Labour Policy on Fixed-Term Employment Contracts in Sweden

Mia Rönnmar[1]
Lund University

1. Introduction

The theme of this 10th Tokyo Seminar is the recent decades' general increase in atypical employment, such as fixed-term, part-time and temporary agency work. The flexibilisation of working life has often been discussed in terms of labour market segmentation and the legal 'tension' between, on the one hand, permanent employment, linked to employment protection, and, on the other hand, more precarious atypical, or flexible, employment. In Europe nowadays the discussion often springs from the notion and strategy of flexicurity, and the balancing of flexibility of labour markets with the security and social protection of employees. The aim of this report is to describe and analyse the legal regulation of fixed-term employment contracts in Sweden.

Fixed-term employment has been on the rise in Sweden. In 2008, 16.1 per cent of all employees had fixed-term employment contracts, as compared to 10 per cent in 1990.[2] In the EU-15 countries, the corresponding average rate in 2008 was 14.1 per cent. In Sweden the incidence of fixed-term employment is higher in the service sector than in the manufacturing sector. Fixed-term employment is more common among women (in 2008 18.7 per cent) than men (in 2008 13.4 per cent), and also more common among young people (16–24 years of age) than in other age groups.[3] The trade union organisation rate among fixed-term employees is lower than among permanent employees (about 50 per cent as compared to 70–75 per cent).[4] In 2008, 26.6 per cent of all employees in Sweden had part-time employment contracts (41.1 per cent among women and 13.3. percent among men, these figures have long been stable). Despite rapid growth of temporary agency work in Sweden, today it still accounts for only about 1 per cent of the entire labour force.[5] In 2008, self-employment accounted for 5.3 per cent of total employment.[6]

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[2] In 2009, 661,000 employees had fixed-term employments, see SCB, *Statistisk årsbok 2010*, Stockholm 2010, p. 272.

[3] Fixed-term employment also seems to be more common among foreign-born than among Swedish-born employees, cf. S. Engblom, Fixed-Term-at-Will: The New Regulation of Fixed-term Work in Sweden, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 24, No 1, 2008, p. 136.

[4] See Engblom 2008, p. 138.

[5] Temporary-work agencies (and private employment agencies) were prohibited in Sweden between 1935 and 1991, in line with the ILO Convention on Fee-Charging Employment Agencies No. 96/1949 (revising Convention No. 34/1933). This prohibition was not fully implemented in practice, though. Temporary agency work was legalised in 1991, and more effectively liberalised in 1993 by the adoption of the 1993 Private Job Placement and Hiring-out of Labour Act.

[6] See European Commission, *Employment in Europe 1998*, Office for Official Publications of the European Communities, Luxembourg 1998, p. 162, European Commission, *Employment in Europe 2009*, Office for Official Publications of the European Communities, Luxembourg 2009, p. 156 and p. 182, K. Ahlberg and N. Bruun, Denmark, Finland and Sweden: Temporary Agency Work Integrated in the Collective Bargaining System, In: K. Ahlberg *et al.*, *Transnational Labour Regulation. A Case Study of Temporary Agency Work*, P.I.E. Lang, Brussels 2008, p. 42 and Engblom 2008, pp. 136 f.

[7] Cf., for example, section 2 of the 1982 Employment Protection Act and section 4 of the 1976 Co-determination Act. See M. Rönnmar, Free movement of services vs national labour law and industrial relations systems: understanding the Laval case from a Swedish and Nordic perspective, In: C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007–08, Hart, Oxford 2008, pp. 493–523.

The outline of this report is as follows: Section 2 presents the background and historic developments as regards regulation of fixed-term employment contracts in Sweden and the EU. Section 3 describes and analyses the current regulation of fixed-term employment contracts in Sweden. Lastly, in Section 4, I make some concluding remarks.

2. Regulation of fixed-term employment contracts: background and historic developments

The Swedish industrial relations system builds on self-regulation, co-operation between the social partners, and autonomous collective bargaining. The trade unionisation rate is about 70–75 percent and the collective bargaining rate is about 90 percent. Wages and other terms and conditions of employment are generally set by collective bargaining. Collective bargaining is accompanied by well-established and strong mechanisms for information, consultation and co-determination, and workers' influence is channelled solely through trade unions in a so-called single-channel model. The 1970s witnessed an increase in legislative activity, and since then, labour law legislation is very frequent in Sweden. Membership of Sweden in the European Union since 1995 has added to this legislation, and today labour law legislation covers areas such as employment protection, non-discrimination, working time, working environment, freedom of association, collective bargaining and the right to industrial action and information, consultation and co-determination. The two real centrepieces of Swedish labour law legislation are the 1976 Co-determination Act (*Medbestämmandelagen*, SFS 1976:580), regulating central aspects of collective labour law, and the 1982 Employment Protection Act (*Anställningsskyddslagen*, SFS 1982:80), regulating central aspects concerning the entering into and the termination of employment contracts. A distinguishing feature of most Swedish labour law legislation is its 'semi-compelling' character, which allows for deviations, both to the advantage and detriment of employees, from the statutory provisions by means of a collective agreement entered into by the employer and the trade union. In this way, flexible modifications to accommodate the needs of specific industries and sectors or companies can be achieved.[7]

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 employees, public and private sector employees and permanent and fixed-term employees (with the exception of employment protection). There is no statutory definition of the concept of employee. However, the courts have developed a legally mandatory, and in a comparative perspective, broad concept of *employee*, covering

also fixed-term workers. 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. During the 20th century, the concept of employee has continuously widened, aiming at providing additional groups of workers with the protection afforded by labour law legislation.[8]

The regulation of fixed-term employment contracts became an important issue in Sweden in the beginning of the 1970s. Statutory employment protection – first established through the 1974 Employment Protection Act – also required regulation of fixed-term employment contracts, to prevent circumvention of the employment protection linked to permanent employment contracts.[9] In comparison with many other countries, the Swedish employment protection stands out as being relatively strong, and has kept most of it basic features since 1974.[10] The 1982 Employment Protection Act in force today applies to all employees, whether in private or public employment (cf. section 1 of the Act), from the first day of employment.[11] Small companies are not exempted. The employer may dismiss an employee for personal reasons or for reasons of redundancy. The employer must have just cause (or objective grounds) for dismissal (cf. section 7 of the Act). Coupled with this basic just cause requirement are rules obliging the employer *inter alia* to negotiate with trade unions, to give notice, to provide the employee with alternative work, to apply seniority rules, and if necessary conditions are met, to re-employ dismissed employees. For example, the seniority rules are 'semi-compelling', and the principle of 'last-in-first-out' can be deviated from by means of collective agreements.

As part of the managerial prerogative – first legally recognised in 1906 in the main collective agreement of the December Compromise between the Swedish Confederation of Trade Unions (LO) and the Swedish Employers Federation (SAF) (now the Confederation of Swedish Enterprise (Svenskt Näringsliv)) – the employer, in principle, enjoys a free right to hire. This right is restricted, however, by *inter alia* non-discrimination legislation, and in the public sector, by constitutional requirements (in the state sector) for applying only objective factors such as merit and competence; and in addition (in the entire public sector) the observance of equality of all before the law and objectivity and impartiality (cf. chapter 11

[8] See S. Engblom, *Self-employment and the Personal Scope of Labour Law. Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States*, European University Institute, Florence 2003 and M. Rönnmar, Sweden, In: T. Araki and S. Ouchi (guest editors), *Labour Law in Motion. Diversification of the Labour Force & Terms and Conditions of Employment*, R. Blanpain (ed.), Bulletin of Comparative Labour Relations, Vol. 53, Kluwer Law International, the Hague 2005, pp. 41–49 and pp. 157–172.

[9] See A. Henning, *Tidsbegränsad anställning. En studie av anställningsformsregleringen och dess funktioner*, Juridiska Föreningen i Lund, Lund 1984, A. Numhauser-Henning, Fixed-term Work in Nordic Labour Law, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No 3, 2002, pp. 429–457, Government Bill Prop. 1973:129 *Lag om anställningsskydd m.m.*, p. 145 and Government Bill Prop. 1981/82:71 *Ny anställningsskyddslag m.m.*, p. 43. For a similar development in many European countries, see B. Veneziani, The Employment Relationship, In: B. Hepple and B. Veneziani (eds), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945–2004*, Hart Publishing, Oxford 2009, pp. 115 ff.

[10] Statutory employment protection in the 1974 Employment Protection Act, and later in the 1982 Act, was preceded first by the unilateral right of the employer to dismiss employees (cf. the employment at will doctrine) and later a limited, collectively bargained, employment protection, cf. Henning 1984.

[11] According to section 1 subsection 2 of the 1982 Employment Protection Act, some minor groups of employees are, however, excluded from the Act, namely employees in a high management position, the employer's family members, employees working in the employer's household, and employees who are employed for work with special employment protection or in sheltered employment. Thus, employers are not restricted by the regulation on fixed-term employment contracts in the Act when concluding employment contracts with these employees.

section 9 and chapter 1 section 9 of the Instrument of Government (*Regeringsformen*)). The employment contract may be oral, written or concludent.[12] Not later than one month after the commencement of work by the employee, the employer must provide written information about the terms and conditions of employment; for example, whether the employment is fixed-term and the final date of employment (cf. section 6c of the 1982 Employment Protection Act).[13]

In the 1974 Employment Protection Act, the basic rules regarding fixed-term employment contracts were laid down – and to a large extent they still apply today.[14] A permanent employment contract is concluded for an indefinite period of time, and can be terminated only by means of dismissal, and then the employer must have just cause for dismissal. In contrast, a fixed-term employment contract is concluded for a limited period of time, and terminates at the expiry of the agreed term, without the need for notice (cf. section 4 of the 1982 Employment Protection Act). As a main rule, a fixed-term employment contract cannot be terminated before the agreed term has expired (with the exception of summary dismissal in case of a grave breach of the employment contract, on the part of either the employee or the employer, cf. section 4 subsection 3 and section 18 of the 1982 Employment Protection Act). Thus, in a sense, under its duration the fixed-term employment contract can be said to provide greater protection for the employee than a permanent employment contract. However, the employer and the employee can agree on a fixed-term employment contract for 'an indefinite term, but no longer than', enabling both the employer and the employee to terminate the fixed-term employment contract in advance, while still having to adhere to notice periods and the requirements of the statutory employment protection for just cause etc.[15, 16]

Employment contracts for an indefinite period – permanent employment contracts – are considered the rule, since they afford the employee employment protection (cf. section 4 of the 1982 Employment Protection Act). Fixed-term employment contracts are allowed only when agreed upon, and when specifically provided for by law or collective agreements. The party – often the employer – claiming the existence of a fixed-term employment contract bears the burden of proof.[17] In order for a fixed-term employment contract to be legal, the precise rules of the 1982 Employment Protection Act must be adhered to (cf. sections 4, 5 and 6 of the Act). Nevertheless, these provisions are 'semi-compelling', and collective agreements regulating fixed-term contracts in specific – narrower or broader – ways are frequent (cf. section 2 of the 1982 Employment Protection Act) (these collective agreement provisions may also be applied to unorganised employees or employees who are members of a trade union, but not a signatory party to the collective agreement).[18] This 'semi-compelling' character of the 1982 Employment Protection Act was strengthened in 1996, allowing such

[12] See K. Källström and J. Malmberg, *Anställningsförhållandet. Inledning till den individuella arbetsrätten*, 2nd ed., Iustus förlag, Uppsala 2009, pp. 104 ff.

[13] Cf. Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

[14] See Government Bill Prop. 1973:129.

[15] Cf. Labour Court judgments AD 1990:98 and AD 1997:42.

[16] See L. Lunning and G. Toijer, *Anställningsskydd*, 8th ed., Norstedts Juridik, Stockholm 2006, pp. 156 ff.

[17] See Lunning and Toijer 2006, pp. 156 ff., Government Bill Prop. 1973:129, pp. 144 ff., Government Bill Prop. 1981/82:71, pp. 38 ff. and Henning 1984. Cf. Labour Court judgments AD 1996:7, AD 1990:92 and AD 1988:143.

[18] See Lunning and Toijer 2006, pp. 75 ff. and Government White Paper Ds 2002:56 *Hållfast arbetsrätt – för ett föränderligt arbetsliv*, pp. 227 ff.

deviating collective agreements to be entered into even at the local workplace level (provided that a collective agreement concluded at the central or national level applies between the employer and the trade union) (cf. section 2 subsection 3 of the 1982 Employment Protection Act). In addition, provisions on fixed-term employment contracts in specific statutes or regulations, for example, regarding universities and higher education, have priority before the provisions in the 1982 Employment Protection Act (cf. section 2 subsection 1 of the 1982 Employment Protection Act).[19]

In 1974 the starting point was that each permitted form of fixed-term employment contract regulated in the Employment Protection Act should be motivated by an *objective reason*. Originally, the regulation on fixed-term employment contracts in the Act was strict, and allowed only for fixed-term employment contracts for a fixed term, specified season, or specified task, if necessitated by the particular character of the work (interpreted narrowly), for temporary substitute employment and for practical training (cf. section 5 of the 1974 Employment Protection Act).[20] In 1982, the scope for fixed-term employment contracts was broadened by the introduction *inter alia* of probationary employment and fixed-term employment, if necessitated by a temporary peak in the employer's workload (not exceeding a total of six months during a two-year period).[21]

Thus, the general trend – both as regards the frequent statutory reforms and the development in case law – has been towards increased opportunities for employers to use fixed-term employment contracts.[22] In 2007, before the latest and in some respects fundamental, reform of the regulation of fixed-term employment contracts (Section 3), the 1982 Employment Protection Act contained a long 'catalogue' of situations in which the use of fixed-term employment contracts was permissible (cf. sections 5–6 of the Act). For example, in 1996 a new fixed-term employment contract was introduced – the so-called 'agreed fixed-term employment' (cf. section 5a) – which could be used with regard to one and the same employer for a period of twelve months during any three-year period, and without the employer having to give any motive or objective reason for any dismissal (the employer could only employ five employees at the same time on 'agreed fixed-term employment'). However, the trend was not entirely unequivocal. Following a heated discussion on the misuse of successive temporary substitute employments, where the permissibility of each temporary substitute employment was evaluated separately, a new provision was introduced in 2000.[23] When an employee had been employed by one employer as a temporary substitute for a total of three years during the last five years, the employment contract was automatically converted into a permanent employment contract (cf. section 5 subsection 2 of the 1982 Employment Protection Act).[24]

[19] Cf. Government White Paper SOU 2007:98, *Karriär för kvalitet*.
[20] See Government Bill Prop. 1973:129, pp. 144 ff and Henning 1984.
[21] See Government Bill Prop. 1981/82:71, pp. 38 ff.
[22] For example, the Labour Court has 'softened' the requirements for using temporary substitute employment and 'project employment contracts' (an employment contract for fixed-term, specified season or specified task, if necessitated by the particular character of the work), cf. Government White Paper Ds 2002:56, pp. 219 ff., Engblom 2008 and, for example, Labour Court judgments AD 1985:30 and AD 2000:51 (Section 3).
[23] Cf. Labour Court judgements AD 1978:17 and AD 1984:66.
[24] In 2002, in a report commissioned by the government, the National Institute for Working Life proposed a new regulatory framework for fixed-term employment. According to the proposal, the 'catalogue' of fixed-term contracts in the 1982 Employment Protection Act should be abolished and instead all fixed-term contracts, concluded for periods up until 18 months, should be permitted. The employment protection of fixed-term workers should be strengthened, *inter alia* by extending the right to re-employment, and employers using fixed-term contracts for periods longer than 18 months should be made to pay an economic fee (in the long run making long-term fixed-term employment unprofitable, thereby promoting the use of permanent employment in these situations), see Government White Paper Ds 2002:56.

The Fixed-Term Work Directive/Framework Agreement on Fixed-Term Work[25] was adopted in 1999, as a result of the European social dialogue, and regulated atypical work at EU level; this agreement followed the Part-Time Work Directive[26] and preceded the Temporary Agency Work Directive.[27] In the Preamble to the Framework Agreement, the parties recognise that 'contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers' and that 'fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers'. The purpose of the Directive is twofold: to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (cf. clause 1).[28] In the words of Numhauser-Henning, the 'restrictive aspect' of the Directive can, be said to 'evince a certain level of ambiguity, and it has been referred to as "normalizing" fixed-term work'.[29] The principle of non-discrimination implies that with respect to employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation, unless different treatment is justified on objective grounds (cf. clause 4). Principles of equal treatment and non-discrimination for part-time, fixed-term, and temporary agency work display a fundamental difference with regard to traditional non-discrimination regulation. Here, equal treatment is not based on the personal characteristics of the employee (such as sex, race, age, or sexual orientation) and related to the human rights discourse, but instead based on the employment contract and its form and content, and related to the flexicurity, employment policy and globalisation discourses.

When it comes to measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, where there are no equivalent legal measures to prevent abuse, the Member States shall introduce – in a manner which takes account of the needs of specific sectors and/or categories of workers – one or more of the following measures: objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships; or, the number of renewals of such contracts or relationships (cf. clause 5). Thus, the Directive does not introduce any requirement for objective reasons for the parties' first entry into a fixed-term employment contract.[30] Employers shall also inform fixed-term workers about

[25] Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by the ETUC, UNICE and CEEP.
[26] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC.
[27] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
[28] Cf. C. Vigneau *et al.*, *Fixed-term work in the EU. A European agreement against discrimination and abuse*, SALTSA, National Institute for Working Life, Stockholm 1999 and C. Barnard, *EC Employment Law*, 3rd ed., Oxford University Press, Oxford 2006, pp. 479 ff. Clause 3 states that for the purpose of the agreement, the term 'fixed-term worker' means a person having an employment contract or relationship entered into directly between an employer and a worker, where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task or the occurrence of a specific event.
[29] See Numhauser-Henning 2002, p. 433, cf. J. Murray, Normalising Temporary Work, *Industrial Law Journal*, Vol. 28, No 3, 1999, pp. 269–275.
[30] Cf. Numhauser-Henning 2002 and C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

vacancies which become available in the undertaking or establishment, to ensure that they have the same opportunity to secure permanent positions as other workers (cf. clause 6).

Together with the 1997 Green Paper on a new organisation of work, the 1998 Employment Guidelines, and the Part-Time Work Directive, the Fixed-Term Work Directive can be said to constitute the early developments in a 'build-up' of an EU flexicurity discourse and strategy.[31] The notion of flexicurity – the successful balance between flexibility and security – relates to Atkinson's model of *the flexible firm*, often referred to in labour market flexibility research. The flexible firm is made up of three different labour force segments. The *core group of workers* is typically offered high-quality working conditions and employment protection. Workers in the core group have firm-specific skills and are not easily recruited from outside the firm. The *peripheral group of workers* consists of workers with a looser connection to the firm. These workers have general, less firm-specific skills, and are often employed on fixed-term or part-time employment contracts. The *external group of workers*, finally, is made up of workers who are utilised, but *not* employed, by the firm, such as self-employed persons or temporary agency workers. The employer typically makes use of different flexibility strategies with regard to these labour force segments.[32] *Numerical flexibility* relates both to the form and duration of the employment contract and to working-time arrangements, and primarily serves the purpose of achieving greater flexibility in the number of workers employed. In focus of numerical flexibility are precisely fixed-term work, but also part-time work, and working time flexibility. *Functional flexibility* is a matter of adaptability and versatility within permanent employment 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. Finally, *financial flexibility* is concerned with making wages more adaptable to circumstances, such as the profits of the business or the employee's knowledge and efficiency.[33]

The much debated 2006 Green Paper on the modernisation of labour law discussed the role labour law could play in promoting growth and jobs; and advancing flexicurity. Following a report by the European Expert Group on Flexicurity, the Council adopted Common Principles of Flexicurity to be integrated into the European Employment Strategy and the Lisbon Strategy for Growth and Jobs.[34] Flexicurity is described at EU level as an integrated strategy to enhance, at the same time, flexibility and security in the labour market, and contains the following components: flexible and reliable contractual arrangements; comprehensive life-long learning; effective active labour market policies; and modern social security systems. Member States are to utilise different pathways to flexicurity dependent on their labour law, industrial relations, and social security systems. Flexible and reliable

[31] Prominent national examples of successful flexicurity strategies and policies, often put forward by the OECD and the European Commission, are the 1999 Dutch Flexibility and Security Act and the Danish 'Golden Triangle of Flexicurity', see, for example, European Expert Group on Flexicurity, T. Wilthagen (rapporteur), *Flexicurity Pathways. Turning hurdles into stepping stones*, Brussels 2007.

[32] See J. Atkinson, Manpower Strategies for Flexible Organisations, *Personnel Management*, August 1984, pp. 28–31 and M. Rönnmar, The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility, *Industrial Law Journal*, Vol. 35, No 1, 2006, pp. 56–74.

[33] See Rönnmar 2006.

[34] See European Commission, Green Paper, *Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final, European Expert Group on Flexicurity 2007 and European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, COM(2007) 359 final.

contractual arrangements aim at reduced labour market segmentation and equal treatment of both permanent employees and fixed-term workers. Such equal treatment can be achieved through a new balance between numerical and functional flexibility, deregulation of employment protection and the creation of a 'tenure track' approach, and progressive employment protection, all of which are partly reflected in the Fixed-Term Work Directive. Employability and labour market transitions are also in focus.

The principle of non-discrimination in the Part-Time Work Directive and Fixed-Time Work Directive was implemented in Sweden through the creation of a new Act, the 2002 Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act (SFS 2002:293).[35] The Act was aligned with other Swedish non-discrimination legislation, and contains prohibitions on direct and indirect discrimination, thereby going beyond the requirements of the Directives.[36] The principle of non-discrimination in the Fixed-Term Work Directive is limited in that it requires the unfavourable treatment of the fixed-term worker to relate *solely* to the fixed-term employment contract, and it also enables the employer to justify even a direct discriminatory behaviour with objective grounds.[37] There was no explicit implementation as regards clause 5 of the Framework Agreement and measures against abuse of successive fixed-term employments. The existing regulation – building on the permanent employment contract as the main rule and a requirement for objective reasons and/or rules on maximum duration for first time and successive fixed-term employment contracts as regards, for example, temporary substitute employment, built into the 'catalogue' of permitted fixed-term employment contracts in sections 5–6 of the 1982 Employment Protection Act – was deemed satisfactory (Section 3).[38] Clause 6 and the obligation for the employer to inform fixed-term employees about any vacancies as regards permanent employment contracts or probationary employment was later introduced into the 1982 Employment Protection Act (cf. section 6f).[39]

[35] See Government Bill Prop. 2001/02:97 *Lag om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning, m.m.* Existing labour law legislation and collective agreements were in principle deemed, with regard to fixed-term employees, to be in line with the principle of non-discrimination of the Directive. – There is no tradition in Sweden to differentiate terms and conditions of employment between fixed-term employees and permanent employees, cf. Engblom 2008 and Numhauser-Henning 2004. – However, legislation was necessary with regard to part-time work, and in the interest of legal transparency and coherence, a common Act was created. Cf. European Commission, *Commission Staff Working Document, Report by the Commission services on the implementation of Council Directive 1999/60/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP (EU-15)*, SEC(2006) 1074.

[36] See Numhauser-Henning 2002. Cf. section 3 on direct discrimination: 'an employer may not disfavour an employee working part-time or an employee with fixed-term employment by applying less beneficial pay or other terms and conditions of employment than the employer applies or should have applied for employees in a similar situation who work full time or have a permanent employment contract respectively, unless the employer demonstrates that the disfavour is not related to the part-time work or permanent employment contract of the person disfavoured, indirect discrimination' and section 4 on indirect discrimination: 'an employer may not disfavour an employee working part-time or an employee with fixed-term employment by applying pay or other terms and conditions of employment that appear to be neutral but which in practice is particularly disadvantageous to employees working part-time or employees with fixed-term employment. However, this does not apply if the application of the terms and conditions can be justified by a reasonable goal and the means are appropriate and necessary in order to achieve the goal'.

[37] Cf. Government Bill Prop. 2001/02:97, p. 31.

[38] See Government Bill Prop. 2001/02:97, pp. 50 ff, Numhauser-Henning 2002 and Engblom 2008.

[39] Numhauser-Henning has pointed to a weakness in the implementation of the Directive linked to the 'semi-compelling' nature of the 1982 Employment Protection Act, namely the fact that the Act has not been

3. Current regulation on fixed-term employment contracts

The latest, and in some respects fundamental, reform of the regulation of fixed-term employment contracts entered into force on the 1st of July 2007. The reform aimed at simplifying and clarifying the regulation of fixed-term employment contracts (i.e., revising the long 'catalogue' of permitted fixed-term employment contracts in sections 5–6 of the 1982 Employment Protection Act), but also at meeting the need for security and involvement of employees within a flexible and efficient labour market.[40] Thus, the reform was set against the background of the Fixed-Term Work Directive. The centre-right government also explicitly wanted to increase the possibilities for employers to make use of fixed-term employment contracts.[41]

Most of the basic principles regarding the regulation of fixed-term employment contracts still remain. Thus, permanent employment is the main rule; fixed-term employment contracts have to be agreed upon, and specifically provided for by law or collective agreement. A fixed-term employment contract is concluded for a limited period of time, and terminates at the expiry of the agreed term, without the need for notice. Collective bargaining and provisions on fixed-term employment contracts in specific statutes or regulations, respectively, can both narrow and widen the scope for fixed-term employment contracts.

However, in part, the new reform represents a new stance towards fixed-term employment contracts. The long 'catalogue' of fixed-term contracts has been replaced by a new form of fixed-term contract – 'general fixed-term employment' (*allmän visstidsanställning*, cf. section 5 of the 1982:80 Employment Protection Act), supplemented only by temporary substitute employment, seasonal employment, fixed-term contracts for employees above the age of 67 years, and probationary employment.[42] Thus, the legal scope for fixed-term employment contracts is now broader. The employer is free to enter into general fixed-term employments, and there is no requirement for objective reasons. In principle, the employer may use only fixed-term employment contracts and conduct his or her entire business using flexible employees. However, when an employee has been employed – in a general fixed-term employment *or* as a temporary substitute – by one employer for a total of two years during the last five years, the contract is automatically converted into an indefinite permanent employment contract (cf. section 5 subsection 2 of the 1982 Employment Protection Act).

This reform can thus be said, in line with the Fixed-Term Work Directive, to normalise the fixed-term contract for a short duration, and at the same time limit the scope for successive fixed-term employment contracts. In addition, there is a progressive build-up of rights for employees.

Principally, temporary substitute employment is only permitted – so-called *genuine* temporary substitute employment – if the employment is linked either to an employee who is temporarily absent or to a position which is temporarily free. However, in its case law, the Labour Court has 'softened' these requirements, and today it suffices if the temporary substitute employment in more general terms reflects the actual staffing situation, and is based on the absence of permanent employees.[43] The need for and use of temporary substitute employment in Sweden must also be seen in relation to Swedes' extensive statutory rights to leave of absence from work, such as 18 months of parental leave and right to leave from work to conduct studies.

Seasonal work is permitted when it is necessitated by the special nature of the work, and most frequently used in specific sectors, such as agriculture and tourism.[44] Fixed-term employment is also permitted without any restrictions, when the employee is 67 years of age or older.[45]

In addition, section 6 of the 1982 Employment Protection Act provides for probationary employment ('hiring on trial'), frequently used in the Swedish labour market. Probationary employment was not affected by the latest reform.[46] As with all fixed-term employment contracts, probationary employment must be specifically agreed upon, and is permissible only if the trial period is no more than six months. The provision on probationary employment is, however, 'semi-compelling'. Some collective agreements limit the period from six to three months, and other collective agreements specify more closely, and sometimes also more restrictively, the conditions for using probationary employment.[47] If the employer or the employee does not want the employment relationship to continue, they must inform the other party to the contract, no later than the end of the trial period. If this is not done, the

complemented with a reference to the Fixed-term Work Directive when it comes to limiting the competence of the social partners who enter into collective agreements, the way this is usually done when transposing EC Directives, see Numhauser-Henning 2002. The duty according to Clause 6(2) to as far as possible facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility seems more or less 'voluntary' and has not been explicitly implemented.

[40] Cf. Government White Paper Ds 2002:56 and Government Bill Prop. 2006/07:111 *Bättre möjligheter till tidsbegränsad anställning, m.m.*

[41] This was to be seen in relation to a similar proposal, put forward by the former social-democratic government (which had also been decided by Parliament and was to enter into force on the 1st of July 2007) for a reform of the regulation of fixed-term employment contracts. This reform also aimed at simplification and clarification, but was stricter regarding the scope for fixed-term employment contracts (it provided, for example, for a so-called free fixed-term employment contract for up to 14 months during a five-year period, and a strengthened priority right to re-employment), see Government Bill Prop. 2005/06:185 *Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen*, cf. Engblom 2008.

[42] See Government Bill Prop. 2006/07:111. Section 5 of the 1982 Employment Protection Act states: 'A contract of employment for a fixed-term may be concluded 1. for a general fixed-term employment, 2. for a temporary substitute employment, 3. for a seasonal employment, and 4. when the employee has attained the age of 67. If an employee has been employed for a period of five years by an employer either for a general fixed-term employment for in aggregate more than two years, or as a temporary substitute for in aggregate more than two years, the employment is transformed into a permanent employment'.

[43] See Government White Paper Ds 2002:56, pp. 219 ff., and, for example, Labour Court judgments AD 1985:30 and AD 2002:3.

[44] See Government Bill Prop. 2006/07:111, pp. 24 f.

[45] This provision is complemented by sections 32a and 33 of the 1982 Employment Protection Act. Section 32a states that 'an employee is entitled to remain in the employment up to the end of the month when he or she attains the age of 67' and section 33 states that 'an employer desiring an employee to leave his or her employment at the end of the month when he or she attains the age of 67 shall give the employee at least one month's written notice of such desire'. According to Numhauser-Henning, these provisions are likely to be in accordance with the prohibition of discrimination on grounds of age as expressed in Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, general principles of EU law, the case law of the European Court of Justice (cf. C-144/05 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 and C-411/05 *Palacios de la Villa* [2007] ECR I-8531) and the Swedish 2008 Non-Discrimination Act, cf. A. Numhauser-Henning, Åldersdiskriminering och några anställningsskyddsrelaterade frågor, In: K. Ahlberg (ed.), *Vänbok till Ronnie Eklund*, Iustus, Uppsala 2010, pp. 439–476. This is also the standpoint of the Swedish Equality Ombudsman.

[46] During a shorter period in the 1990s, the 1982 Employment Protection Act provided for 12 months of probationary employment.

[47] See Lunning and Toijer 2006, p. 261.

probationary employment is automatically converted into an indefinite employment contract. Thus, probationary employment differs from other forms of fixed-term employment contracts, which expire at the end of the agreed period. Inherent in the nature of probationary employment is both the employer's need to initially 'try out' the employee, and the later automatic conversion into an indefinite employment contract.[48]

No objective reasons are needed for the employer's use of probationary employment, and such use can therefore not be legally scrutinised in the court. In exceptional cases, the use of probationary employment may be legally challenged, for constituting a circumvention of the 1982 Employment Protection Act (cf. Labour Court judgement AD 1987:148).[49] In addition, the employer's termination of the probationary employment contract cannot be legally scrutinised or challenged within the framework of the 1982 Employment Protection Act. Such a termination can, however, be legally scrutinised as constituting, for example, a violation of the freedom of association (cf. Labour Court judgement AD 2004:49), or a violation of non-discrimination legislation (cf. Labour Court judgement AD 2002:102).[50]

In order to give the employee some respite and the possibility to discuss the situation with the employer, the employer is obliged to inform the employee, and his or her trade union, of the termination of the probationary employment contract two weeks in advance (cf. section 31 of the 1982 Employment Protection Act). The employee and the trade union have a right to consult the employer. These provisions on information and consultation are merely 'provisions of form'. A breach of these provisions is thus sanctioned only by the employer paying damages, and does not in any way affect the validity of the termination of the probationary employment contract.

Likewise, the employer is obliged to inform (give notice to) the employee and his or her trade union one month before the termination of a fixed-term employment contract concluded according to section 5 of the 1982 Employment Protection Act (general fixed-term employment, temporary substitute employment etc.), provided the employee has been employed for a total of 12 months during the last three years (cf. sections 15–17 and 30a of the 1982 Employment Protection Act). The employee and the trade union have a right to consult the employer.

An employee with a fixed-term contract (but for probationary employment), who has been employed in total for more than twelve months during the last three years with the employer, and whose employment has been terminated for reasons of redundancy, has a so-called priority right of re-employment (cf. section 25 of the 1982 Employment Protection Act).[51] The priority right of re-employment is on condition that the employee is sufficiently qualified, and re-employment offers are to be presented to employees in accordance with the 'last-in-first-out' principle. A priority right of re-employment exists even if re-employment of the employee implies 'crossing' the two-year limit and the fixed-term employment contract automatically being converted into a permanent employment contract.[52]

An employer who is bound by a collective agreement and concludes a fixed-term contract with an employee for work to which the collective agreement applies, shall notify the relevant local trade union organisation without delay. No such notice is necessary if the

[48] See Lunning and Toijer 2006, pp. 259 ff. and Källström and Malmberg 2009, p. 116 f.
[49] See Lunning and Toijer 2006, pp. 261 ff.
[50] Cf. Källström and Malmberg 2009, p. 116 f.
[51] Specific time limits apply for seasonal employment (cf. section 25 of the 1982 Employment Protection Act).
[52] See Källström and Malmberg 2009, p. 118.

employment is not to exceed one month (cf. section 28 of the 1982 Employment Protection Act).

The Swedish Labour Court (*Arbetsdomstolen*) was established in 1928, originally aiming at resolving disputes relating to the collective bargaining system. 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 in most instances. 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 appeal. (The procedure in labour disputes is regulated by the 1974 Act on Litigation in Labour Disputes (SFS 1974:371). The Labour Court tries only about 200 cases each year, so 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 exhausted. Thus, negotiations both at local and national level must have been conducted, and must have failed in order for the case to be admitted to the Labour Court. As a result, many disputes are settled out of court.[53]

A fixed-term employment contract that has been entered into in violation of the provisions of the 1982 Employment Protection Act (for example, a temporary substitute employment contract that is not genuine) can be declared by the court as an indefinite permanent employment contract (section 36 of the 1982 Employment Protection Act) This declaration can be combined with damages, both financial and punitive (cf. section 38 of the 1982 Employment Protection Act). If the employer does not adhere to such a judgment, the court will declare the employment relationship dissolved and award the employee specific 'standardised' damages in high amounts, relative to the duration of the employment relationship (cf. section 39 of the 1982 Employment Protection Act). If the employer does not acknowledge the automatic conversion of a general fixed-term employment or a temporary substitute employment into a permanent employment contract, the employee can, for example, make a claim to have the permanent status of the employment contract established, combined with a claim for damages.[54]

The periods of employment spent in general fixed-term and temporary substitute employment are non-cumulative. An employee can therefore be employed for a total of four years (within a five-year period; seasonal and probationary employment may, in principle, by added to this).[55]

In 2007 the Swedish Confederation for Professional Employees (TCO) made a formal complaint to the European Commission as regards the Swedish State's failure to correctly implement the Fixed-Term Work Directive with regard to clause 5 and the measures to prevent abuse arising from the use of successive fixed-term employment contracts. TCO

[53] In Sweden there are no labour inspectorates. Instead, a large part of the control of the enforcement of labour law legislation and collective agreements is performed by the trade unions, together with some government authorities, such as the Working Environment Authority and the Discrimination Ombudsman.
[54] See Källström and Malmberg 2009, p. 119.
[55] The Government Bill Prop. 2006/07:111 acknowledges this fact, but doubts that misuse will occur on any large scale. If, however, future and frequent misuse occur, the government states that it will investigate and contemplate future reforms.

criticised the content of the 2007 reform of the regulation of fixed-term employment contracts, *inter alia* the vast scope for general fixed-term employment without any need for objective reasons, and the effects on the non-cumulative calculation of the periods of employment spent in general fixed-term employment and temporary substitute employment. In March 2010 the European Commission made a formal notification (the second step in the infringement procedure) to the Swedish government regarding the insufficient implementation of the Directive. The Swedish government was given two months to reply.[56]

There is only a very limited case law concerning the principle of non-discrimination in the 2002 Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act. As of yet, no employees have had any success in claiming discrimination. As with case law from the European Court of Justice, it has been difficult to prove that a person is in a *comparable situation* (with a full-time or permanent employment), or that one has been treated less favourably *solely* on grounds of a part-time or fixed-term employment contract.[57, 58]

The Swedish social security system has (like the labour law system), a homogeneous and uniform character, and covers not only all categories of employees – permanent employees and fixed-term employees – but also self-employed workers. However, fixed-term employees may have greater difficulties in fulfilling the work requirements necessary in order to qualify for unemployment benefits (cf. the 1997 Unemployment Insurance Act).[59]

4. Concluding remarks

Naturally, it is still too early (*inter alia* with regard to the lack of case law from the Labour Court) to evaluate the full effects of the 2007 reform of the regulation of fixed-term employment contracts. In line with the Fixed-Term Work Directive this reform, together with the 2002 Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act, combines to some extent, however, minor, requirements for objective reasons for the entry into fixed-term employment contracts with the setting of upper limits for the maximum duration of successive fixed-term employment contracts, and the establishing of a principle of non-discrimination.

Earlier studies show that collective bargaining (allowing for a broader or, as perhaps more often is the case, a narrower scope for fixed-term employment contracts) serves to 'cushion the blow' and delay the effects of statutory reforms.[60] One possible negative side-effect of limiting the maximum duration of successive fixed-term employment contracts –

[56] Cf. TCO, *Anmälan mot Konungariket Sverige på grund av att nya regler om visstidsanställningar i Sverige innebär ett bristande genomförande av Direktiv 1999/70/EG om ramavtalet om visstidsarbete undertecknat av EFS, UNICE och CEEP*, Stockholm, 2007-06-20, Engblom 2008 and C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057.

[57] Cf. Labour Court judgment AD 2008:32 (wages for fixed-term and part-time employees, being advertisement producers), Labour Court judgment AD 2008:97 (vacation for fixed-term employed actors) and Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KGK* [2004] ECR I-9483, see also Barnard 2006, pp. 472 ff.

[58] There is no specific discussion on a conflict of interest between permanent and fixed-term employees with regard to the principle of non-discrimination. The trade unions represent both permanent and fixed-term employees; however, as previously stated, the trade union organisation rate is lower among fixed-term employees than among permanent employees.

[59] See Engblom 2008, p. 137. The unemployment insurance system and the health insurance system etc. have been the object of much debated reforms by the current centre-right government.

[60] See Government White Paper Ds 2002:56, pp. 227 ff. and Engblom 2008.

especially when combined with the priority right of re-employment in case of redundancy – is the risk of employees not being offered further employment when the time limit (12 months and two years, respectively) for the priority right to re-employment and conversion of the fixed-term employment into a permanent employment is approaching. Earlier rules of a similar character have proven to have such effects in certain sectors, for example in the media sector.

The basic content of the 2007 reform – the simplification and clarification of the regulation on fixed-term employment contracts – was not disputed by the social partners. However, the trade unions criticise the upper limits for general fixed-term employment and successive fixed-term employments as being too generous. Today, in the midst of the large 2010 national collective bargaining round, the major debate in the field of employment protection revolves mostly around the existence and content of the seniority rules and the scope for employers to engage temporary agency workers following dismissals for reasons of redundancy and the risks for circumvention of the employment protection.

The Swedish regulation on fixed-term employment contracts is well in line with the current flexicurity strategy and discourse. Fixed-term employment contracts for a short duration are normalised, and employers are offered increased numerical flexibility by way of general fixed-term employment and temporary substitute employment. Employees are provided with security through upper limits for maximum duration of successive fixed-term employment contracts, and the conversion of these fixed-term employment contracts into permanent employment contracts. In addition to all this, there is a progressive build-up of rights and employment protection in the form of information, consultation and priority rights to re-employment. The 'semi-compelling' character of the 1980 Employment Protection Act and the scope for and use of collective bargaining as regards fixed-term employment contracts are expressions of the element of procedural flexibility inherent in the Swedish industrial relations and labour law system.[61]

[61] Cf. Rönnmar 2006.