SOU 2019:5
Time for security

Summary

In this final report, the Inquiry on sustainable working life over time (A 2017:02) presents its deliberations and proposals concerning employee protection against changing employment conditions in connection with re-regulation of the level of occupation (working time) in the event of a shortage of work, employment protection for intermittent employees, and whether employees should be entitled to working time that corresponds to their actual working hours under certain conditions. In March 2018, we submitted an interim report (SOU 2018:24), in which we presented other components of the Inquiry's remit. In submitting this final report, the Inquiry has thus presented all parts of its remit.

The purpose of the Inquiry, according to its remit (see Annex 1), is that the Government wants to create a more sustainable working life, with reduced risk of ill health and unemployment. The Government also wants to enhance employee protection, create a clearer regulatory framework and improve the opportunities for a flexible working life.

The Inquiry's proposals and deliberations have been analysed to ensure they do not prevent the social partners from building further upon already existing types of collective agreements and also otherwise respecting the Swedish labour market model. This applies particularly to the principles for the Swedish labour market model that the Inquiry developed in consultation with the social partners: freedom for the social partners to establish agreements without central government intervention, the employer's right to direct and delegate work assignments, and the importance of a high level of coverage among both employers and employees.

Precarious employment and health

Essentially, having a job promotes good health. However, this positive connection between work and good health presupposes reasonable working conditions and a good work environment. The part of the Inquiry's remit concerning the re-regulation of working time in the event of a shortage of work is primarily connected with the insecurity resulting from cutbacks and restructuring in the workplace, while the other two parts concern the insecurity resulting from (short) fixed-term employment contracts.

These phenomena are examples of job insecurity that may lead to limited opportunities to influence when and how the work is to be carried out and insecurity concerning the wage to be received. This in itself leads to increased insecurity, stress in working life and poorer health. Precarious employment may also place employees in a situation where they have difficulty earning a living and planning their future, despite the fact that they are working. This can lead to increased anxiety over the future, a form of stress that can be particularly difficult to handle – especially if the insecure situation is protracted or repeated.

Work environments are clearly not gender equal; working conditions and work environments are poorer in sectors dominated by women. This increases the risk of ill health and the risk of leaving a position of employment as a result of ill health or dissatisfaction with working conditions.

Studies show that young people in precarious employment are at greater risk of both injuries at work and mental health problems compared with those with an open-ended employment contract. Young women and temporary workers run a greater risk of being subjected to sexual harassment compared with others.

It is against this background that the Inquiry has examined the questions the Government has tasked us with.

Re-regulation of working time in the event of a shortage of work

The employer's managerial prerogative means that employers can shape the organisation as they choose, including the working time that various positions should involve, as long as they stay within the

frameworks stipulated by other legislation. If a shortage of work arises at a workplace, the employer can reorganise the workplace or give staff notice of termination, in accordance with the Employment Protection Act (1982:80). The basic premise of the Employment Protection Act is that any notice of termination in conjunction with a shortage of work is to be handled using the rules on the order of priority, which normally provide protection to employees with the longest period of employment. This creates objective criteria regarding who will be given notice. However, employers are always obliged to examine whether it is possible to offer employees redeployment to other duties, with the aim of avoiding termination notices.

The question of re-regulation to reduced working time in the event of a shortage of work – 'time shaving' – has been the subject of discussion and debate in recent years. The starting point for the debate has been the fact that the application of the law has established that employers do not need to consider the order of priority between employees if they propose a reduction in working time instead of giving staff termination notices in the event of a shortage of work. If the employee who is offered a reduction in working time declines, the employer has objective grounds for notice of termination, as long as the offer can be considered reasonable. This means that the person the employer directs their offer to can be given notice of termination, without using the order of priority rules. Any employee who accepts a redeployment offer involving a reduction in working time is (normally) not entitled to any period of adjustment. Nonetheless, since 2016 a number of collective agreements have been signed with a period of adjustment corresponding to the period of notice and severance pay; on the other hand, as far as the Inquiry is aware, no agreement has been found on using the order of priority in this situation.

According to the Inquiry's examination, re-regulation of working time occurs regularly but is not applied on any great scale in the labour market. However, it is unclear how widely it would be applied in a recession, as the application of the law became generally known following the Labour Court's judgment no 69 of 2016.

The social partners provide a coherent account that the reasons for re-regulation are primarily: 1) to try to create profitability in a financially unprofitable situation by reducing working time and thus

wage costs, and/or 2) that reorganisation is necessary because the work needs to be performed in a shorter period of time.

Employers emphasise operational needs – that it may be a matter of survival to try to reduce costs while trying to retain important skills in the company. They report that this takes place only when necessary, and that there is full understanding of the impact on employees' personal finances, but that it is nevertheless better to have a part-time job than no job at all. Employers also highlight the fact that the redeployment obligation is mandatory, and that it is of the utmost importance that any redeployment can take place without being governed by the order of priority rules.

The employees' perspective primarily highlights the fact that, in practice, employees are compelled to say yes, thus accepting reduced working time and lower wages, since the consequences may otherwise be considerable. It is also considered problematic that employers can freely choose who receives a redeployment offer, as this can result in workplaces where no one risks speaking out and employees no longer dare to assert their rights.

The Inquiry would also like to point out that the issue has a clear gender dimension. Re-regulation of working time in the event of a shortage of work is common in industries with a high rate of part-time employment. These industries are also largely dominated by women. In practice, this means that in different shortage of work situations, implementing the Employment Protection Act can result in different outcomes depending on whether the workplace is dominated by women or men. Gender equality considerations and different standards for part- and full-time work in various industries has been repeatedly pointed out to the Inquiry as an explanation of why the re-regulation of working time only occurs in certain labour market sectors. In other words, the same Act can lead to very different outcomes for industries dominated by women or by men.

The Inquiry considers it particularly problematic that the employer can choose who receives a redeployment offer entailing reduced working time, regardless of the order of priority rules in the Employment Protection Act. The Inquiry considers that the legislator's intentions are clear: there should be objective criteria to support which individual(s) will receive notice of termination in conjunction with a shortage of work. This protection against arbitrary treatment has for some time outweighed the employer's

managerial prerogative. The Inquiry considers that such protection should also be the point of departure for these situations, which can basically be considered a 'partial termination notice' due to a shortage of work, rather than redeployment. In the course of its work, the Inquiry has found no indication that the legislator had envisioned that the redeployment obligation would be used in this way.

The Inquiry proposes that a redeployment offer should not be considered reasonable if it solely entails reduced working time. In a shortage of work situation, employees may accordingly decline any redeployment offer that solely entails reduced working time, without risking notice of termination as a result of having declined the offer.

This proposal means that if one or more employees were to decline a reduction in working time, the employer must use termination notices to achieve any reduction in working time, which in turn means using the order of priority rules. In accordance with its remit, the Inquiry has considered – but is submitting no proposals on – introducing a requirement that any redeployment offers entailing a reduction in working time in conjunction with a shortage of work be given in the order of priority.

Our proposal increases the clarity for all employees that it is the order of priority rules that govern which employees will remain in a shortage of work situation. From the employers' perspective, they retain the possibility of reorganising and offering a reduction in working time to the employees of their choice. However, our proposal means that employers cannot create positions with reduced working time to the same extent, while remaining fairly sure of being able to retain their staff.

Employment protection for intermittent employees

The general rule in the Swedish labour market is that employment is to be open-ended, in other words that employment contracts are valid for an indefinite term. Fixed-term employment contracts, such as substitute employment, probationary employment and general

limited contracts, are also forms of employment in the Employment Protection Act or other statutes, and in collective agreements.

The Inquiry has examined the situation for intermittent employees, often referred to in the debate as having 'on-call', 'casual' or 'if and when' contracts. Employees who are employed for intermittent work always have some form of fixed-term employment contract regulated by law or in a collective agreement.

The Inquiry has defined the group as employees who only work short periods at a time, only when called in by the employer, and each new shift entails a new employment relationship. The time between shifts is not regarded as a period of employment, and the employee can decline any offer to work.

The Inquiry's starting point is that open-ended contracts must remain the general rule in the Swedish labour market, but that various forms of fixed-term contracts, including intermittent contracts, also have an important role to play. They can be important for employers in need of labour during temporary workload peaks and when employers need to replace staff who are temporarily absent. They can also be a path into working life, not least for groups that are detached from the labour market. Different forms of fixed-term employment may also be desirable for certain employees; students, for example, may have a particular need to work for short periods of time. Employers emphasise that fixed-term contracts are an important path into the labour market. Studies on the importance of the type of employment contract for entry into the labour market show that probationary employment and temporary substitute contracts are much better paths into the labour market than casual or on-call contracts.

Nevertheless, intermittent contracts can also mean involuntary insecurity for employees. Social security schemes are primarily based on full-time, open-ended employment contracts, and there is a risk that the individual must be responsible for their own continuing professional development. The small scope to influence when and how work is to be performed can result in increased insecurity and stress in working life. Furthermore, individuals risk ending up in a situation where they have difficulty earning a living and planning their future, despite the fact that they are working. Many housing companies and banks require an open-ended employment contract to rent housing or take out a mortgage. The value of an employee's

right to decline an offer of work can also be questioned, as in practice there may be a risk that no more offers will be made once an employee has declined.

To summarise, intermittent contracts can be a good complement in the labour market specifically to cover the temporary needs of both employers and employees, but not at the expense of employees being employed on open-ended contracts, provided there is a need of work.

Based on existing statistics, it has been difficult to identify the prevalence of intermittent contracts. However, we can note that 27 per cent of all fixed-term employees – corresponding to 200 000 people – worked without any agreed working hours in 2017. More than half of these people work in jobs in the service, care and sales sectors. More than half the people in this group prefer to work on fixed-term contracts. But when those who study are excluded, more than half would prefer open-ended employment.

The Inquiry's challenge has been to arrive at proposals that strengthen the position of those working involuntarily on intermittent contracts without complicating matters for those working voluntarily on such contracts.

The Employment Protection Act contains protection regulations for employees working on a fixed-term contract, the purpose of which is to ensure that the position transitions into an open-ended contract when it is no longer considered temporary. Employees with intermittent contracts generally have particular difficulty attaining the time frames established for protection under the Employment Protection Act, since the time between different contracts is not regarded as a period of employment.

The Inquiry proposes that time between repeated short employment contracts be regarded as a period of employment in applying certain provisions of the Employment Protection Act (1982:80).

When an employee has had more than two fixed-term employment contracts with the same employer during a period of 30 days, the time between contracts will also be considered part of the period of employment.

The Inquiry considers that there are financial incentives for employers to choose intermittent contracts over longer fixed-term

employment contracts (for example, holidays and other free days are not counted in intermittent contracts, while they are regarded as part of the period of employment for people with a consecutive employment contract). Calculating the length of employment in relation to the existing time frames, for example in the rules on conversion to open-ended contracts, thereby in fact risks contributing to the (unnecessary) use of several successive fixed-term contracts. We consider this a shortcoming in the existing regulatory framework that needs to be remedied.

One aim of the proposal is to shift costs so that with regard to rights of conversion and order of priority, it is not more advantageous for employers to divide substitute positions and shifts up into small parts as opposed to creating positions and shifts that are as continuous as possible. Operational need should determine when intermittent contracts are used.

The rule is proposed to be non-mandatory in collective agreements.

The right to working time that corresponds to actual working hours

The Inquiry has also examined Norwegian regulations on the right to working time that corresponds to actual working hours, and the ideas behind this regulatory framework. If a person consistently works more than the working time set out in their employment contract in Norway, they are currently entitled to have their working hours stipulated to the higher working time.

The Inquiry considers the Norwegian model an interesting source of inspiration. It is based on the employer's ability to plan work assignments with a margin for predictable absence, thus reducing the need for temporary labour.

However, a range of circumstances make the Norwegian design difficult to transfer to Sweden as policy reform. Above all, the basic staffing prerogative upon which the regulatory framework is based lacks any direct equivalent in Sweden. The Norwegian labour law model is also different to the Swedish model.

The Inquiry considers that it should be up to the social partners to determine whether there should be a right to working time that corresponds to actual working hours.

Need to regulate zero-hours contracts

It is doubtful whether zero-hours contracts of the type that entail an obligation to work formally exist at all in the regulated labour market today. However, there are likely employees who perceive that they work under such conditions. The number of employees on open-ended contracts without agreed working hours has increased dramatically among both women and men, from around 20 000 in 2006 to around 57 000 in 2017.

The Inquiry's examination has shown that it is possible for employees to work under precarious conditions despite having an open-ended contract.

Employees on open-ended contracts sometimes have a low basic level of working time and then work considerably more than this basic level. This is a form of work that is similar to intermittent contracts but is based on a longer, continuous contract.

The Inquiry's assessment is that the current provisions and practice in the area do not permit fixed-term contracts to be stacked on top of an open-ended contract with a low basic level of working time.

Other proposals and assessments

In the view of the Inquiry, there are good reasons to raise our sights and contemplate measures that impact the costs of intermittent contracts by taking a broader perspective of sustainable skills provision and staffing in companies and organisations. We believe it would be a good idea to make it less expensive to employ people on open-ended contracts and more expensive to employ people on fixed-term contracts.

The Inquiry makes the assessment that the Government should appoint an inquiry to draft proposals on how to use differentiated employers' social security contributions or other financial incentives to promote open-ended contracts as the norm.

The Inquiry also considers that the Government should task Statistics Sweden with developing its labour force surveys to ensure that the statistics are better suited to current and future conditions in the labour market.

Entry into force

The Inquiry proposes that the new rules we have presented should enter into force on 1 January 2021.

Some time is needed in order to circulate the proposals for comments, and for preparation at the Government Offices. Following this, it is desirable that the social partners have the opportunity, should they wish, to negotiate new agreements based on the new rules in the Employment Protection Act.