have given rise to a debate about the need for redefining the personal scope of labour law. In the wake of the increased importance of self-employment many argue that the personal scope of labour law should be extended also to self-employed workers, who perform work personally and are more or less economically dependent on a single principal/employer.<sup>40</sup>

In the Swedish context the questions raised above have for the moment been answered. The National Institute for Working Life was commissioned by the government to, *inter alia* against the background of the ongoing flexibilisation of working life and the increased importance of self-employment, examine the appropriateness of the current civil law notion of employee and the personal scope of labour law. The examination focused on the predictability and transparency of the legal rules and principles in question, the relevance of the criteria used by the courts in their overall assessment, and on whether certain groups of workers in need of protection fell outside the scope of labour law. In their final report presented in the autumn of 2002 (Ds 2002:56 *Hållfast arbetsrätt – för ett föränderligt arbetsliv*) they found, in all accounts, in favour of maintaining status quo. They found no need for statutorily defining (and thereby perhaps changing the meaning of) the notion of employee. Instead the courts should, in their overall assessment and application of the multi-factor test in individual cases, be able to adapt the notion of employee to ongoing changes in the labour market and the work force. The courts were, however, recommended to put greater emphasis on the economic dependence of the worker. Furthermore, there was no need to extend the personal scope of labour law to new categories of ‘quasi-employees.’<sup>41 42</sup>

Inevitably, though, the growth of flexible employment and working arrangements challenges the traditional notion of employee. The dynamics of EC law may contribute to the future reshaping of Swedish labour law in these respects. The focus in EC law on non-discrimination and equal treatment of different categories of employees (cf. the Part-time and Fixed-term Directives) implies that characteristics of the traditional employment relationship can, and should, no longer be determining factors in the courts’ overall assessment of whether or not an employment relationship actually exists. Furthermore, the wide extent of the notion of employee in EC law and the emphasis on fundamental rights for all (workers) and non-discrimination may eventually result in an undermining of the notion of employee as defining the personal scope of labour law.<sup>43</sup>

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<sup>38</sup> Cf. Ds 2002:56, pp. 202 ff., Supiot *et al.* 2001, pp. 4 f. and Storrie 2002, pp. 27 ff.

<sup>39</sup> Taking also the high proportion of part-time work in Sweden into account one may even question the ‘hegemony’ and *typical* character of traditional employment.

<sup>40</sup> Cf. Supiot *et al.* 2001, Davies and Freedland 2000, Engblom 2003 and Deakin 2001.

<sup>41</sup> Cf. Ds 2002:56, pp. 75 ff.

<sup>42</sup> In their reactions to the government report the social partners and other labour law-actors, in principle, agreed with these conclusions.

<sup>43</sup> See Nielsen 2002.

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