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Family Ties in Swedish Employment Law

Catharina CALLEMAN*

Members of an employer's family are exempted from the Swedish Employment Protection Act. This exception, which may be seen in the light of the ban on discrimination on the grounds of family status of EC law, strengthens the prerogative of the employer. It may have the consequence that the working party has no employment contract, pay, or other benefits and also no union membership or other connection to the labour market. It also typically increases the dependence of an employer's spouse, counteracting the aim of mutual autonomy between spouses in Swedish family law. This dependence in turn may acquire a new meaning in a context of an international labour market, a growing income gap, and an increasing dependence on the family for survival. This paper explores these contradictions, posing questions such as the following: How has this exception changed with the development of society? How has it historically been justified and which societal values does it mirror? How has the personal scope of the exception been defined and what effects does the exclusion have today for family members, both legally and practically?

1. INTRODUCTION

Protecting the individual's right to private life and family from intrusion and intervention by the state is a crucial objective of the legal order in Sweden as in other countries.¹ The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Swedish Instrument of Government aim at preventing active intervention by the state. However, the protection of family life can also imply that family is exempted from certain legislation, or that the laws are applied differently in cases concerning the inner life of the family. One example within Swedish employment law is the exception to the statutory protections offered as to work performed in the employer's home or by members of the employer's family.

This paper focuses on this much-ignored exception from employment legislation of members of the employer's family. This exception today is almost² exclusively with respect to the provisions of the Employment Protection Act (1982, 80) but can still be viewed as having great significance at a time when entrepreneurship is increasing and small enterprises amount to several hundred thousand.

* Associate Professor, LLD, Department of Law, Umeå University, 901 87 Umeå, Sweden. Email: <catharina.calleman@jus.umu.se>.

¹ This protection may be traced in the legislation and case law in many legal areas and is explicitly stated in a number of international conventions, including Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Family and private life are also protected in Art. 12 of the United Nations Universal Declaration of Human Rights, Art. 17 of the United Nations International Covenant on civil and political rights, and Arts 5 and 16 of the United Nations Convention on the Right of the Child.

² There are also exceptions for family members in the Domestic Work Act (1970, 943), the Work Environment Ordinance (1977, 1166), and the Ordinance on Working Time (1982, 901).

At the ratification by Sweden in 1997 of the revised Social Charter of the European Council, it was considered that Article 24 on protection against dismissal without just cause could not be signed, as the Charter requires the employment protection to apply to all workers with the exception of fixed-term employed and persons employed on probation. Since Article 1 of the Swedish Employment Protection Act exempts various categories of workers, the above-mentioned article could not be ratified.

The exception from employment law highlights the contradictions between (1) the principle of protecting the weaker party as found in both employment and family law; (2) the mutual autonomy of spouses, an aim of Swedish family law; and (3) the prerogative of the employer in employment law. It strengthens the prerogative of the employer at the expense of the employee, and it also typically increases the dependence of an employer's spouse. In this paper, questions are posed such as the following: How has the exception changed with the development of society? How has it been justified and which societal values does it mirror? Which underlying values are expressed in the case law on the subject? How has the personal scope of the exception been defined and what effects does the exclusion have today with respect to family members, legally and practically? The analysis here is focused on Swedish law, and the materials are legislation, preparatory works, and case law, primarily from the Labour Court.

2. HISTORICAL DEVELOPMENT OF THE EXCLUSION

During the early period of Swedish industrialization, most production was carried out within agriculture and the family household. Wages of family members as well as servants consisted mostly of food and lodging, and in addition, they could receive clothing and semi-manufactured articles from the farm.³

Work and family life formed an entity, factually as well as legally. The regulation of labour performed in agriculture and by servants – the *Legostadgan*⁴ – was part of family law. Until 1920, a married woman was under the control and guardianship of her husband.⁵ He had the right to demand that she devote herself to the care of the family and home, and she could not dispose of her own labour without his consent. In factories and in agriculture, the husband usually entered into employment contracts on behalf of the whole family and the wages were paid to him.⁶

The *Legostadgan* contained rules concerning both the relationship between the master and servants and the relationship between the master and his children and foster children. Under the heading, 'On indentured servants' was a provision that children under the age of 21 were not allowed to engage in service for anybody else as long as their parents wanted their services. Rules also existed for situations in which a master

³ SOU 1938, 47, Gift kvinnas förvärvsarbete (Government Commission 1938, 47, Married Women's Paid Work), 65.

⁴ *Legostadgan* (1833, 43), the Act on Indentured Servants.

⁵ According to the National Code of 1734.

⁶ SOU 1938, 47, Gift kvinnas förvärvsarbete (Government Commission 1938, 47, Married Women's Paid Work), 74.

had orphans or poor children to foster, feed, and clothe in return for a certain number of years of service.⁷

During the twentieth century, the right of the master/employer to decide over working conditions was successively limited by protective legislation on occupational safety, working hours, and leave in the form of vacation. The principle of protecting the weaker party was consequently strengthened at the cost of the prerogative of the employer. Production was gradually separated from households, and employment law was separated from family law. However, the work of family members was excluded from employment legislation.

2.1. THE REASONS GIVEN FOR THE EXCLUSION

The first general protective legislation in Sweden was the Occupational Safety Act introduced in 1912.⁸ The committee drafting the Act gave no lengthy reasons for the exception as to family members. It was of the opinion that limiting child labour and introducing inspection in an employer's home would result in coercion and intrusion into the private sphere of the family. It was also of the view that feelings of belonging and affection within a family normally give rise to the same degree of protection as proposed in the law. These feelings were assumed to serve as a guarantee against abuse.⁹ In later preparatory works regarding employment legislation, reference was simply made to the 1912 Act.¹⁰ The exception appears to have relied on a value so accepted that it did not have to be expressed in words or explained.

The argument against intrusion in the home and family life has been repeatedly cited, particularly concerning legislation implying control and inspection, in other words, regulations on working time and occupational safety. In discussions concerning new legislation on occupational safety in 1949, LO – the national trade union – was of the opinion that legislation should be extended to family members, finding it unlikely that occasional and short-time inspections would endanger the peace of the home. The exception was kept, however, with the justification that an extension of the legislation to family members would imply intrusion in the home.¹¹ Much later, when self-employment (which includes the self-employed person's family) was excluded from most of the provisions of the Work Environment Act (1977, 1160), the central argument was to avoid regulation that could be considered undue interference in personal privacy.¹²

Another argument for the exception of members of the employer's family is that family ties per se constitute protection, negating the need for the protective provisions of law. In this way, family businesses are construed as good workplaces, with the persons

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⁷ Sections 18–20 of the *Legostadgan*.

⁸ The Occupational Safety Act (1912, 206).

⁹ Report given on the 9 Dec. 1909 by the commission on occupational safety, 60.

¹⁰ See, e.g., Government Bill 1973, 129, 195, SOU 1993, 32, 254 and 748.

¹¹ Government Bill 1948, 298, with a proposition for an Act on Occupational Safety, 61 and 71.

¹² Government Bill 1976/77, 149, with a proposition for an Act on Work Environment, 261 et seq.

there having united interests. This argument was repeated in the discussions in the 1930s concerning legislation on working time. It was emphasized that relationships within a family are shaped according to needs other than those deciding the relationship between an employer and workers, and therefore, family ties include a guarantee against abuse in the area of working time.¹³ During this same period, a different commission gave the opinion that housewives, and particularly housewives in agriculture, were overworked. This was considered especially compelling at a time when working hours were regulated and shortened in all other professions.¹⁴ In the same years, the Commission on Vacation was of the opinion that the protection of society did not necessitate providing family members with rest and recreation.¹⁵ Twenty years later, the same argument was given, but the family tie was then seen as a guarantee 'with few exceptions'.¹⁶ Exceptions to *bonus pater familias* were hinted at but never discussed.

An important part of the justification for the exception of family members was the separation of 'real employment relations' from other relations. In discussions on the first Act on Vacation, it was asserted that employed close relatives were usually not really employed. The case was rather that the family conducted a business together. In the same spirit, the commission on vacation was eager to avoid conflicts within the family, at least conflicts that were visible in public. Mandatory statutes, which could lead to litigation between family members, were without further reason considered inappropriate.¹⁷

Likewise, the preparatory works to the 1970 Vacation Act stated that there was a right to vacation independent of family ties as soon as a *real employment relationship* existed.¹⁸ In discussions evolving around the Work Environment Act, it was articulated that the law was applicable even if the parties in a *real employment relationship* belonged to the same family. The sense of belonging between family members, however, would usually mean that the work could be presumed to be performed for the common good.¹⁹ A few years later, in discussions on legislation on working time, it was further clarified that work performed for the common good was not carried out within an employment relationship.²⁰ The meaning of this statement was not discussed. Neither was a legal ground given for the difference between a real relationship and other relationships. Instead, one catches a glimpse of a conception of the family as a legal subject, where the idea of belonging is more important than ownership or remuneration. The distribution of ownership and surplus in the business or the distribution of power and resources within the family was not dealt with in these discussions.²¹ For example, situations in

¹³ Government Bill 1936, 230, with a proposition for an Act on Working Time in Agriculture, 71.

¹⁴ Government Commission 1938, 47, Married Women's Paid Work, 54.

¹⁵ Government Commission 1937, 49, A Paid Vacation Act, 120.

¹⁶ Government Bill 1948, 298, with a proposition for an Act on Occupational Safety, 84.

¹⁷ Government Commission 1937, 49, A Paid Vacation Act, 120.

¹⁸ Government Bill 1976/77, 90, 153.

¹⁹ Government Bill 1976/77, 149 with a proposition for an Act on Work Environment, 198.

²⁰ Government Bill 1981/82, 154 with a proposition for an Act on Work Time, 62.

²¹ As far as I know, information does not exist on the factual distribution of ownership of companies within families. According to the National Organisation of Farmers (May 2003), family farms are usually the separate property of the husband and generation changes occur through gifts from father to son.

which one spouse performs work in a business belonging only to the other spouse were totally disregarded.

The argument about family ties as a substitute for legislation has a weakness: The supposition that there is no *need* for legislation in order to guarantee a certain category of workers tolerable working conditions is not a reason to *exclude* that category from protection. There is thus reason to believe that the exclusion of family members has a different motivation. This also becomes obvious from the insistent argument by employer organizations for expanding the scope of the exception.²² There is good reason to believe that the wish of keeping the employer's prerogative within the family has been decisive for the construction of the exclusion of family members. The principle of protecting the weaker party found in employment law has thus been subordinated to the employer's prerogative and the value of the family appearing publicly as a unit. This means that the individualization of family relations, the goal in reforming Swedish marriage law in 1920 and in 1973, has had no impact on employment law.

2.2. WHO WAS TO BE EXCLUDED?

When work performed by the employer's family was exempted from the Occupational Safety Act in 1912,²³ an employment law family concept was established. Not only were parents and children included in this concept but also other relatives and even persons unrelated to the employer, such as foster children and wards, if they shared homes or households with the employer.²⁴ The spouse of the employer was not even mentioned in the enumeration of family members, as two spouses could not enter into an employment relationship because of the husband's guardianship at that time over his wife.²⁵

When the Act (1936, 333) on Working Time in Agriculture was drafted in 1936, the farmworkers' union suggested that foster children and wards be excluded from the employment law family concept, but the union did not gain sympathy for this opinion.²⁶ In the discussion concerning the Act on Vacation (1938, 287), employer organizations opposed including those employed by siblings or grandparents in the right to vacation and the broader definition of the exception for the employer's family was kept.²⁷

A legislative bill on working time in 1954 contained a limitation of the traditional circle of family members. The Working Time Commission was of the opinion that it was inappropriate to exclude a person from protective legislation merely for the reason that he shared a household with the employer. The Commission therefore suggested that only parents and children and, 'naturally', the spouse of the employer and also other close relatives who shared a household with the employer should be included in

²² See below the section on the scope of the exemption.

²³ The Occupational Safety Act (1912, 206).

²⁴ Government Bill 1912, 104, with a proposition for an Act on Occupational Safety, 106.

²⁵ Report given on the 9th of Dec. 1909 by the Committee on Occupational Safety, 60.

²⁶ Government Bill 1936, 230, with a proposition for an Act on Working Time in Agriculture, 73.

²⁷ Government Commission 1937, 49, A Paid Vacation Act, 120.

the family exception.²⁸ The Farmworkers Union and the Shoe and Leather Industrial Worker's Unions required a more narrow definition of the exception implying that only the spouse of the employer was exempted. The Employer's Union of Swedish Handicraft and Small Industry argued, however, that small enterprises had grown in number and had been consolidated through the shared efforts of family members and that the family and business constituted a whole with common interests. The organization saw the discussions as foreign to reality.²⁹ In accordance with its wishes, a wide exception was kept in the Act (1957, 253) on Working Time.

The exclusion of family members from protective legislation started to be contested in the 1970s. New welfare regulations were passed concerning the right to leave to study, parental leave, and paid vacation.³⁰ It was emphasized that these rights were also to apply to family members on the condition that there was a *real* employment relationship. During the same period of time, the exception was repealed in the legislation on working environment and working time but was kept in the Employment Protection Act. The relationship between the employer and his family members was considered to be of such a 'special character' that it was not appropriate to subject their employment to legislation. As to the scope of the exception, the proposition adhered to the traditional, broad definition.³¹

At the end of the twentieth century, a proposal was made to widen the exception for the employer's family to cohabitants – heterosexuals as well as homosexuals.³² The proposal did not lead to legislation but, as seen in the cases discussed below, was adopted by the Labour Court.

2.3. WHEN WERE NO EXCLUSIONS MADE?

No exceptions were made for the employer's family in a couple of pieces of legislation. The 1914 ban on the dismissal of persons doing military service did not contain any exceptions for any category of workers. Its aim was to prevent young men doing military service from losing their employment, terms of employment, or possibilities for promotion due to military service.³³ Another statute came into force in 1939 based on this same provision.³⁴ As in the 1914 Act, no exceptions from the application of the law were discussed and no reason for this was given.

Based on a report from the Population Committee, a ban on dismissals on the grounds that the employee was engaged to be married, married, or pregnant was also

²⁸ Government Commission 1954, 22, A new regulation on Working time and a Partial Shortening of the Working Time, 109 et seq.

²⁹ Government Commission 1954, 22, A new regulation on Working time and a Partial Shortening of the Working Time, 110.

³⁰ Study Leave Act (1974, 981), Paid Vacation Act (1977, 480), Parental Leave Act (1976, 280).

³¹ Government Bill 1973, 129, with a proposition for an Act on Employment Protection, 230.

³² By expanding the exception to include homosexual relationships, the courts have extended the prerogatives of the employer to a type of relationship where the rule of the master has no traditional basis.

³³ The Act (1914, 271) with a Ban in certain cases on Dismissal due to Military Service.

³⁴ The Act (1939, 727) with a Ban on Dismissal due to Military Service.

introduced in 1939.³⁵ The employer's family and housemaids were initially exempted from this legislation, as were all enterprises with fewer than three employees. However, the ban on dismissal was later extended to all employees for the explicit purpose of reducing the number of abortions.³⁶ The Population Commission highlighted the fact that care of society's next generations and their mothers was a social task of the utmost importance. It found it legitimate to compare this ban with the ban on dismissal of men doing military service. In that legislation, any disadvantages to employers had been subordinated to the protection of those doing military service for the good of society and women fulfilling their duty as mothers were considered to have the same right to protection in their employment. Thus, in the second version of the ban on dismissal due to marriage and pregnancy in 1945, all exceptions from the ban were abolished. The exception for the employer's family was no longer considered necessary.³⁷

The acts of employment legislation making no exception for family members may be seen as expressions of the legislature's desire to emphasize values other than those of the employer's privacy and prerogatives. The interest in recruiting men for the defence of the country may have been so strong that exceptions from the ban on dismissal were not even considered. At a time of decreasing birth rates in the 1940s, the value of care for society's next generations and their mothers was given greater impact than the prerogatives of employers.

2.4. CONTEMPORARY CASE LAW CONCERNING THE SCOPE OF THE EXCEPTION

The scope of the current exception for family members has been fairly thoroughly discussed in certain cases decided by the Labour Court concerning the application of the Employment Protection Act. Few cases have ended up in court.³⁸ One reason may be that the scope of the exception is fairly clearly defined in the preparatory works. Another reason may be that it is often seen as inappropriate for a family member to make demands based on employment legislation against another family member. It is also striking that none of the family members filing suit against an employer were represented by a trade union. There is also no indication that these plaintiffs were members of any trade union.³⁹

2.5. WHO IS TO BE CONSIDERED AN EMPLOYER?

From the case law, it becomes obvious that the exception for family members in the Employment Protection Act may imply both advantages and disadvantages for a family

³⁵ The Act (1939, 171) with a Ban on Dismissal due to Marriage or Pregnancy, etc.

³⁶ SOU 1944, 51. Betänkande i abortfrågan avgivet av 1941 års Befolkningskommission, (Report 1944, 51 on the Abortion Question given by the Government Commission of 1941 on Population), 132 et seq.

³⁷ Government Bill 1945, 368, with a proposition for a Ban on Dismissal due to Marriage and Pregnancy, 21 et seq.

³⁸ Labour Court Judgment 1975 no. 42, 1979 no. 145, 1982 no. 135, 1992 no. 84, 1993 no. 157, 1996 no. 139, and 2000 no. 97.

³⁹ Around 80% of Swedish employees are members of a trade union.

member of the employer. A clear disadvantage is that there is no requirement for just cause for dismissals.⁴⁰ This means that a family member has no right to petition the court to declare a dismissal void or to receive damages if the dismissal lacks just cause. Just as obvious is the advantage for a family member of keeping employment regardless of seniority or qualifications. (In Swedish law, dismissals based on redundancy normally follow the rules as set out in the Employment Protection Act on seniority and qualifications.)

The first issue to be addressed with respect to the exception for family members is on who is to be considered an employer. The Labour Court has made the statement that the personally coloured relationship between family members may be obvious regardless of the form of business its owner has chosen (e.g., a joint-stock company or a joint venture), on condition that the related person in question is active in the business and has a considerable influence on the enterprise.⁴¹ The Court ruled that a man who owned 40% of the shares in a company and in fact managed the business was to be considered an employer in the application of the exception for family members.

In Labour Court Judgment 1993 no. 57, an office worker who was the daughter of a director on the company board had been dismissed. She maintained that the dismissal had no just cause and filed a suit against the company demanding that her dismissal be declared void. The issue raised in the case was whether her father was to be considered an employer as with respect to the exception for the employer's family members. The Labour Court emphasized that the father owned 50% of the shares, was one of the two members of the company board, the sales manager in Sweden and the manager of one of the branches and its personnel. He, no doubt, had considerable influence on the activities of the company. The father was to be considered an employer as to the exception of family members, and therefore, the daughter could be dismissed without just cause.

2.6. WHO IS TO BE CONSIDERED A FAMILY MEMBER?

In one case, the issue was the importance of an extended family.⁴² According to the employer, his brother had acted disloyally and caused losses in the company and had therefore been dismissed. The brothers had separate households, but the company maintained that, in accordance with Iraqi tradition, the brother and his wife lived in an extended family with the employer. As the employer was the eldest brother and played the role of family head, the rules of the Employment Protection Act were not applicable. The Court found, however, that the Act was applicable as the brother had his own household. It is, however, interesting to note that, deciding on the nature of the dismissal, the Court was of the opinion that the special relationship between the two brothers due

⁴⁰ There is also no limitation as to the number of employment contracts or their length.

⁴¹ Labour Court Judgment 1979 no. 145.

⁴² Labour Court Judgment 1975 no. 42.

to kinship must be taken into consideration. The Court found plausible that the purely personal antagonism that had occurred between the brothers affected the employment relationship.⁴³

Labour Court Judgment 1979 no. 145 concerned the position of a stepson. When a stepson of the employer was hired, the trade union protested, alleging that a former employee ought instead to be given priority for the position. The union argued that the exception from the Employment Protection Act was applicable only if there was either a biological kinship or some kind of a legal relationship between the employer and the employee. The court referred to the preparatory works of the Act and maintained that a stepson living in the employer's household was to be considered belonging to his family. Furthermore, the court was of the opinion that the right to priority could not arise in relation to a person not encompassed by the law.⁴⁴ It was therefore in accordance with the law to hire the stepson instead of the person who otherwise would have had priority to the position.

Labour Court Judgment 1982 no. 135 concerned the possibility of exempting the employer's son, who had his own household. The Labour Court referred to the preparatory works of the Occupational Safety Act of 1912 and maintained that spouses, parents, and children were always to be considered family members. The requirement of a common household was only for more remote relatives. The employer's son was encompassed by the exception and could be exempted from the dismissals and retain his employment.

2.7. SPECIFICALLY REGARDING COHABITANTS⁴⁵

Exceptions from employment law were made for certain persons in a close relationship with the employer even before cohabitants were given recognition in family law. Not only family members but also housekeepers were exempted from the rights of the Act (1944, 461) on Domestic Workers. The Commission on Domestic Workers maintained that in the same way it was not possible to regulate the work of a housewife, it was not possible to include housekeepers in the legislation.⁴⁶ No reason for this was given, and this may have been the first step taken to exclude cohabitants of the employer, as housekeepers primarily referred to employees of widowers and bachelors.⁴⁷

⁴³ A reflection here is that personal antagonisms may also have a great impact on dismissals outside the family, in the public sphere.

⁴⁴ In my opinion, this is a weak argument, as the Act does not regulate hiring, but only the right to retain employment.

⁴⁵ The personal background is revised rather extensively, as the courts are often referring to the 'special' character of family relations and it is obvious that the legislator and the courts have given great importance to the personal character of employments within the family.

⁴⁶ SOU 1939, 15. Betänkande angående anställnings- och arbetsförhållanden inom det husliga arbetet mm (Government Commission 1939, 15, Employment and Working Conditions in Domestic Work), 157 et seq.

⁴⁷ Government Bill 1944, 217, an Act on Domestic Work, 50 et seq.

When the Act on Domestic Workers was replaced by the Act (1970, 943) on Working Time in Domestic Services,⁴⁸ the exception for housekeepers was contested. Problems were anticipated concerning those domestic workers who were referred to as housekeepers but were in fact cohabitants with the employer under conditions similar to marriage. It was therefore emphasized that an employment relationship must prevail for the Act to be applicable. The difficulties in determining whether this was the case, when the relationship between the parties was coloured both by a personal and an employment relationship, were emphasized. In deciding whether the relationship between the parties was of an employment or a personal character, a total assessment had to be made taking into consideration all factors pointing in one or the other direction. If the personal relationship dominated and the employment relationship was pushed into the background, the parties were not considered to be employer and employee.⁴⁹ This kind of argument had the implication that three kinds of work relationships were conceivable: (1) employment relationships outside the family, (2) employments within the family, and (3) other personal relationships. There was no reason given for the exception of 'personal relationships' from employment law. The idea behind the exclusion is probably the assumption of a shared interest between the parties and the concept of the prerogative of the master. For a cohabiting woman, the consequence became that she was exempted from the rights of the 1970 Act at the same time as the 'common interest' did not correspond to any entitlements for her within family law.

There is one case law as an example of drawing a line between an employment relationship and a personal relationship.⁵⁰ The case concerned wages for domestic work performed for a period of eight years by a woman for a man who now was deceased. None of the witnesses in the case had perceived the relationship between the man and his housekeeper as a cohabitation similar to marriage but rather as an employment relationship. Consequently, the housekeeper was entitled to a salary from the estate. The case suggests that the housekeeper would not have been considered entitled to a salary for the work she had been doing had the two persons had a sexual relationship.

In one court case, a woman employed as a housekeeper in a joint-stock company had moved in with a man who had a strong influence over the activities of the company and had lived with him for six years.⁵¹ According to the court, the woman was to be considered a member of the employer's family, and therefore, the rules of the Employment Protection Act were therefore applicable.⁵² Thus, a cohabitant was treated as a family member within employment law at a time when cohabitants without children still had no rights according to either family or tax law. The reason for the decision is not clear from the judgment. The explanation might be an underlying idea that 'private' relationships are to be exempted from legislation.

⁴⁸ The Act (1970, 943) on Domestic Work.

⁴⁹ Government Bill 1970, 150, with a proposition for an Act on Domestic Work, 45 et seq.

⁵⁰ Labour Court Judgment 1977 no. 196.

⁵¹ Rättsfall från hovrätterna (Cases from the Courts of Appeal) 1982, 4.

⁵² The case concerned the calculation of remuneration according to the Wages Guarantees Act (1992, 497).

Labour Court Judgment 1996 no. 139 concerned an employee who had lived with his employer for five years, having a child with her.⁵³ He was employed for three years by the woman, who owned a taxi business. The parties separated and she fired him, maintaining that he had severely neglected his duties by abusing her and not accounting for monies made in the business. The man filed suit against his employer, petitioning that the firing be declared void in accordance with the Employment Protection Act. The employer objected, holding that the Act was not applicable to the employment at hand. The District Court stated that according to the preparatory works, the exception for the employer's family no doubt comprised the case in which an employer and employee lived together under conditions similar to marriage, at least if they had children together. The Labour Court made the same assessment as the District Court.⁵⁴ This had the consequence for the employee that there were no legal grounds for his objection to the dismissal.

Labour Court Judgment 2000 no. 97 concerned the application of the requirement of just cause in a case where the two parties had separated. A woman had moved in with a man who owned a wholesale store and started to work for his company. One and a half years later, she reported the man to the police for unlawful threats and abuse, and the parties separated. The woman was then dismissed from her employment. The employer maintained that the report to the police was not the ground for the dismissal, but it had made it impossible for them to work together. The District Court pointed out that at the enactment of the Employment Protection Act in 1982, the exception for family members, had not comprised cohabitants without children. The question whether the exception for family members was to also include cohabitants without children had later been discussed by a committee,⁵⁵ but no amendments to the Employment Protection Act had been made. According to the court, the Employment Protection Act was therefore applicable to the employment in question and the woman was considered entitled to damages due to dismissal without just cause.

On appeal, the Labour Court pointed out that the application of the Employment Protection Act to cohabitants, with or without children, had not been discussed at its enactment. However, the exception had been given a relatively wide application in the case law, and the exception for family members must, according to the Court, be interpreted considering the evolution of society. The court found that it was common for men and women to live together under conditions similar to marriage without being married. This development had been mirrored in legislation, for example, in the Cohabitees Joint Homes Act (1987, 232). The reasons for the exception of spouses from the Employment Protection Act were, according to the Court, just as valid in the case of cohabitants living together under marriage-like conditions. Consequently, an employee living together with

⁵³ In this case, a woman is the employer. According to Ds 2003, 27, women constitute 18% of entrepreneurs with employees.

⁵⁴ See also below under Separation and Divorce.

⁵⁵ The District Court probably was relying on statements by the Government commission referred to above, SOU 1993, 32.

an employer must be exempted from the application of the Employment Protection Act. The court referred to the preparatory works of the Cohabitees Joint Homes Act, considering that the duration of the relationship was of importance when assessing whether a cohabitation relationship was similar to marriage.⁵⁶ In the case in question, the two persons had been cohabitants for about eighteen months. Therefore, their cohabitation had no doubt been long enough for the exception from the Employment Protection Act to be applicable, and there was no requirement for just cause for the dismissal.⁵⁷

2.8. SEPARATION AND DIVORCE

The Labour Court has also discussed whether the Employment Protection Act is applicable after the dissolution of a marriage or marriage-like relationship.⁵⁸ A woman who had been working partly in Stockholm and partly in Sundsvall had been dismissed from employment in a company owned by her husband after their separation.⁵⁹ The spouses had separated when the husband had begun a relationship with the woman's best friend. The woman refused to work in the office in Stockholm (where, according to the woman, her husband and friend were staying) during the time of notice. She consequently received no salary for the period in question. She maintained that the Employment Protection Act was applicable to her, which meant she had the right to stay in Sundsvall during the time of notice in order to be able to seek new employment.⁶⁰ She filed suit against her husband demanding that the company pay her salary during the notice period.

The District Court was of the opinion that the Employment Protection Act was applicable to the woman after the separation, as she had her own household and as spouses are economically independent of each other. The Court also found that a move to Stockholm in the period of notice would have worsened her chances to seek employment. Finally, taking into consideration the circumstances, the Court found it unreasonable to force the woman to stay in the company office.

The Labour Court reversed the judgment of the District Court, finding that it was apparent from the preparatory works that spouses, children, and parents were to be considered family members independently of whether they shared a household. The exception from the legislation was based on the special character of the relationship between family members. Therefore, the intention could hardly be that the question of just cause for dismissal would be tried between two spouses whose marriage was dissolving. The conclusion of the Labour Court was that the Employment Protection Act was not applicable to the woman's employment. Neither was an analogous interpretation appropriate, as the legislator had made an explicit exception from the legislation considering the

⁵⁶ Government Bill 1986/87, 1, 252 et seq.

⁵⁷ In this author's opinion, the dismissal could be seen as contrary to good labour market practices.

⁵⁸ In the Judgment referred above, Labour Court Judgment 2000 no. 97, the implications of the termination of the cohabitation by the time of the dismissal were not discussed.

⁵⁹ Labour Court Judgment 1992 no. 84.

⁶⁰ According to s. 14 of the act, a person dismissed may not be transferred to another place during the notice period if this means worsening the possibilities of the employee to seek a new job.

special character of the relationship between the employer's family members and the employer. As to the woman's claim that it was unreasonable to demand that she stay in the company office, the Labour Court stated that she naturally could not be forced to stay there. Such deep antagonisms between the parties existed that one of the parties had chosen to withhold her performance, that is, to perform work. It was not then unreasonable that the other party choose to withhold his performance, that is, to pay the salary.⁶¹

Labour Court Judgment 1996 no. 139, summarized above, concerned a dismissal from a taxi business after a separation of two cohabiting parties. According to the District Court, the fact that the cohabitation ended on a specific day could not reasonably mean that the Employment Protection Act was automatically applicable to the employment from that same day. According to the Court, no circumstances implied that the employment changed from being exempted to being encompassed by the provisions of the Employment Protection Act. The conclusion of the District Court was that the Employment Protection Act was not applicable to the employment. The Labour Court drew the same conclusion.

3. CONCLUSIONS

In spite of major changes in the structure of industrial relations and increasingly strong trade unions, the exception for family members remained unaltered for a long time in practically all-Swedish employment legislation. Not until the 1970s, when far-reaching changes in Swedish employment law coincided with a weakened position of the family, did the legislation come to also apply to the family of the employer. This was true of legislation concerning occupational safety, working time, and leisure, but in the regulation of the crucial issue of employment protection, the exception for the family was kept. The exception from the Employment Protection Act is crucial in the sense that other rights in working life become illusory without effective employment protection.

While other exceptions from the Employment Protection Act have been interpreted restrictively,⁶² the exception for the employer's family has been given a wide definition. Already in the preparatory works to the Working Time Act of 1970, the family concept was expanded to include cohabitants having children together. This was done with reference to tax law, where cohabitants were sometimes treated as married couples. Both Social Democrat and Liberal governments have supported the exception of family members from employment protection, but the active steps towards enlarging the exception have been taken by liberal governments. Thus, the idea of a difference between a *real employment relationship* and work that could be presumed to be performed for the

⁶¹ In this case, the Court chose to see the two spouses as equal parties to a contract. Nothing was mentioned about the woman's weaker position in the situation or about the Employment Protection Act as a protective legislation for the weaker party in an employment relationship.

⁶² The other exceptions concern employees who are 'in managerial or comparable positions', 'engaged to work in the employer's household' or 'in subsidised schemes such as relief work or sheltered work'.

common good was upheld by a liberal government. The proposition for an expansion of the exception to include homosexual and heterosexual cohabitation was made by a commission appointed by a liberal government.⁶³

Furthermore, the family concept as found in the preparatory works has been expanded in the case law. The Labour Court has considered a relationship of the special family character to prevail also when the business in question has the form of a joint-stock company. It has also included cohabitants without mutual children and former cohabitants. In such cases, the Court has referred to vague assessments in the preparatory work about the special character of family relationships. The reason for the exception then seems to be the 'private' emotional character of the relationship and an assumption that such relationships should not be regulated by law, which entails an extension of the employer's prerogative. Reference has also been made to the fact that cohabitation was recognized in family law.

Thus, the extension of the exception for the employer's family to cohabitants was made with reference to amendments in tax and family law without considering the aim of those amendments. The aim of the provisions on cohabitants in family law is to *protect* the weaker party. When a parallel was made to motivate the *exception from protection* in employment legislation, the effect becomes the opposite.

Family members have been depicted as equal partners in a contract relationship, and the Court seems to have disregarded the fact that an employer's family members – and particularly a cohabiting partner – often have the position of the weaker party. Nor has the court mentioned the principle of mutual independence of spouses or the gradual abolition of the family exception in employment legislation. Furthermore, the court has not used its option to limit the employer's prerogative by assessing that a dismissal is contrary to good labour market practices in cases where this might be a viable alternative.

The cases decided by the Labour Court clearly show that the exception for family members from the Employment Protection Act may have positive or negative effects for the family member in question depending on the nature of their relationship to the employer. If the employer wishes to keep a family member in his business, this person may be given priority to existing jobs after dismissals or may be hired even if another person would otherwise have had a right to be rehired. If, on the other hand, a family member later falls out of favour, the person may be dismissed without requirement for just cause. This is particularly evident with dismissals in connection with divorce or separation.

The wider legal consequences for family members of being exempted from employment protection have hardly ever been discussed in the preparatory works. These consequences may be very different depending on the circumstances in different cases. A wife or former wife of an employer who has been dismissed may eventually be

⁶³ This proposition did not lead to legislation.

compensated for her work through marital property in the business, but only on the condition that the business does not belong only to the husband. On the same condition, she may – just as the employer's children – possibly be compensated through inheritance after the employer's death. A person living together with the employer, however, has no marital property in the business and also no right to inherit. Therefore, the only compensation for the work performed is any salary. In the absence of empirical investigation, it is not possible to draw any conclusions about the actual consequences of the exception from employment protection. It seems probable that there are at times explicit contracts concerning work and employment conditions between family members and that conditions can vary greatly between business of different sizes and in different trades.

The statistical importance of the exception may have diminished since its introduction in the sense that living with relatives together in the same household is less common today than a hundred years ago. On the other hand, the real significance may have increased in recent years because of the extension to cohabitation relationships and because of an increasing number of small enterprises.

In tax and family law, the mutual independence of spouses has been an overall goal; an individualization of relations within marriage has taken place. The exception for family members in employment law has the opposite effect: the dependence of the employer/spouse increases and this exception/dependence has been extended to cohabitants. The changes in family law implying that cohabitants are entitled to parts of the common household goods – based on the affinity between the parties – have the purpose of protecting the weaker party. The exception from employment law of the employer's family is in contrast protection for the stronger party. Retaining this exception in employment law is especially surprising, as conditions in paid work have often been considered central in Swedish endeavours for equality between the sexes.

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