HIDDEN CLAUSES IN COLLECTIVE AGREEMENTS. THE CASE LAW OF THE SWEDISH LABOUR COURT

BY

HÅKAN GÖRANSSON

1. INTRODUCTION

The four basic prohibitions against industrial action embraced by Swedish law are found in sec. 41 of the Act on Joint Regulation in Working Life. Under that provision, it is unlawful to take or participate in industrial action while a collective agreement is in effect where the object of the action is:

(1) to exert pressure in a dispute over the validity of a collective agreement, its existence, or its correct meaning, or in a dispute as to whether a particular procedure is contrary to the agreement or [the Act on Joint Regulation],

(2) to bring about alteration of the agreement,

(3) to effect the adoption of a provision intended to come into operation when the agreement has ceased to apply, or

(4) to support some other party which is not itself permitted to take industrial action.

These prohibitions against industrial action originate from the 1928 Act on Collective Agreements, and have with minor linguistic changes been incorporated in the 1976 Act on Joint Regulation. In the practice of the Swedish Labour Court the prohibition contained in the second point of sec. 41 has caused most problems of application. According to this point, the peace obligation comprises not only matters which have been expressly regulated in the agreement, but also to a great extent matters which, at least at first glance, do not appear to have been regulated at all. This problem was discussed in Scandinavian Studies in Law by the Finnish legal scholar Antti Suviranta in 1965.[1] He starts his discussion by noting that

> "[I]t is ... often asserted that there are terms of employment relationships which have the same effects as collective agreement clauses even though they have not been explicitly inserted in the applicable collective agreement. Such terms might be called 'invisible clauses' of collective agreements."

[1] Antti Suviranta, "Invisible Clauses in Collective Agreements", 9 *Sc.St.L.*, pp. 177 ff. (1965).

This discussion has been pursued in relation to the practice of the Swedish Labour Court in interpreting collective agreements with respect to such "hidden clauses", particularly after the enactment of the Act on Joint Regulation. The present author would classify such clauses into five categories, viz.:[2]

(1) Various general principles of law to *supplement* the terms of the collective agreement which have been applied by the Court.

(2) Matters which the Labour Court in *construing* a general principle of law it has already formulated has found to be regulated in the collective agreement.

(3) Matters which have been regulated *in a negative way*, i.e. through rejection of a claim presented during the bargaining for an agreement, the rejection being tantamount to a decision that the meaning of the agreement is that a certain right should not be enjoyed by one of the parties.

(4) Matters which the Court has found to be covered by the collective agreement in such a way that it must be considered a *mutual precondition* for the making of the agreement that they are covered although no express provision has been made. In contradistinction to the first category it is here a matter of individual preconditions for a certain agreement and not general preconditions for collective agreements at large.

(5) Certain not expressly regulated matters, which under the preconditions for the agreement should be left to *separate free negotiation* between the employer and the individual employee. The right to decide in such matters can be regarded as *delegated* from the parties to their respective members.

In what follows these five categories will be discussed separately. Finally a short discussion of the concept of hidden clauses in relation to what is termed the residual right to industrial action in the 1976 Act on Joint Regulation will be added.

2. CATEGORY 1. GENERAL PRINCIPLES OF LAW SUPPLEMENTING THE COLLECTIVE AGREEMENT

The most important category of invisible clauses is the use of various general principles of law to "supplement" the terms of collective agreements.

[2] Håkan Göransson, *Kollektivavtalet som fredspliktsinstrument. De grundläggande förbuden mot stridsåtgärder i historisk och internationell belysning*, diss. Stockholm 1989, pp. 248 f.

In determining what general principles are deemed to govern collective agreements, considerable importance has been attached to those rights which LO (The Swedish Confederation of Trade Unions) and SAF (The Swedish Employers' Confederation) had agreed upon in the "December Compromise" of 1906. Under sec. 23 of SAF's charter—changed to sec. 32 in the 1961 charter—employer-members of SAF were unconditionally obliged *inter alia* to ensure that collective agreements contained a provision on the employer's right to manage and distribute work. In December 1906 LO agreed, under the threat of lockout, to attempt to persuade its member organizations to incorporate the following wording into the collective agreements:

> With due observance of the other provisions in the present agreement, the employer shall be entitled to manage and distribute work, to hire and dismiss workers at will, and to employ workers, whether organized or not.

The adoption of the Act on Collective Agreements enhanced the legal significance of the December Compromise. It did not matter whether the contents of the compromise had been written into the collective agreement. The Labour Court deemed the employer's prerogative under sec. 23 [32] of the Swedish Employers' Confederation rules a general principle of law.

The leading case on general principles of law as a constructive content of the collective agreements is AD 1933:159.

> Götaverken AB, a large shipyard in Gothenburg, had dismissed a number of workers in spite of the fact that they had higher seniority than other workers. The National Union of Metal Workers retaliated by proclaiming a ban on new employment, to last until the workers were reinstated. The Union considered the ban a lawful industrial action as the collective agreement signed with the Swedish Industrial Salaried Employees' Association contained no provision corresponding to sec. 23 of SAF's charter. According to the Union the dismissals constituted an unregulated question of interest and the Labour Court was consequently not competent. The Labour Court did not agree and added:
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> "For any limitation to exist in the right of an employer freely to dismiss an employee employed for an indefinite period of time, a stipulation in a contract, be it an individual contract of employment or a collective agreement, is required. If such stipulations are not inserted in a collective agreement, the employer's right is valid, *even if that right has not been expressly recognized in the agreement.*" (Emphasis added)

The object of the industrial action was to force the enterprise to reinstate the dismissed workers, which in the eyes of the Labour Court is tantamount to a Union attempt to deprive the employer of its right to dismiss workers at will. The ban on new employment thus contravened

the prohibition against industrial action contained in point 2 of the Act, as it was considered "intended to bring about an alteration in the rules laid down in the collective agreement".

The Labour Court has adopted the same point of view in relation to other management prerogatives under sec. 23 [32] of SAF's charter. The right to freely employ workers and the right to manage and distribute work have both been considered protected by the peace obligation.

One may ask whether there exist other principles of law attached to collective agreements on pay and other conditions of work than those based on the prerogatives contained in sec. 23 [32] of SAF's charter.

The Swedish scholar Svante Bergström and the Finnish scholar Antti Suviranta both maintain that the peace obligation connected with a collective agreement on pay is more or less absolute. According to Bergström a presumption exists that the peace obligation covers unregulated matters other than those connected with pay and similar issues.[3] Suviranta has maintained that the common collective agreements on pay and other conditions of work as a rule aim at comprehensive regulation of working conditions. In his view conditions of employment not expressly mentioned in the collective agreement may be covered by the peace obligation, even though not all the legal consequences following from regulation in a collective agreement will be present. Consequently such conditions of work will be covered by the collective agreements only in the sense that they are covered by the peace obligation.[4]

In a government Green Paper containing proposals for the Act on Joint Regulation delivered by the labour market committee in 1975, a survey of the practice of the Labour Court with regard to interpretation of collective agreements in the light of general principles of law was presented. In the Green Paper it is maintained that the Labour Court has presumed that any normally comprehensive collective agreement on pay and other conditions of work entails a peace obligation in matters of management prerogatives covered by sec. 23 [32] of SAF's charter, regardless of the fact that the agreement lacks express provisions to that effect. The committee, however, say that they have been unable to find evidence of any other general legal principle having been included in a collective agreement in such a way as to be covered by the peace obligation. Surely it is natural to assume when construing collective agreements that the parties to the agreement have intended that indus-

[3] Svante Bergström, *Arbetsrättsliga spörsmål I. Om räckvidden av den s.k. 200-kronorsregeln i kollektivavtalslagen*, Stockholm 1950, pp. 41, 56.

[4] Suviranta, *op.cit.*, pp. 205 ff., particularly pp. 211 f., 214 f.

trial action over the fundamental rules on the relationship between employers and employees should not be allowed in the area of individual contracts of employment. Such an assumption should however not, according to the committee, be made unless the general principle of law referred to is a clear and immediately applicable rule of the character represented by the employers' prerogatives here referred to.[5] An example of a matter which should not be considered covered by a collective agreement unless expressly regulated is the duty of care incumbent upon the employee according to general principles of law, i.e. his obligation to exercise due care in carrying out his work, his duty to try and prevent damage to machinery and goods, etc. Thus, rules on the duty of care have not been considered contents of the collective agreement.[6] The conclusion to be drawn from the committee's discussion of the case law of the Labour Court seems to be that the peace obligation is not as wide as maintained by Bergström and Suviranta.

The question is now, however, whether the extensive reforms in the 1970s of Swedish labour law legislation have affected management prerogatives under sec. 23 [32] of SAF's charter.

A fundamental point is that the right to dismiss workers at will no longer exists as a hidden clause in collective agreements. Since 1974 a dismissal must be for good cause, and the reasons for the dismissal may be tried in court.[7]

The right of the employer freely to recruit under the protection of the peace obligation remains on the whole intact, although this right is circumscribed mainly by the Act on Equality between Men and Women in Working Life.[8] This Act does not mean that the employer has been so deprived of his right to decide that he can be compelled to employ a certain person. However, the employer can be liable for damages, should he recruit someone in preference to someone else of the other sex, although the latter is better qualified for the job.

No legislation fundamentally affecting the employer's right to manage and distribute work has been enacted. The Act on Joint Regulation in Working Life presumes that the employees' right to influence the employer's decision-making process shall be achieved mainly through collective agreements on joint regulation (or co-determination, as the

[5] *SOU* 1975:1, pp. 402 ff.

[6] SOU 1975:1, pp. 403 f., with references to case law, Tore Sigeman, *Lönefordran. Studier över löneskydd och kvittningsregler*, diss. Stockholm 1967, p. 454.

[7] Lagen (1974:12) om anställningsskydd (Act 1974:12 on Employment Protection), now replaced by Act 1982:80 on Employment Protection.

[8] Act 1979:1118.

Swedish term *medbestämmande* is often translated). In sec. 32 of the Act the labour market parties are recommended to make such agreements. The Act includes, however, a procedure for joint consultation before an employer decides on matters involving distribution of work as well as management of the enterprise (secs. 11–14). As far as the peace obligation is concerned, no real change has occurred apart from a residual right to industrial action, which in the view of the present author is without practical significance (sec. 44). This residual right to industrial action will be commented upon later in this paper.

In case 1986:127 the Labour Court maintains that the rules in secs. 32 and 44 of the Act are based on principles established in earlier court practice for construing collective agreements on pay and other conditions of work. The capacity of the employer to decide in matters concerning the distribution of work and the running of the enterprise has been considered to be included in the collective agreement and hence protected by the peace obligation even where no explicit provision to that effect has been included in the agreement. Therefore the rule is still in force that any industrial action with the object of limiting the exercise of this right must be considered unlawful according to the prohibition contained in the second point of sec. 41 of the Act. According to the Labour Court there exists, in other words, a peace obligation with regard to matters covered by the duty of consultation under secs. 11–14 of the Act, when sec. 44 or express provisions of the collective agreement do not provide otherwise.

In later Labour Court practice, the right of the employer to manage the business of the enterprise has been important as a limitation on the possibilities for industrial action during the validity of a collective agreement. For example, industrial action with a political purpose has often been considered to contravene this management prerogative.[9] There is, however, no general prohibition in Swedish law against such industrial action as far as the private sector is concerned. Yet, according to Labour Court practice, political industrial action is lawful only if it has the character of a short protest or demonstration. Otherwise it may infringe the right to manage the enterprise. In case 1980:15, the Court expounds its view on the significance of the right of management to the peace obligation in the following way:

[9] AD 1980:15, 1984:91. See also Tore Sigeman and Ronnie Eklund, "Right to Take Political Industrial Action", in *International Labour Law Reports*, F. Morgenstern (coord. ed.), vol. 4, Dordrecht 1986, pp. 65 ff. Cf. AD 1981:124, 1982:31.

> The collective agreements concerned [in the case before the Court] must be said to rely on the silent condition that the right to manage the business of the enterprise remains the employer's alone as long as no other express agreement has been made. Industrial action taken to provide the employee side with influence over this right will therefore be in contravention of the peace obligation rules of the Act on Joint Regulation, as long as it is not a matter of the residual right to industrial action. In the view of the Labour Court any claim with the object of depriving a party of a right guaranteed by the agreement must amount to a claim for amendment of the collective agreement, and this also applies to rights which lawfully rest with him and from which he has not abstained through the agreement. Industrial action with such a purpose is therefore forbidden. The rights here referred to include the right to manage the business of the enterprise. It may be added that the Joint Regulation Act rules on the residual right to industrial action are based on the points of view here presented.

3. CATEGORY 2. THE INTERPRETATION OF A PREVIOUSLY DECLARED PRINCIPLE OF LAW

Of significance for the extent of the peace obligation under the prohibition contained in point 2 of sec. 41 of the Act on Joint Regulation is not only the fact that the Labour Court has extended that peace obligation by inferring general principles of law, but also the way the Court will apply such principles in the future. The room for industrial action will change should the Labour Court feel free to annul such principles or modify their contents. It is, however, obvious that the Court has felt strictly bound by its own practice.[10] As pointed out by Tore Sigeman, this practice was given high rank in the order of sources of law, viz. second only to statutes, including *travaux préparatoires*.[11] The primary practical problem concerning the relevance of general principles of law for the peace obligation was consequently to establish their precise contents.

In the practice developed before the advent of the Joint Regulation Act, the Labour Court had adopted a, for employers, very generous attitude concerning what concrete issues could be interpreted as part and parcel of the right to manage the enterprise and to distribute work.[12] An illuminative example is case 1964:5.

> The shipyard Götaverken AB in Gothenburg had since 1916 provided salaried employees with lunch at a heavily subsidized price of SEK 0.40 per

[10] *SOU* 1975:1, pp. 565 ff.

[11] Tore Sigeman, "Om rättsbildning och prejudikatlära i arbetsdomstolen", in *Arbetsrätten i utveckling. Studier tillägnade Folke Schmidt*, Stockholm 1977, p. 208.

[12] See for instance AD 1929:29, 1934:179, 1937:89, 1950:42, 1960:20.

meal. This price was not regulated in the salaried employees' collective agreement. In 1963 the company unilaterally raised the price to SEK 1.20. The union felt that the price of the lunch was a non-regulated matter of interest and therefore applied to the Labour Court for a statement that the union had a right to take industrial action in the matter, regardless of the fact that a collective agreement existed between the parties. The company replied that the matter of whether lunch was to be provided at all was one of organization and therefore a management prerogative. In consequence the price was also a matter for management to decide. The Labour Court held for the employer. The right to manage included the right to decide on organization and various kinds of activities. The Court developed its decision in the following way:

"The unrestricted right of the employer under the collective agreement to manage the enterprise must be considered to have a wide ambit. This right cannot be regarded as limited to matters concerning company production, but also includes the provision—over and above what the collective agreement may stipulate—of services and facilities for the employees. Lunch is one such service. Consequently the employer is free according to the collective agreement to decide whether he is to provide a lunch service for his employees. Therefore such a matter cannot be regarded as one of interest, the solution of which permits industrial action. The employer's right to arrange a lunch service of necessity also includes the right to decide on the details involved, including the price."

In the entire court practice from the time before the Act on Joint Regulation concerning the right of the employer to manage and distribute work, there seems to be only one case where the Labour Court, against the claim of an employer, found that a matter was not covered by an employer prerogative. In case 1972:7 the Court found that the question of whether the employer had the right to suspend a worker for disciplinary reasons should be regarded as a question of interest, not regulated in the collective agreement. It is intimated in the judgment that such a right of suspension might earlier have been included in management prerogatives. A deviation from the requirement that collective agreements must be made in writing cannot, however, be extended further than to include in the collective agreement such rights as might have been *generally accepted* at the time the present collective agreement was made. In the present state of the law, the Labour Court found, the employer is not entitled, as an extension of his right to distribute work, to suspend a worker for disciplinary reasons, as this right is commonly understood in the labour market.

From the reasoning in the judgment it is thus clear that the Court has taken into account how the contents of general principles of law may be affected by shifting values in the labour market. Perhaps the judgment can be seen as a reaction to the criticism the Court received in the early

1970s for being too rigidly bound by its own practice created in the 1930s.

The *travaux préparatoires* to the Act on Joint Regulation adopt a similar perspective on the possibilities of the Labour Court to take shifting social values into account. Although the starting point must be that the precedents of the court shall be based on statutes and on the explanatory statements in the *travaux préparatoires*, it is also emphasized that the way labour law legislation has been formed allows a certain scope for politico-legal evaluations in the Court's creation of precedents. New social values may to some extent supplement or replace traditional values in the Court's handling of disputes.[13] According to Sigeman the Labour Court should in doubtful cases seek guidance in values accepted in due democratic order. Precedents in private law may be set aside by new legislation which may not be directly applicable, but which affects adjacent areas and which rests on values different from those expressed in earlier court practice. What may be called statutory analogy may in Sigeman's view gain increased relevance in the Court's adjudication and making of precedents.[14]

To some extent such notions have had an impact on court practice developed since the advent of the Joint Regulation Act. The best example is case 1978:89.[15]

> Mats was employed as a sulfite paper pulp operator at the Ortviken paper pulp mill. One of his jobs was to supervise a boiler for the preparation of sulphuric acid. After being found taking a sauna bath during working hours, he was reassigned to other and less qualified tasks in the wood cleaning and sorting compound of the mill. Through the reassignment his working hours were changed and the pay was considerably lower.
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> The Labour Court noted that an employer's right according to earlier court practice to reassign workers is entirely within the field of distribution of work and hence subject to the unilateral decision-making power of the employer. However, during recent years "changes have occurred of a labour-law nature which may motivate another way of looking upon this issue". The Court continued by mentioning that labour legislation contains a great number of rules for the protection of the employee which all have in common that a measure directed against the employee may be subject to trial in court. Of particular importance is the strong job security provided by the Act on Employment Protection.
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> In consequence of this, the Court formulated a new rule that there must be "acceptable grounds" for an employer to be able to reassign an employ-

[13] Göransson, *op.cit.*, pp. 344 ff. with references.

[14] Sigeman, *op.cit.* in footnote 11, pp. 213, 219, cf. also Tore Sigeman, "Från legostadgan till medbestämmandelagen", *SvJT* 1984, pp. 889 f.

[15] See also AD 1979:65, cf. Göransson, *op.cit.*, pp. 362 ff.

> ee for reasons connected with the employee personally. Reassignments of this kind which have "particularly far-reaching consequences for the working assignments as well as for employment benefits and other working conditions" shall in future be subject to judicial review.
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> The two employer representatives in the Labour Court dissented, considering it "wrong without support in legislation or contract to take such a drastic and serious step" in using court practice to limit the employer's right to distribute work.

The decision also shows that the Labour Court is prepared without specific support in the sources of the law to amend practice which it considers out of date. Sigeman sees the decision as a clear demonstration of the competence of the Court, supported by the principles of the doctrine of the sources of the law, to adjust the contents of the general legal principle of the employer's right to manage and distribute work.[16] In recent court practice it is difficult to find a clearer example of the Court as a creator of new norms, and in doing so the Court stressed that the position adopted entailed the closing of unsatisfactory *lacunae* in the protection of the individual employee.

Thus one possible way the Court can limit the employer's right to manage and distribute work is—as in the sauna case—with new social values in mind, to construct exceptions from the employer's unilateral right to decide in the guise of new legal principles favouring employees.

Another possibility is for the Court, still referring to changing values, to find that a certain right can no longer be considered included in an employer's prerogative and therefore must be regarded as not covered by the peace obligation, as in case 1972:7. This was the line in case 1980:156, where it seems that the Court generally regards disciplinary measures as unregulated when the collective agreement lacks provisions about them. However, it seems hardly likely that the Court, in view of the importance it has attached to the protection of industrial peace, would be prepared to any greater extent to limit the employer's right to lead and distribute work by regarding certain matters as not covered.

4. CATEGORY 3. NEGATIVE REGULATION

The famous Danish scholar Henry Ussing, discussing contract bargaining in general, writes that whenever a party in bargaining has failed to get a provision providing him with a certain right inserted in the

[16] Tore Sigeman, "36 § avtalslagen och arbetsrätten", in *Festskrift till Jan Hellner*, Stockholm 1984, p. 627. Cf. also Sten Edlund, *MBL i arbetsdomstolen*, Stockholm 1982, p. 12.

agreement, the silence of the contract may under certain circumstances be seen as expressing agreement between the parties that such a right does not exist. Normally, however, such silence may only be taken as a sign of the parties not having been able to agree. The consequence should be the same as if the issue had never been raised.[17]

It appears from the *travaux préparatoires* to the 1928 Act on Collective Agreements that the normal approach, i.e. that a lack of explicit provision in a contract should be regarded as if the matter had never been raised, does not apply as far as questions raised in collective bargaining are concerned.[18] Whenever a party requests that a certain issue should be regulated in the collective agreement, but no agreement is reached, this must, according to the Labour Law committee, be regarded as though that party has refrained from pursuing the request for the duration of the agreement.[19] The matter may thus be regarded as subject to *negative regulation* in the meaning stated by Ussing as an exception, i.e. the non-existence of a provision in the contract entails agreement that that particular right does not exist. Consequently a peace obligation also exists in the matter.

This negative regulation has had little importance in Labour Court practice. The rule appears rather to have been regarded as a principle of interpretation for establishing the common will of the parties regarding the peace obligation when a party has dropped a request in collective bargaining.[20]

> In case 1978:124 the Court in an *obiter dictum* discussed negative regulation when a party has dropped a request for regulation in collective bargaining. The Court pointed to the fact that a parallel situation may arise if one party has made his claim during bargaining so unclearly that the other party has not in good faith understood what it meant. In such a case, in the view of the Court, the collective agreement may mean that no obligation according to the claim so presented has arisen for the opposite party. This *obiter dictum* seems to imply that neither party may take industrial action once the agreement is concluded.

5. CATEGORY 4. COMMON GROUNDS FOR MAKING THE AGREEMENT

Category 4 refers to court practice where the Court has tried to establish, on the basis of the parties' common grounds for concluding a

[17] Henry Ussing, *Aftaler paa formuerettens omraade*, 3rd ed., Copenhagen 1974, p. 270.
[18] *Prop.* 1928:39, p. 95.
[19] *SOU* 1975:1, p. 399.
[20] Göransson, *op.cit.*, p. 271.

collective agreement, whether a certain question may be considered as covered by the agreement as a hidden clause. The most interesting question in this connection is whether the Court is here applying silent supplementary rules in matters of pay and general terms of employment.

According to Suviranta, a collective agreement in general aims at complete regulation of terms of employment. In his view "the presumed intent of the parties" is that they have made a comprehensive regulation of their relationship and that work shall continue uninterrupted during the period of the agreement.[21] It seems that Suviranta rather regards the principle of comprehensive regulation as a *naturale negotii* or a precondition typical for collective agreements rather than as an individual precondition in each case.

The Labour Law committee also express the thought that provisions on pay and other economic conditions of employment should be understood as comprehensive in the sense that the parties agree that claims for additional compensation may not be raised during the validity of the collective agreement and must not be supported by industrial action. In support of this notion it was maintained that the *natural point of departure* in interpreting an ordinary business contract is that the contract exhaustively lists the parties' duties and obligations. As a rule, the committee say, the same applies when "interpreting such parts of collective agreements as concern the duties of the parties, viz. primarily those of the employer".[22] The reasoning conveys the impression that the committee, like Suviranta, contemplate some kind of supplementary rule in the sense that there should exist a common *presumed* intention of the parties that a peace obligation applies as far as matters of pay are concerned during the term of the agreement. Yet the committee emphasized that it appears strange to presume that bargaining parties omitting matters of pay in a collective agreement would want thereby to be subject to a peace obligation in such matters;[23] such a point of view is not easily reconciled with the idea that collective agreements in general should be regarded as comprehensive. It would rather seem that the Labour Law committee, as Suviranta does, distinguish agreements aiming at comprehensive regulation of employment conditions from those aiming at partial regulation. There is, however, a decisive difference

[21] Suviranta, *op.cit.*, p. 211.

[22] *SOU* 1975:1, pp. 398 f. See also Olof Bergqvist and Lars Lunning, *Medbestämmandelagen. Lagtext med kommentar*, ed. 1:1, Stockholm 1986, pp. 433 f.

[23] *SOU* 1975:1, p. 403.

from Suviranta's assumption. The committee cannot be said to accept the view that a comprehensive collective agreement aims at exhaustive regulation of *all* employment conditions. On the contrary, they assume that the extended peace obligation in respect of conditions of pay in collective agreements, except for the exhaustive regulation of pay, is restricted to the area of employer prerogatives according to sec. 23[32] of SAF's charter.[24] The assumption is based on a survey of the practice of the Labour Court and must be said to refute Suviranta's ideas.

In support of its reasoning on the generally comprehensive character of conditions on pay in collective agreements the committee refer to Labour Court cases 1970:19 and 1973:33. These concerned a request from the employee side for a declaratory judgment to the effect that certain matters of pay were not covered by the agreements. In both cases the Court found with reference to certain express provisions in the agreements that matters of pay had been exhaustively regulated. Similarly in case 1970:23 the Court held that it was in best accordance with the wording of a certain provision of a collective agreement as well as with its general structure that bargaining without a peace obligation could only take place under the conditions specified in the relevant provision.

The decisions in the cases now mentioned are all built on individual interpretation data, i.e. that the individual circumstances of the agreements have determined the outcome of the cases. There is no evidence that the Court has used the technique of supplementing the agreements with standardized rules—on the contrary a traditional method of interpretation has been applied. No broad statements supporting the notion of comprehensiveness in collective agreements on pay and other conditions of work are made in either case.

In his dissertation Anders Victorin gives a case survey which appears to support the notion that the question of whether a collective agreement constitutes a comprehensive regulation of conditions of pay, in the sense that there are no unsolved issued concerning matters of interest, must be determined from individual interpretation data.[25] It is quite a different matter that, *de facto,* the structure of collective agreements is generally such that they must be regarded as exhaustive as far as pay is concerned. And where this is not so, it would seem that the Labour Court tends to interpret generously when including new or seemingly

[24] *Op.cit.*, p. 402.

[25] Anders Victorin, *Lönenormering genom kollektivavtal*, diss. Stockholm 1973, pp. 202 ff.

unregulated work under a certain collective agreement provision.[26] Two examples from recent practice may be mentioned where the Court has subsumed a certain kind of work in an already existing agreement provision.

> 1983:103. A collective agreement had provisions concerning on-call duty and pay for such duty, but no provisions on the actual work involved. The employer maintained that such duty was not foreseen in the collective agreement, i.e. the matter was not regulated. The Labour Court thought that "it is difficult to explain why the pay provisions of a nationwide collective agreement would be so construed that they cover compensation for time worked, including waiting time and compensation for on-call duty at home, while leaving the matter of actual work done as part of the on-call service unregulated". The Court attached major importance to the following provision in the collective agreement:
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> "The employee shall receive compensation during the time of employment, while he is at the disposal of the employer and is reporting time worked on time slips."
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> Since the employee is at the employer's disposal when on call, the provision was held to cover this time also.

> 1984:76. A collective agreement for the clothing industry contained provisions on minimum wage for workers with "three years of apprenticeship or corresponding vocational training". Lower pay could be paid only to apprentices. The employer and an employee, Tomas, had made an individual agreement on sub-minimum wages. Tomas lacked the prescribed training, but was not to be regarded as an apprentice either.
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> The Court thus had to decide on Tomas' claim for pay according to the minimum wage provisions of the collective agreement. The Court considered it most unlikely that the minimum wage provisions would not apply, since this would imply that a number of employees' wages would be unregulated in the collective agreement. Such a conclusion was irreconcilable with labour market practice. Since the employer was unable to explain why the relevant collective agreement should deviate from normal labour market practice, Tomas was held to be entitled to pay according to its minimum wage provisions.

It would in the latter case almost seem as though the Court applied some general rule for construing collective agreement provisions on pay and other remuneration for work. It is implied that the parties to such an agreement must be presumed to have agreed that the contract shall be deemed exhaustive as far as pay is concerned.

The present author, however, doubts that any general conclusions can be drawn from the case. The Court's reasons for making the collective agreement apply to the apparently unregulated question of

[26] *Op.cit.*, p. 208.

pay for Tomas are very brief. The decision is also remarkable in that the Court completely ignores the express provisions of the agreement that the worker must have had certain occupational training to receive minimum pay. For this reason the Court's two employer representatives dissented. The reason why the majority considers it can disregard the wording of the agreement seems to be that Tomas "was assigned work for which he obviously had sufficient occupational qualifications". This passage thus indicates that the decision was based on considerations of reasonableness rather than on a general principle of interpretation.

The most significant recent case, where the Court decided whether or not a certain matter of pay shall be regarded as contractually unregulated, is 1982:97.

> A sector agreement for security services contained no express provisions regarding on-call service, i.e. time when the employee is at the employer's disposal, available to be called in for duty by telephone or in some other agreed manner. The employer side considered that on-call service and its remuneration were to be regarded as unregulated. Any such service depended on an agreement with each individual guard. The employee side maintained, on the other hand, that the matter *was* regulated and that the agreement provisions on working hours, overtime, etc., would apply to on-call service. The trade union remarked that in its view the collective agreement constituted "a comprehensive regulation of all guard work and all compensation for such work".
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> The Court noted that this particular collective agreement, in distinction from most other agreements, contained no rules on an employee obligation to do on-call work, or on pay for such work. This fact was considered to militate against the employer's opinion. The *reasonable point of departure* for interpreting this collective agreement in the dispute must be that it only covered work and working time in the normal sense. Therefore, the Court found that the agreement in the absence of explicit provisions regarding on-call duty, etc., must be interpreted in favour of the employer. The provisions offered no obstacle to separate individual agreements for on-call duty and pay for this. In an *obiter dictum* the Court adds: "The fact that a certain question is found not to be contractually regulated implies typically that the parties are free, even during the validity of the agreement, to resort to industrial action with the object of achieving such regulation. Whether this state of the law applies in this particular case the Court has not had reason to ascertain." Of importance in this respect might be what meaning could be attributed to an agreement between the parties on the procedure to be applied in matters of on-call duty and pay for this. This question had not been scrutinized in the case.

The decision seems to support the notion that the question of whether a wage agreement is to be considered exhaustive must be decided on the basis of an interpretation of the individual circumstances of that agreement. In this case an apparently important question was not explicitly

regulated. Therefore the Labour Court seems to have adhered to the Labour Law committee statement which, seeing that matters of pay are perhaps the most important part of collective bargaining, stresses that bargaining parties who omit such matters do not wish to be bound by the peace obligation. To be sure, the Court does not here take a final position on the issue of peace obligation, but it apparently wishes to adjudicate the matter according to the factual intent of the parties.

6. CATEGORY 5. FREE BARGAINING AT THE INDIVIDUAL LEVEL

Certain questions which have not been subject to explicit regulation in the collective agreement may still be regarded as regulated in that, according to the parties' circumstances, individual agreements between employer and individual employee are permitted. The peace obligation arising from this kind of regulation is here discussed as category 5.

In case 1964:5 the employer side expounded its view on permissible departures from collective agreements in the following way:

> The fact that a question may be regarded as subject to negative regulation in the collective agreement does not of course necessarily imply that individual contractual regulation is excluded. To a considerable extent individual parties may strike agreements which deviate from the collective agreement. Such agreements may concern matters which are regulated in the collective agreement and may mean more favourable conditions for the employee than those laid down in the agreement. The agreements may, however, also concern matters which have not been so regulated, but which yet are not to be regarded as matters of interest in the relationship between the contracting parties. In the relationship between the employer and the individual employee a number of questions of typically individual character may arise, e.g. concerning the further training or the re-location of a salaried employee, which are less suited to collective regulation and which in the context of the collective agreement may be seen as left to free bargaining between individual parties.

The statement quoted served as an employer's argument concerning the extent of the peace obligation during the period of validity of a collective agreement. It had no direct bearing upon the disputed point in the case before the Court. The Court, however, answered this argument in the following statement:

> The extent of the regulation inherent in the collective agreement must quite naturally be determined primarily by the explicit provisions of the agreement. Regulation, however, often extends further than the provisions indicate. Examples hereof have been quoted by the parties in this case. . . .

> As another example, it has been mentioned that certain questions according to the preconditions of the parties may be seen as referred to free bargaining between the employer and the individual employee, and that the right to decide in such matters has thus for the term of the agreement been delegated from the contracting parties to their members. In regulations of the kind here intimated the prohibition against industrial action with the object of bringing about alterations in the agreement obviously also applies.

The wage systems of private-sector collective agreements may be divided into two categories: agreements on "normal" pay and agreements on "minimum" pay. Thus the system of minimum pay builds on the notion that any payment in excess of the agreed tariffs is a matter which has been delegated to the parties to contracts of employment. This delegation need not be explicit but can be said to be immanent in the system of minimum pay. Anders Victorin notes that part of the specific character of the system is that it presupposes *individual* agreements on pay above that of the tariffs. The core of the legal effects of the minimum pay system is that it constitutes a prohibition of organizations' interference in individual bargaining. Above all, according to Victorin, organizations may not support claims for higher wages with industrial action.[27] The prohibition against industrial action here may be said to rest on a hidden clause of category 5.

> Another example refers to the setting of piecework rates, a system which in many ways is similar to the minimum wage system. In the engineering industry, employers have since the first draft collective agreement opposed the notion of a collectivization of the setting of piecework rates, i.e. there has been unwillingness to allow the trade unions any substantive influence on piecework.[28] In the national agreement for the engineering trade, the following provision was introduced, and is still in force:
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> "In all piecework, where the price has not ... been fixed in a price schedule, the rate is to be set in free bargaining in each individual case between the employer or his representative and the worker or workers to whom the piecework is offered, and any agreement on the rate must be made before commencement of the work." (Para. 4, mom. 3.)
>
> This provision apparently entails an express delegation to the parties at individual contract of employment level in principle to set free piecework rates through "individual" bargaining without union participation. Between the parties to the collective agreement it is undisputed that this provision means that if a piecework agreement cannot be reached, workers are obliged to perform the work at the hourly rate and that the so-called free bargaining is conducted under peace obligation. It follows that con-

[27] *Op.cit.*, pp. 234 f.
[28] *Op.cit.*, pp. 159 f.

certed industrial action with the purpose of getting higher rates than those offered by the employer in such individual bargaining amounts to a breach of the peace obligation.[29]

Svante Bergström has discussed the question of peace obligation that arises when the parties to the collective agreement have referred certain questions to individual bargaining.[30] What Bergström has in mind is primarily the situation when the delegation of decision-making power has been explicitly made in the collective agreement, but his reasoning can be applied to the situation discussed in case 1964:5.

Questions referred to individual bargaining are, according to Bergström, to be regarded as questions of interest from the viewpoint of the individual contract of employment. Seen from the viewpoint of the parties to the collective agreement, however, such questions have been removed from the front line and any industrial action would therefore amount to an attempt to change the agreement. According to Bergström the individual worker is allowed to exert pressure to make the employer for example pay more than is provided in a minimum agreement. But such action may only be taken by the individual employee and only within the framework of permitted action under ordinary rules of contract law. The real lever is therefore a threat of notice.[31]

7. RESIDUAL RIGHT TO INDUSTRIAL ACTION

The stated purpose of what is termed the residual right to industrial action under sec. 44 of the Joint Regulation Act is to give the employee side a chance to put some pressure behind claims for collective agreements on joint regulation under sec. 32 of the Act. This section is in the form of a recommendation to the labour market parties: "Between parties bargaining for collective agreements on pay and general conditions of employment, an agreement on joint regulation should, at the request of the trade union side, be made in matters concerning the right to employee influence in matters concerning the entering into, or termination of, contracts of employment, the management and distribution of work and the conduct of the organization in other respects."

The residual right to industrial action aims more precisely at counter-

[29] See AD 1931:122, 1971:8, 1972:3.

[30] Svante Bergström, *Kollektivavtalslagen*, 2nd ed., Stockholm 1948, p. 131. See also Bergström, *Arbetsrättsliga spörsmål*, p. 41.

[31] See also *SOU* 1975:1, p. 398.

acting the supplementation of collective agreements by general principles of law according to categories 1 and 2. The Labour Law committee saw no reason to counteract other kinds of supplementation.[32]

The residual right to industrial action presupposes that the trade union side *in connection with ordinary bargaining over pay and other conditions of employment* requests influence in such matters as are mentioned in sec. 32. If the parties do not reach agreement, the peace obligation shall not apply in the matters covered by the request, provided that the trade union side has not dropped its request. In other words, the employer can no longer exercise his unilateral right to decide under the protection of the peace obligation. To be able to call for industrial action during the term of an agreement it is also required that further negotiations in the matters covered by the request shall have taken place without any agreement having been reached.

The residual right to industrial action is mainly a psychological reminder from the legislator that the labour market parties should make agreements on joint regulation.[33] It goes without saying that it is impossible to burden difficult and sensitive bargaining over pay with simultaneous bargaining over joint regulation. In practice it is hardly possible only to raise issues of joint regulation and save the actual bargaining for a later date. Employers have also declared that they will not sign a wage agreement if the employee side is in a position to exploit the residual right to industrial action. Consequently all existing collective agreements on joint regulation have been made completely independent of wage bargaining and with no possibility for the employee side to resort to industrial action over the contents of such agreements.

It seems paradoxical, however, that the most important effect of the introduction of the residual right to industrial action is apparently that the Labour Court technique of supplementing collective agreements with hidden clauses has gained increased support in the legal sources. For the very existence of sec. 44 presupposes that the Labour Court will continue to apply its doctrine of hidden clauses in collective agreements.

[32] *SOU* 1975:1, p. 399.

[33] Cf. *Prop.* 1975/76:105, *bil.* 1, pp. 241, 243 f., *SOU* 1982:60, p. 34. Compare for the following, Göransson, *op.cit.*, pp. 349 f., 396, 406.