

Compensation of Employed Inventors in Sweden

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1. Introduction

In Sweden, invention work is to a great extent carried out by employees. This means that a significant number – and probably a majority – of inventions are created in an employment relationship. Today, employees may not directly question that all or part of the exclusive rights to an invention accrues to the employer. However, there is an identifiable burgeoning opinion that employed inventors to a greater extent wish to receive reasonable compensation for their creative work, especially when businesses make large amounts of money due to the inventions of their employees.

In Sweden there is a special law governing employers' rights to employees' inventions, namely the Act on the Right to Employee's Inventions no. 345 of 1949. The Act applies to patentable inventions made by employees in their private or public employment. However, the Act is not applicable to inventions made by university researchers (teacher exception). Swedish universities are supposed to carry on educational activities, rather than to pursue commercial activities, and as a matter of principle teachers and researchers employed by universities own their inventions.

The Act on the Right to Employee's Inventions is mostly non-mandatory, and individual contracts or collective agreements may govern the transfer of patent rights in inventions, and in the private sector, rights in employee inventions are also regulated by collective agreements. However, the most important employee rights are mandatory. Thus, for example, the employee has a mandatory right to a reasonable remuneration in compensation for the rights transferred to the employer. An employee cannot be deprived of this right by way of an individual contract or collective agreement.

The reason for the right to special remuneration being expressed in a mandatory provision is that the legislator has wished to inspire creative work, at the same time as the regulation protects the weaker party, since negotiations between employer and employee are frequently characterised by imbalance. It is important from a societal point of view to stimulate the desire to innovate, and extra remuneration to the employee may constitute an incentive for creativity, while

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at the same time an employer may obtain competitive advantages or economic profit by assuming an employee's invention. The inventor must be rewarded for this positive result. There are however no exact statements in the preparatory works as to what actually constitutes reasonable remuneration.

An employee's right to reasonable remuneration follows by Sec. 6 the Act on the Right to Employee's Inventions. The size of the remuneration is to be determined by the parties involved. The value of the invention, the scope of the rights acquired by the employer, the terms of employment and the significance that the employment may have had in making the invention are factors taken into consideration when determining the amount of remuneration. The weaker the connection between the scope of employment and the invention, the stronger is the right to remuneration. The compensation right must be exercised within 10 years from the day the employer was notified by the employee.

It is not very common for the issue of remuneration to come under the scrutiny of the courts, and there is no information regarding the effect of the provision of Sec. 6 the Act on the Right to Employee's Inventions in negotiations between the parties where the remuneration is determined. In the two cases where the Swedish Labour Court has had to consider the reasonableness of amounts paid, the remuneration has been relatively low.

The Labour Court has in 1983 estimated that reasonable remuneration was SEK 100,000 for the employer's license right and in 1982, the court's conclusion was that the amount of SEK 300,000 that the employer had paid to the employee constituted full and final remuneration for the license right that the employer had acquired to the invention.

The two precedents from the Labour Court are 25 years old and do not say much about either the present-day level of remuneration or about what should be reasonable remuneration. The more detailed limits for the employer's acquisition in relation to the right of remuneration that employed inventors have according to the mandatory remuneration provision in the Act on the Right to Employee's Inventions must therefore be considered unclear.

However, for such issues that concern the Act on the Right to Employee's Inventions, statements from the Swedish Board for Employee's Inventions (Sw. Statens nämnd för arbetstagares uppfinningar) constitute a special source of law. The majority of these are older opinions, from the years 1950–1989. During this time, the Board has issued some 70 opinions, most of which have considered the issue of reasonable remuneration in addition to salary and the related issue of the relevant category of invention. From the year 1990 and onward, the Board has issued seven opinions and all of these opinions concern the employee's right to special remuneration.

Furthermore, great parts of the private part of Swedish labour market are regulated by collective bargaining agreement, through the Collective Agreement on the Right to Employee's Inventions. The Industrial Inventions Board (Sw. Industrins uppfinnarnämnd) issues arbitral awards in issues that concern the application of the Collective Agreement on the Right to Employee's Inventions.

2. The Swedish Board for Employee's Inventions

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The Swedish Board for Employee's Inventions, with members appointed by the parties, is an authority with the assignment to try, through non-binding advisory opinions, disputes that concern the application of the Act on the Right to Employee's Inventions. Opinions by the Board may, e.g., concern the employer's right to acquire an employee's invention, the size of the remuneration or the category of invention that is applicable.

The Swedish Board for Employee's Inventions is broadly composed, with members of great experience and detailed knowledge in the area. The Board is made up of a chairman and six members with one deputy for each member. Two of the members and the chairman are appointed among persons who are independent both of employer and employee interests. The chairman and one of these members shall be experienced judges, while the other member shall have special insight into and experience in patent rights and associated issues. In addition, two members each are appointed as representatives of the employer and the employee parties, respectively.

3. The Industrial Inventions Board

Disputes regarding the application of the Collective Agreement on the Right to Employee's Inventions shall be tried by the Industrial Inventions Board. The Board is an arbitral tribunal and cases before it are determined as arbitration awards with binding effect on the parties. The Board may, e.g., determine the issue of the category a certain invention belongs to or the size of the remuneration.

The Industrial Inventions Board is made up of a chairman and two members, along with deputies. The chairman of the arbitral tribunal is appointed jointly by the employer and employee associations, while the employer party and the employee party appoint one member each.

4. Assessment of remunerations by the Swedish Board for Employee's Inventions

In the period 1990–2008, the Swedish Board for Employee's Inventions has issued opinions in seven cases, which all have concerned the issue of reasonable remuneration in addition to salary according to Sec. 6 of the Act on the Right to Employee's Inventions. Year 2009 two cases are pending before the Board.

In one of these cases, the Board found that SEK 1.8 million was reasonable remuneration, while five of the cases have concerned amounts of between SEK 100,000 and 600,000. The Board has furthermore tried the issue of whether an employee was entitled to economic compensation for an invalidated patent.

Case 1/2005 (opinion of 23 February 2006)

In this case, the Swedish Board for Employee's Inventions assessed the remuneration issue for a service invention to which the employer had acquired the entire right. The employee received a

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standard remuneration of Euro 700 when a Swedish patent was granted. In addition the employer was of the opinion that the employee should receive a certain royalty, or in the alternative a one-time amount of SEK 150,000 including social security fees. The inventor was of the opinion that the remuneration should primarily also be paid in the form of a royalty and in the alternative by a one-time amount of SEK 2 million, excluding social security fees.

The opinion shows that the employer had sold two installations of the invention. One was a test project of the invention, while the Board considered that the second sale was not made on market terms. In the opinion of the Board, these two sales could therefore not be assigned any greater significance in the assessment of the value of the invention. The Board furthermore pointed out that the fact that the employer had failed to apply for a patent in other countries than Sweden could not be assigned any greater significance either. It was however of great significance that the employer had acquired the entire right to the invention, which could give the employer competitive advantages on both the Swedish and foreign markets. In conclusion, the Board found that the invention must be deemed to have had a significant value to the employer. Furthermore, the Board was of the opinion that the employment was not so significant in the creation of the invention. After a final weighing of the circumstances of significance to the remuneration issue, the Board assessed reasonable compensation to the employed engineer at SEK 1.8 million, excluding social security fees.

Case 1/2002 (opinion of 22 February 2007)

In 2007, the issue was considered whether remuneration was to be paid for an invalidated patent during the time that the employer had utilised invention while it was still patented. The background was that the Swedish Board for Employee's Inventions had earlier recommended, in case 1/1984 (opinion on 22 December 1986), that the four inventors jointly had the right to SEK 3 million for the employer's license right to three patented inventions.

The Swedish Board for Employee's Inventions was of the opinion in case 1/2002, in spite of the invalidity of the patent according to the judgment that had entered into effect, that the remuneration provision in Sec. 6 of the Act on the Right to Employee's Inventions was applicable for the time during which the invention was protected, i.e., for little over ten years. The Board stated that the fact that the patent was declared invalid would not affect the remuneration right of the employees, since the employer during the time that patent protection was in effect, was able to use the invention in its operations and receive the value thereof. The Board also stated that the employer actually without any reservation with respect to patentability had assumed the invention and thereafter applied for and received grant of a patent.

The case did not however assess reasonable remuneration. Considering the normal validity period of a patent being 20 years, the remuneration should probably be assessed at SEK 1.5 million (cf. opinion 1/1984).

Case 1/2000 (opinion of 1 October 2002)

In the case it was assessed that reasonable remuneration should be paid by SEK 200,000

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excluding social security fees for one of two add-on inventions that the employer had acquired the entire right to, while with respect to the main invention, the employee's right to claim economic compensation under the Act on the Right to Employee's Inventions had become time barred.

With respect to one of the inventions, the Board found that a paid standard remuneration of SEK 15,000 was also sufficient. As to the other, which the employer was of the opinion should not give rise to any remuneration, the assessment was different. The Board was of the opinion that the invention had brought commercial value to the employer that was not insignificant; a value that exceeded what the employee reasonably could have been expected to perform in consideration of his low salary. Through a general reasonability assessment, the Board determined the remuneration for that invention to SEK 200,000 excluding social security fees.

Case 2/1996 (opinion of 3 June 1997)

The Swedish Board for Employee's Inventions was of the opinion in this case that two employees had a right to SEK 300,000 excluding social security fees each for two service inventions to which the employer had acquired the entire right. If the inventor had been alone, the remuneration should thus have been determined at least to SEK 600,000.

The employer had in the case claimed that the amount of SEK 60,000 that had already been paid to the inventors was sufficient remuneration for the acquired rights. The case showed that the employer had not yet used the inventions but had expended great costs on the inventions, which led to the Board considering that they had great economic value to the employer. Moreover, the Board found that the inventions had been developed at the inventors' own initiative, at the same time as they would not have been made if the employees had had different work assignments. For this reason, the Board was of the opinion that the employment had a great significance to the creation of the inventions.

A special issue in the case was the scope of the rights acquired by the employer' and in this issue there was a dissenting opinion on the Board. Four members were of the opinion that the employer had acquire the entire right to the inventions, while the chairman and two members were of the opinion that the employer had acquired only a simple license.

Case 1/1996 (opinion of 26 June 1996)

In this case, the employer's offer to the five inventors for an invention that had been acquired was deemed reasonable; a one-time sum of SEK 25,000 and royalty remuneration of 25 percent of any net income upon a sale, licence or transfer as remuneration.

Case 1/1993 (opinion of 17 December 1993)

The Board found in the case that reasonable remuneration for the inventor was a one-time amount of SEK 200,000 excluding social security fees for the entire right to two patented inventions. The employee had claimed a one-time amount of SEK 500,000 plus royalty in case

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of sale or licensing of the patented inventions, while the employer was of the opinion that no special remuneration in addition to salary should be paid.

The Board was of the opinion in the case that the employer's expended costs on the inventions and the fact that the patent applications were still upheld strongly indicated that the inventions had a great value to the employer. Furthermore, the Board was of the opinion that the inventor's employment had not directly contributed to the creation of the inventions. The Board however found that the submitted documentation regarding the value of the inventions did not provide support for a recommendation by the Board of greater remuneration than SEK 200,000 excluding social security fees.

Case 1/1989 (opinion of 19 January 1990)

In this case, the Board was also of the opinions that reasonable remuneration was SEK 200,000 for an invention to which the employer had acquired the entire right. From a substantive point of view, the employer alleged in the case that no special remuneration according to Sec. 6 of the Act on the Right to Employee's Inventions should be paid to the employed inventor. The Board deemed the invention valuable to the employer, at the same time as it was not the sole reason for the success on the market of the product (of which the invention was a part). Furthermore, the Board was of the opinions that the employment was of great significance to the creation and development of the invention, since the employee did not have any other technical abilities than those acquired through the work with the employer. The Board also found material development efforts to have been required before the invention could be used in practice, efforts carried out by use of the resources of the employer.

5. Remuneration assessments by the Industrial Inventions Board

During the period 1980–2009, 16 disputes have been referred to the Industrial Inventions Board for trial of reasonable remuneration according to the Collective Agreement on the Right to Employee's Inventions.

In eleven of these disputes, arbitration awards have been issued, and in four the cases have been dismissed. One case has not yet been ruled on by the arbitral tribunal. In six of the determined cases, the employee side has prevailed and in four cases the employer side has prevailed. In one case, each of the parties must be deemed to be the prevailing party by reason of multiple petitions.

Four of these arbitration awards are discussed below; one issued in 2000 about remuneration right in case of an invalidated patent, and four issued in the years 1999, 2002 2005 and 2009 about reasonable remuneration in addition to salary.

Arbitration award of May 2009

In 2009 the Industrial Inventions Board considered an employed co-inventor's right to remuneration. The employee claimed that the employer should pay a royalty of several

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million SEK to him, while the employer took the position that the paid out remuneration of SEK 100,000 was sufficient.

The product was covered by at least nine patented inventions, and the Board had to determine the employed inventors' remuneration in one of the patented inventions. The employee had claimed that he was the sole inventor.

In this case, the arbitral tribunal's conclusion was that the employee was not the only inventor of the patented invention, and for his part of co-ownership in the invention the Board determined the remuneration to SEK 200 000.

Arbitration award of January 2005

In the arbitration award of 2005, the Industrial Inventions Board determined the remuneration to SEK 1.9 million plus interest to an inventor bound by the collective bargaining agreement who had made an invention together with two other inventors who were not bound by the Collective Agreement on the Right to Employee's Inventions. The employee had claimed that the employer should pay a royalty to him, along with a one-time amount of SEK 6 million; the employer took the position that the paid out remuneration of SEK 400,000 was sufficient. The three inventors agreed that they held equal parts in the patented invention, and the Board therefore had to determine the reasonable remuneration for one third of the invention, belonging to the employee bound by the collective bargaining agreement.

Regarding the documentation for the assessment of the reasonable remuneration, the employer had accounted for six years' sales of the product, but with a lower forecast and a rapid reduction of revenue. The inventor however showed other numbers that indicated increased demand and a still-growing market. After a reasonability assessment, the Board determined the remuneration to SEK 1.9 million for the employed inventor.

Since the three inventors held equal parts of the invention, the remuneration would thus likely have been determined to SEK 5.7 million if the employed inventor had been alone.

Arbitration award of December 2002

In 2002, the Industrial Inventions Board tried what constituted reasonable remuneration in addition to salary for the right accruing to the employer, and found that the employee's claim for SEK 5 million was reasonable.

The background to the dispute was the following. An employed civil engineer and chief technical officer at an industrial company had reported an invention to his employer at the beginning of the 1990s. A patent was not applied for until 1998. The company had however already in 1992 put the invention to use. When a patent was applied for the invention, the employed inventor received a standard remuneration of SEK 3,100 and was offered an additional SEK 9,200 when a patent was granted 2002. The employer was thus of the opinion that the employee should be satisfied with an aggregate of SEK 12,300, while the inventor did not think this constituted

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reasonable additional remuneration and instead claimed SEK 5 million plus interest for the invention.

Before the Board it had been revealed that the company at the time of the arbitration award had made over SEK 800 million on the invention through operational savings, and the arbitral tribunal's conclusion was that the employee's remuneration claim was not unreasonable and he was therefore granted the claimed amount.

Arbitration award of March 2000

In 2000 the Industrial Inventions Board considered an employed inventor's right to remuneration for an invalidated patent. The employee side had in the case claimed that the employer should pay a one-time amount of SEK 2.6 million plus interest, and furthermore that remuneration should be paid as royalty during the term of validity of the patent or for as long as the employer used the invention. The employer side had on its part claimed that no remuneration in addition to salary should be paid.

The background to the dispute was that an application for a European patent had been submitted by the employer in 1989 and the European Patent office (EPO) granted a patent for the invention in 1994. After objections made, the EPO invalidated the granted patent in 1997. The employer appealed the decision of the EPO, and in the trial of the dispute before the Board, the appeal had not yet been tried. The employer was however of the opinion that in all likelihood the company's appeal would not be successful. Thereby, the employer was of the opinion that the invention was not patentable and the employee had no right to any special remuneration.

Initially, the Industrial Inventions Board determined that the right to remuneration is not dependent on the existence of a granted patent, but on whether the invention is patentable or not. According to the Board, the employee must prove that the invention was patentable. But since a patent was granted by the EPO, the Board was of the opinion that the burden of proof had passed to the employer and that it therefore had to show that the invention was not patentable. However, the Board further reasoned that when the EPO decided that the invention lacked inventive step, the burden of proof had reverted to the employee. The Board however found that the employee had not submitted any evidence regarding the patentability of the invention and decided that the employed inventor was not entitled to inventor's remuneration.

Arbitration award of October 1999

The Industrial Inventions Board tried in 1999 an employee's right to remuneration in addition to salary for an invention to which the employer acquired the entire right. The employee side had claimed in the case that the employer should pay a one-time amount of SEK 8 million plus interest, along with royalty. The employer was of the opinion that the salary was sufficient.

The relevant product in the case was in its entirety protected by four different intellectual property rights, among others design and patent protection. It was only the patented part of the product that was assessed in the remuneration issue.

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In the case, the employer stated that the production of the product would cease at the end of 1999. The employee could not produce evidence to refute the allegation, and the Board's remuneration assessment was based on manufacturing of the product up to and including 31 December 1999. After a reasonability assessment, the remuneration was determined to SEK 400,000. In hindsight, the product is still being sold in 2009.

6. Concluding remarks

In the disputes and cases that have considered the reasonable remuneration of employed inventors, no models for calculation of the remuneration have been developed. However, in practice this is a technical and economic assessment. If the employee is able to show that the company has benefited economically, e.g., by increased revenues or reduced costs, or that the employer's manufacturing has been made more efficient, the likelihood of a larger remuneration is greater. In a particular situation it may however be difficult for an employee to prove that the employer has benefited from the invention, since the employee frequently lacks full insight into the employer's business.

There is also considerable uncertainty of the exact definition of the locution "reasonable" remuneration. The rather few disputes that have been brought before courts and boards, have neither led to the development of any calculation method nor of any level of reasonableness. In practice, this means that the size of the remuneration may vary greatly. In the end, the size of the remuneration is therefore many times dependent on the identity of the employer, and also on the importance that invention activities have for the development and competitiveness of the company.

Generally, however, in my opinion, the bar has been significantly raised in the 21st century in comparison to the Labour Court's and the Swedish Board for Employee's Inventions moderately assessed reasonability levels during the 1980s and 1990s. This is indicated both by the Swedish Board for Employee's Invention's opinion from 2006 and by the Industrial Inventions Board's two arbitration awards from 2002 and 2005, respectively – in these cases, the boards have awarded exceptionally large amounts. This may well become significant not only in the area regulated by collective bargaining agreement but also in the unregulated areas, since employees in the future should have support for claiming high remunerations for the rights that have accrued to the employer. Perhaps, the value of the invention may to a greater extent be taken into consideration in the calculation of the reasonable remuneration, in particular if the employer markedly has received great economic benefit by, e.g., increased revenue or cost savings in production.

Another reflection is that most of the opinions by the Swedish Board for Employee's Inventions and arbitration awards by the Industrial Inventions Boards have been to the advantage of the employees. This indicates that an employee who has the will and stamina to pursue the remuneration issue further than to mere negotiations between the parties has better chances of receiving higher remuneration for the right that the employer has acquired to an invention. However, the imbalance that frequently exists between an employer and an employee in a negotiation situation must not be disregarded, especially for an employee who will continue working at the company. Furthermore, evidentiary issues are often central in disputes regarding

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reasonable remuneration. This, in combination with the costs that may arise, is likely to dissuade many inventors from pursuing the remuneration issue further. This may also explain why few disputes reach Swedish courts and Boards.

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