

Finland

**The Employment Relationship
(scope)**

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1. INTRODUCTION

1.1 The aim, methodology and sources of the study

This study, which is based on the commission of the ILO,¹ examines the scope of the protection of workers in Finland and its shortcomings in various situations. The purpose is to indicate the existent forms of employment relationships and new demands placed on workers, and to find out the workers who do not fall into the scope of labour law regulations and protection.

The study also aims to evaluate the appropriateness of labour legislation in dealing with new problems and changes affecting employment situations. The question of sufficient protection of workers is considered, in relation to various types of employment relationships. Examples are given from jurisprudence and from practice in order to illustrate the protection of workers in different employment situations. In some cases this protection might be indefinite and even defective. Some workers are excluded from the protection provided by employment relationship, even though they carry out their tasks within the framework of employment relationships.

Regulation, commentaries, literature have been essential sources in preparing this report. Recent articles, studies and interviews of the labour market actors providing empirical information of changing work patterns and the lack of protection are also given attention to.

1.2 Characteristic features in the Finnish labour market

According to the sample inquiry on employment situations made by the Statistical office of Finland, the population in Finland was 5,2 million by the end of 2001 of which 3,9 million people (aged 15 – 74) are in economically active age. The Finnish labour force consisted of 2,6 million people. The number of employed was 2,3 million of which 1,7 million work in the private sector and 643.000 in the public sector. The number of unemployed people was 238.000, which amounts to 9,1 per cent of the labour force.

In Finland it is common for men and for women to work equally. The labour force included 1,2 million male workers and 1,1 million female workers. Out of 2 million employees 751.000 were wage earners and 1,2 million salaried employees. The number of entrepreneurs and self-employed was 302.000 people.²

During the past years continuous changes and a tendency to increase flexibility of working patterns and arrangements have been the main features in the labour market. This has caused instability and differentiation in working circumstances and brought up the question of the sufficiency of protection. The traditional forms of worker protection, such as minimum wage, regulation of working

¹ See the outline given by ILO concerning the National studies.

² Statistics Finland: Labour Force Statistics 2001 - September and 3rd quarter. See appendix 1 and 2.

hours and job security are seen more as barriers to the growth and the success of the company.³

Large reorganisations, also international ones, are common. Increasing competition and international comparison in taxation tighten the budgetary limits that private companies and public services have to cope with. New industry (new technology, small it-companies) has developed in a relatively short time. Typical work in a new economy is knowledge-intensive. All this has had a large impact on the worker's situation as well. The traditional formula of employment relationship does not always respond to the actual situations in working places. In order to reduce expenses, risks have in many cases been transferred more or less to workers. The work may be performed under the status of an entrepreneur of a worker while the tasks remain the same. The worker does not always know what his or her legal status is in the current situation. As a result, a "grey area" where the form of work is hard to classify has grown.⁴

The traditional definition of employment relationship has been followed in legislation and in legal writing. Due to the rather inflexible character of the traditional employment relationship and the obligations connected with it, supplementary forms for working have been created (part-time work, fixed-term contracts, freelance employment, consultation, agency work, telework etc.). The workers perform their tasks more independently than previously. Often that means working without the employer's direct supervision.⁵

The English scholar John Atkinson has presented a well-known theoretical model of the flexible company. In that model the personnel is divided into three different circles. In the middle of the circle there is the so-called core labour force, the group of workers most important for the company. The less important workers are placed in the next circle. They usually work in atypical employment relationships. In the third circle there are persons who work outside the company, independent entrepreneurs, self-employers, subcontractors, freelancers, teleworkers etc. The model further contains a division made between, on the one hand, quantitative and functional flexibility, and, on the other hand, internal and external flexibility. For example, subcontracting, outsourcing and the transition of employees to independent entrepreneurs represent external functional flexibility. The forms of flexibility that are nowadays part of the working life in Finland seem to respond to this model.⁶

During the past decade part-time and fixed-term relationships of employment have become more common than earlier. The transition towards 24-hour society has differentiated working hours. Working hours have become individualised, anti-social, and localised. Those who work in a fixed-term relationship of employment often work in shifts or irregularly. As distinct from the international situation, fixed-term employment relationships are general in Finland and especially so in the public

³ Koskinen – Mikkola, p. 214.

⁴ Koskinen – Mikkola, p. 11 and 214.

⁵ Koskinen – Mikkola, p. 12.

⁶ Koskinen – Mikkola, p. 13; Kandolin, I – Huhtanen, P., (2000), 'Määrälliset joustot, työyhteisö ja hyvinvointi', in Lehto, A- M., p. 107 – 108.

sector. The normal ground for fixed-term relationships of employment is that permanent work is not offered.⁷

Despite the changes, the majority of wage earners still work in full-time and permanent employment relationships. The most typical form of flexibility in working hours is overtime work. Over half of the wage earners performed overtime work regularly each month.

Creativity of individuals, internalised quality control of production, customer-centred way of production/services and flexibility have placed ever-increasing demands on workers since the 1980s. On the whole, the requirement to achieve results has increased. All this has meant that workers need more training and feel that they are entitled to share the results of improvements made (i.e. result related incomes, funds and bonus systems).⁸

In the Finnish labour law system, legislation and collective agreements have traditionally been essential due to their mandatory status. However, increased opportunities to make local agreements within limits set in legislation and in collective agreements and the variations in working life have made the regulation more complex than before.

1.3 Main changes in the judicial level

The legalistic tradition in Finland has made the labour law system extensive and far-reaching. Working life has therefore to a large extent been legislated. The primary source of regulation concerning the employment relationship is legislation. However, the preparatory works of the legislation (committee reports, government bills) have a specific role when interpreting the law. Collective agreements and the individual employment contracts constitute a major regulatory source as well.

New demands of working life are responded through legislation, collective agreements and dominant practises. The new Employment Contracts Act (55/2001) came into force at the beginning of June 2001. It regulates the forms of making a contract of employment and defines the basic rights and obligations of the employer and the worker. It also sets the limits for changing the terms of the contract of employment and determines the grounds upon which a worker can be laid off or dismissed from work.⁹

The Employment Contracts Act is based on the principle of protection of workers. Prohibition of discrimination and the demand for equal treatment have also been emphasised. These principles have to be taken into account while interpreting individual paragraphs. In some parts the Act is an answer to current problems in working life such as the growth of atypical employment relationships and the continuous change of business operations. More emphasis than before has been put on the re-employment of workers and the employer's obligation to offer work and

⁷ Koskinen – Mikkola, p. 13 – 14.

⁸ Ibid. p.15.

⁹ See Government Bill 157/2000.

possibilities to move to another job. This is the case even when some training is necessary to employ the worker in question.

New ways of controlling work and workers have created pressures to re-evaluate also labour regulation. The Employment Contracts Act does not give much attention to these questions. For example, increasing demands for knowledge, problems of team working and classification of flexible working forms in general have not been thoroughly dealt with. However, in the publicity, in newspapers and in other media these problems have been highly present.¹⁰

The objectives of the Employment Contracts Act have been to create a logical system to facilitate the application of law and, also, to make labour legislation more reliable. The Act is mandatory unless otherwise provided. A certain degree of flexibility was needed, because the Act is applicable to all companies regardless of size and field of activity, including employment relationships in the public sector. Therefore some rules of the Act may be deviated from if so agreed in a contract between the employer and the worker or in a collective agreement.¹¹

The Act has in many respects remained the same as the previous one (Act 320/1970). The scope of the new Act is determined with almost the same criteria as those included in its predecessor. The Act applies to all cases that fulfil the characteristic features of the employment relationship. However, the Act is not applicable to contracts on work, which are governed by specific regulations.¹² (see part 4 later)

The minimum terms of employment relationships set in the Act are further determined by generally binding collective agreements. One of the objectives of the Act has been to clarify the position of collective agreements and applicability of generally binding collective agreements.¹³

Further, new rules concerning voluntary work and temporary agency work, laid down in the Employment Contracts Act and the Labour Protection Act (1958, as amended) are meant to increase the protection of workers.

1.4 Collective agreements in working life

The influence of the central organizations in the labour market has affected, and continues to affect, all regulation of Finnish working life. No significant Act relating to working life is drafted without tripartite consultations between the Government, employers' and workers' central organizations. Since the 1960's these parties have agreed on several incomes policy agreements concerning aims and changes in taxation, wages, labour and social legislation. Central organisations of employers and workers have also entered into a number of centralized agreements¹⁴ on general conditions of work. These agreements give a framework for over 200

¹⁰ Koskinen – Mikkola, p. 214-215.

¹¹ Committee report 2000:1.

¹² See part 4 later.

¹³ Committee report 2000:1.

¹⁴ Koskinen, p. 147.

union level collective agreements many of which are also generally binding in the field concerned.

In the Collective Agreements Act (1946), a collective agreement is defined as an agreement concerning conditions in employment contracts or in employment relationships. A collective agreement can be concluded by one or more employers or employers' organizations on the one side but only workers' organizations on the other side. By this way the legislation aims to ensure equality and balance between the parties. A collective agreement is binding not only to the parties of the agreement, but also to organizations, employers and workers who are, directly or through one or more intermediate organizations, members of the parties of an agreement.¹⁵

The binding effect of the collective agreement provides the parties of the agreement with regulatory competence. This means that in employment relationships between employers and workers bound by the agreement, the terms must be observed by both parties. An employer bound by the agreement has an obligation to observe at least these minimum terms in employment relationships with his or her workers who perform work covered by the agreement. Also unorganised workers who perform the same work are protected. So it is not legally possible for the employer to use unorganised workforce as cheap labour in a field covered by a collective agreement. However, there are some exceptions to this rule in provisions outside the Collective Agreement Act.¹⁶

A collective agreement can also be generally binding in its sector of application. This kind of collective agreement is required to be nation-wide, i.e. signed by nation-wide organizations, and representative in its sector of application (industry-wide or a craft-wide agreement).¹⁷

The Confirmation Commission set by an Act¹⁸ confirms with its decision whether a national collective agreement is generally binding or not. The decision of the Commission can be contested by means of a written appeal to the Labour Court. If the collective agreement is found to be generally binding the terms of it apply as minimum provisions to all workers in the field concerned. Even the employers who are not members of an employers' organization are obliged to follow the minimum terms of the relevant collective agreement.¹⁹

The applicability of generally binding collective agreements creates duties only for the employer and only rights for the worker. Whether the worker is bound by the agreement or not is without legal significance. Better terms for the worker can always be agreed upon collectively or individually.

The Employment Contracts Act does not contain general provisions on the amount of minimum wages. Instead, the amount of pay is determined in collective agreements. If it happens that neither a collective agreement binding under the

¹⁵ Koskinen, p. 147 and Suviranta, p. 51-52.

¹⁶ Suviranta, p. 52.

¹⁷ Suviranta, p. 53 and Koskinen, p. 148.

¹⁸ Act on confirmation of the general applicability of collective agreement (56/2001)

¹⁹ Bruun, p. 184.

Collective Agreements Act nor a generally applicable collective agreement is applicable in a particular case, the Act states that the worker shall be paid a reasonable normal remuneration for the work performed. If the application of a term or condition in the employment contract is contrary to good practice or otherwise unreasonable, the term or condition may be adjusted or ignored.²⁰ In the interpretation of these provisions collective agreements in similar sectors give guidelines for what a reasonable normal remuneration might be.

2. THE EMPLOYMENT RELATIONSHIP

2.1 Concept and legal definition of the contract of employment

The employment relationship defined in the Employment Contracts Act is the basic concept of Finnish labour law. It is also relevant in respect of the applicability of other labour law acts, social legislation and collective agreements. The protection of the Working Hours Act, the Annual Holidays Act, the Workers Pension Act, etc. depends on whether the person falls in to the scope of the Employment Contracts Act or not. In accordance with the principle of workers' protection the concept of the employment relationship has traditionally been wide.²¹

The contract of employment does not presuppose a particular form of contract. The contract may be concluded in writing, electronically, orally or sometimes even silently. In any case, the employer must provide information on the principal terms of work in writing within the maximum time of one month from the beginning of the first contract.²²

The criteria of an employment relationship are stated in the new Employment Contracts Act Chapter 1 Section 2. The provision is mandatory, so that the parties are not allowed to agree upon any exceptions. An employment relationship exists, when the work has economic value and the work is performed personally for the employer under the employer's direction and supervision in return for pay or some other remuneration.

The application of the Act is not prevented merely by the fact that the work is performed at the employee's home or in a place chosen by the employee, or the work is performed using the employee's implements or machinery.

As a general rule, Finnish labour law avoids categorization of employees. The labour law makes no distinction between wage earners and salaried employees, blue-collar and white-collar workers. It has been a definite legislative policy to avoid creating anything that could be regarded as privileges for certain categories of employees and to try to abolish any existing privileges.²³ Consequently, in this report the concepts of worker and employee are used as synonyms unless otherwise stated.

²⁰ Employment Contracts Act Chapter 2 Section 10 and Chapter 10 Section 2

²¹ See Bruun, p. 179.

²² Employment Contracts Act Chapter 2 Section 4.

²³ Suviranta, p. 69.

However, the small and still diminishing significance in labour legislation of the categorization of employees does not entail a complete uniformity of employment conditions in all respects. For some groups the minimum conditions set by legislation have been complemented in collective agreements to a larger extent than for others. This applies especially for white-collar workers.²⁴

The obligation to perform the work personally is characteristic for the employment relationship, while an entrepreneur is assumed have the right to choose the person who performs the actual work. However, the borderline between employee and entrepreneur is not always clear (See part 4).

Working for the employer means that the direct benefit from the work is intended to accrue to the employer. In other words, the benefit from the work, except the wages, is not allowed to accrue to the worker.²⁵

A worker has to work under the direction and supervision of an employer. A typical feature for the employment relationship has traditionally been the worker's subordinate status. The Act does not define the content of the right to the direction and supervision in more detail. According to well-established praxis, an employer does not have to control the work de facto, general supervision and the possibility for control are considered sufficient. This is partly why working in a place chosen by the employee does not exclude the work from the scope of the Act.

The use of employee's implements or machinery can be significant only when also other circumstances show that the person performing the work is actually self-employed or an entrepreneur.

2.2 Groups excluded from the scope of the Employment Contracts Act

The Employment Contracts Act is according to Chapter 1 Section 2 not applicable to:

- employment relationships or service obligations subject to public law;
- ordinary hobby activities;
- contracts on work which are governed by separate provisions.

The first one of these exceptions concerns mainly state and municipality officials. The second group consists of people acting in hobby-activities in sports clubs, youth organisations and charity organizations, as well as voluntary workers working, for example, with young people, handicapped persons or in their families. However, according to the proposal for a new Labour Protection Act the employer has to take care that there is no harm or imminent danger for the voluntary worker's safety and health. The rule is not meant to restrict voluntary working in different fields.²⁶

²⁴ Suviranta, p. 69.

²⁵ Committee report 2000:1.

²⁶ Committee report 2001:13.

The third exception refers to various Acts and Decrees according to which certain groups, such as family caretakers and unemployed people engaged in employment programs are excluded from the scope of the Employment Contracts Act (See part 4.4.2 later).

The fourth significant group of people who do not enjoy the protection of the Employment Contracts Act are those practicing a profession: self-employed persons, entrepreneurs or managing directors in a limited company.

However, the scope of the Labour Protection Act is wider. Under this Act, also people in the three first groups mentioned above are protected, and in certain respects also the fourth group.

3. PROBLEMS SOLVED IN LEGISLATION

From the perspective of labour legislation, perhaps the most central development has been the increase of fixed-term and part-time work. The amount of fixed-term employment relationships has increased from the 1980's. Undertakings have, in order to save expenses and to improve the functional and quantitative flexibility, tried to minimize the actual permanent staff. By the same time differences in the treatment between sexes has become more and more obvious. These employment relationships are problematic also as far as the social and employment security are concerned. In Finland the social and employment security legislation is in many ways based on traditional full-time work.

These changes have occurred mostly in sectors such as the service-sector, health care, hotel and catering, cleaning and transport. In public service with the feminine majority, especially in health care, fixed-term relationships are highly common today. Of all wage earners 21 per cent of women and 15 per cent of men are working in fixed-term employment relationships.²⁷ Part-time work has become a typical way of working in retail shops and supermarkets where the labour force consists nowadays mostly of part-time workers. Over the past few years labour law regulations have changed so as to protect equally workers working in different forms of employment relationships. Reasons for this have been, on the one hand, problems arisen in the labour market, and, on the other hand, the influence of EU law.²⁸

One of the aims of the Employment Contracts Act is to improve the situation of workers who work in atypical employment relationships. Since more women than men work in atypical employment relationships, the new Act improves women's situation in the labour market as well. The objective of the Act is to get the conditions of fixed-term and part-time employment relationships closer to those of full time employment relationships. The goal has been to equalize the terms in these types of employment relationships by means of the following solutions adopted in the Employment Contracts Act:

²⁷Laaksonen (1999), p. 30.

²⁸ See Koskinen – Mikkola, p.46-47.

- the requirement of equality that belongs already to the basic rights of the Constitution is reinforced in the Act by the prohibition on discrimination and the requirement for impartial treatment;²⁹
- the employer cannot refuse to give to the fixed-term or part-time worker the same benefits that are given to full-time workers even though they can be in relation to the contract or to the amount of working hours concerned;
- it is not permitted to apply different provisions to fixed-term workers, part-time and full-time workers unless there are well-grounded reasons for that;
- the employer has to inform the worker of the central terms of the employment in writing and this includes also the justified reason for the fixed-term contract;³⁰
- the employer shall provide information on open vacancies in accordance with practice generally adopted in the enterprise or at workplace in order to ensure that part-time and fixed-term workers have the same opportunity as permanent or full-time workers when applying for these jobs.³¹

3.1 Fixed-term work

The primary form of an employment contract is valid indefinitely. For every fixed-term contract, whether consecutive or not, there has to be a justified reason.³²

Legal conditions for a fixed-term employment relationship are not specified in the Employment Contracts Act³³. However, in the Governments Bill the justified reasons are described in almost the same way as in the previous Act:

- nature of work, temporary, practical or other comparable circumstances;
- reasons justified by the business of the company or the nature of the work to be carried out;
- instability of demand for services at the beginning of the company operations.

A change has taken place in respect of the instability of company operations that can now be a justified reason for concluding a fixed-term contract only a short time at the beginning of the business. Furthermore, it is prohibited to make a fixed-term contract on initiative of the employer if it is:

- used to avoid the application of the mandatory rules on employment security or/and;
- the employer has a continuous need for labour force.³⁴

²⁹ Employment Contracts Act Chapter 2 Section 2.

³⁰ Committee report 2000:1.

³¹ Employment Contracts Act Chapter 2 Section 6.

³² Employment Contracts Act Chapter 1 Section 3.

³³ When interpreting these situations also the directive on the fixed-term employment (1999/70/EY) concluded by ETUC, UNICE and CEEP has to be taken into consideration.

³⁴ See Government Bill 157/2000.

A fixed-term contract can be made to substitute another worker, or if there exists a particular job to be carried out or work with a specific duration). The precondition is that employer cannot offer more work in that situation.³⁵

Fixed-term contracts made on employer's initiative shall be considered valid indefinitely if they are concluded:³⁶

- without a justified reason (i.e. even the first contract);
- consecutively without a justified reason (i.e. even if some of the contracts have had justified reasons).

In these cases the benefits of an employment relationship – such as wage and annual leave – are determined in the same way as in an employment relationship with an undetermined duration.

Case law has indicated what kind of factors do not constitute a justifiable reason for making consecutive fixed-term employment contracts.³⁷ In previous case law, however, typical reasons for making consecutive fixed-term employment agreements almost immediately one after another were seen justified, for example, on the basis of established custom and due to the irregularity of the business operations³⁸. These kind of cases were the reasons why the Workers Pension Act was changed in 1999. Before that the employer was responsible to pay pension security payments only for those workers who worked for the same employer longer than a month. As some employers wanted to save expenses by misusing the law and circulating workers' salary payments through different companies the legislation was changed (Act 1263/1999).

In borderline situations attention has to be paid to whether the employer's purpose - de facto - has been to continue the employment relationship and with fixed-term contracts only to circumvent workers' protection.³⁹ In order to avoid this there are, in addition to the main rules mentioned above, a number of special provisions concerning fixed-term workers:

- if the employer and the employee conclude a number of consecutive fixed-term employment contracts under which the employment relationship has continued without interruption or with only short interruptions, the employment relationship shall be regarded as having been valid

³⁵ Government Bill 157/2000.

³⁶ Employment Contracts Act Chapter 1 Section 3.

³⁷ For example budget funds that are awarded periodically did not make a reason for signing new agreements after another (The Supreme Court 1993:70, 1995:159, 1993:70). A significant new precedent concerning the making fixed-term contracts is the decision of 2002:2 of the Labour Court of Finland. The judgement expresses a negative attitude towards consecutive fixed-term contracts; the employment relationship based on (ca. 30) consecutive fixed-term contracts were considered as an employment relationship valid for an undetermined period.

³⁸ For example the Supreme Court of Finland has stated (1995:13) that the established custom in the field of road construction was a justifiable reason to make five consecutive fixed-term employment contracts during the period of one year and four months. The irregularity of the operations was the justifiable reason to make consecutive fixed-term agreements with the so-called extra waitresses in a restaurant (The Supreme Court 1995:159).

³⁹ Tiitinen et al. (1989), p. 35.

continuously when benefits based on the duration of the employment relationship are specified;⁴⁰

- partial family leave accumulates also during fixed-term work;⁴¹
- in a fixed-term contract shorter than eight months, the trial period cannot be longer than half of the length of the employment contract.⁴² The rule prohibits the custom, previously approved in case law, that the entire time of employment could be agreed to be a trial period;
- it is allowed to lay off a fixed-term worker only when he or she is working as a substitute for a certain permanent worker and the employer would have had a legal right to lay off this permanent worker;⁴³
- a fixed-term employment relationship ends without notice when the contract period elapses or when the worker finishes the task particularly agreed;⁴⁴
- both the worker and the employer now have the right to end a fixed-term employment relationship after five years if the fixed-term contract is made for longer than five years. However, the employer has to have the same reasons and he has to use the same procedure applicable to the termination of an employment relationship made for an undetermined period;⁴⁵
- to decrease the need for fixed-term employment relationships, the period of notice during the first year of employment has been shortened into 14 days.⁴⁶ Legal reasons and procedures are still required.

3.2 Part-time work

The number of part-time workers has increased during the last decade in Finland. In the Employment Contracts Act the concept of part-time work has not been defined. However, the practice is well established and the Directive on part-time work clarifies the issue.⁴⁷ According to those, the part-time worker is a worker whose regular working time is shorter than the working time of a full-time worker. The definition of a part-time worker is also mentioned indirectly, for example, in the Unemployment Allowance Act.

A part-time employment relationship is possible to establish with the agreement between the employer and the worker. Workers usually want to work part-time if they have the right for partial family leave or part-time pension. Also students prefer part-time work that can be combined with their studies. In general it is usually the employer's decision to offer only part-time work. It is also possible for the employer to change the terms of the employment contract by shortening worker's working time. The procedure and the reasons required for this are the same as those

⁴⁰ Employment Contracts Act Chapter 1 Section 5.

⁴¹ The regulation came into force in 1998. See also The Government act 37/1998. Employment Contracts Act Chapter 4 Section 4.

⁴² Employment Contracts Act Chapter 2 Section 4.

⁴³ Employment Contracts Act Chapter 5 Section 2.4.

⁴⁴ Employment Contracts Act Chapter 6 Section 1.1.

⁴⁵ Employment Contracts Act Chapter 6 Section 1.3.

⁴⁶ Employment Contracts Act Chapter 6 Section 3.

⁴⁷ See Directive on part-time work (97/81/EY), See The publication of Labour Ministry of Finland No.135.

in terminating the employment relationship. The reason to offer part-time employment is usually the employer's need to level out possible changes in the business operations.

Chapter 2 Section 5 of the employment Contracts Act contains a rule on the employer's obligation to offer a full-time job to a part-time worker. The employer has to offer open jobs first to part-time workers suitable for the duties. The position of a part-time worker has been improved so that supplementary work now has to be offered primarily to the part-time worker and after that to workers who belong to the sphere of the re-employment obligation of the employer.⁴⁸

The employer also has to provide a reasonable training-period, if it is necessary for the open job. The duty to provide training emphasizes the employer's obligation to maintain the professional qualifications and skills of the worker.⁴⁹

3.3 Telework

The concept of telework is not defined in the Finnish employment legislation. However, many scholars have defined it as a work that is performed mostly outside the office or physically far from the employer or the principal client. Telework is considered as a way to organize the work more flexibly. Typically the work is performed in the home of the worker or in a specific remote office and is based on data communications.⁵⁰

The Committee on Employment Contracts Act did not propose any substantial changes with respect to the concept of employment relationship, nor any specific provision on telework. However, the statement of reasons connected to the definition of employment relationship builds on recent case law, which entails a certain return to the freedom of contract. This means that the parties have a freedom to agree on the factual situation under which the work is performed. Also the common will of the parties has been given more weight than before. Nevertheless, in the final evaluation the actual circumstances are still decisive for determining the applicability of the Act. The criterion of subordination is relevant as well. The employer is expected to have the right to direct and supervise also telework, although it is irrelevant whether these rights are in fact used or not.⁵¹

The definition on employment relationship in the Employment Contracts Act Chapter 1 Section 1 is applicable to the teleworker as well. The employer's right to the direction and supervision exists even if the work is done at home or in some other place. However, an assistant taken on by the worker for such work is not in an employment relationship with the employer unless this has been expressly agreed between the employer and the principal worker.⁵²

Further, the Act states that the use of worker's machine or another tool does not exclude him or her from the scope of the employment relationship.

⁴⁸ Committee report 2000:1.

⁴⁹ Ibid.

⁵⁰ The publication of Labour ministry of Finland Nro 135.

⁵¹ The questionnaire on special problems concerning telework.

⁵² See Committee report 2000:1.

When telework is performed in an employment relationship, the protection of labour law against termination applies in principle in the same way as it does to “normal workers” (About limitations see part 4.3 later).

In principle, teleworkers benefit from collective agreements on the same terms as other workers in a company. Sometimes collective agreements contain specific provisions on work at home, e.g. exemptions from provisions concerning working hours. In case homework is not excluded from the scope of a given collective agreement, the regulation of working hours is subject to individual agreement concluded within the limits of the collective agreement.⁵³

3.4 Temporary agency work

The Employment Contracts Act also provides for the collective agreement applicable to hired labour force and the divided responsibility of the agency and the undertaking using workers supplied by the agency.

In recent years temporary agency work has been a growing field in business life. However, so far only one percent of Finnish wage earners can be called temporary agency workers. In the field of shipping as well as in hotel and catering business temporary agency workers are been used more than in other fields.

Agency work refers to an activity in which an employer sends his or her workers to perform/undertake a work in a user company. In Finland the rules on temporary agency work concern both the agencies and other enterprises that only occasionally hire-out their labour force. In temporary agency work the employer transfers the right to use the labour force and the related managerial rights to another subject in return for remuneration. There is a definition for temporary agency work in the Labour Inspection Act 21 a § and in the Labour Protection Act 3 and in the Employment Contracts Act Chapter 2 Section 9. The use of temporary agency workers is different from subcontracting in which the right to control and supervise the work remains with the subcontractor and the client will receive a ready product or a service. Although the dividing criteria is clear in principle, there are borderline cases where the control and supervision of the work are exercised both by the firm supplying the services and by the firm receiving them.

The agency is mainly responsible to take care of the employer’s obligations towards his or her workers. By the contract between the agency and the user enterprise the companies agree on their mutual rights and obligations. Despite the contract which is commercial in nature, the agency has to take care of the employer’s responsibilities and act as an actual employer in this situation. The user enterprise has the right to the direction and supervision of the workers in question.

Legislation has not so far covered all the aspects of temporary agency work. This might be one reason why speculation has occurred. Workers’ rights have been ignored in different business arrangements and, in general, uncertainty as to the terms of temporary agency work has emerged. These issues were under

⁵³ Ibid.

consideration when the new Employment Contracts Act was under preparation. Under these circumstances the new Act is a central improvement considering the problems occurred in agency work. Since agency work widely concerns women wage earners, the new legislation is generally relevant from the point of equality between sexes as well. A good example is the hotel and catering field, in which atypical employment relations are widely common. Over 84 per cent of the members of the trade union in this field are women.⁵⁴

In agency work the legal rights and obligations of an employer do not totally rest with the same legal entity. When evaluating the situation and defining the obligations of an employer it is significant that the work is based on the order of an employer, the work is performed to the employer and the employer has the right to the direction and supervision.⁵⁵

In temporary agency work there is a triangular relation between the parties: agency – user enterprise – worker. The employment relationship exists between the worker and the agency as stated in the Employment Contracts Act. The employment relationship does not exist between the user enterprise and the worker. In the Employment Contracts Act Chapter 1 Section 7, it is provided that the employer is allowed to transfer the right to the direction and supervision and the rights that are directly connected to the work and the work arrangements only with the consent of the worker. In practice, this consent is given in the contract of employment made between the agency and the worker. The main rule, which is followed in practice as well, is that the agency has an obligation to pay the wage unless otherwise agreed. This also concerns other obligations like pension and annual leave benefits, payment of sick leave and, for example, other social and insurance payments.

The Labour Protection Act Section 3 has a rule on the division of the health and safety obligations of the parties in agency labour work. According to this rule, the user enterprise is responsible for the health and safety of the temporary agency workers in the same way as for the safety of its own workers. Nevertheless, the agency still has a general obligation to make sure that the working circumstances in the new enterprise fulfil the requirements of health and employment safety. This also includes the duty to ensure that the workers receive adequate guidance to new tasks. The obligations are determined according to the actual working circumstances.

The Council of State has issued a Decree on health and safety requirements in temporary agency work.⁵⁶ In this Decree more specific duties on the provision of information to the agency are imposed to the user enterprise. The user enterprise has to inform the agency of the professional qualifications required and the special characteristics of the work. The worker has to be informed adequately and also of the possible injurious or danger factors and the precautionary safety measures needed in the situation. Also, the agency is obliged to provide the workers with information.

⁵⁴ The equality publication 2000:8, p. 39.

⁵⁵ Sädevirta, p. 26-27.

⁵⁶ The act came into force 1st of September 1997 in order to implement the relevant EU Directive 91/383 and also to make it possible for Finland to ratify ILO Private Employment Agencies Convention No. 181.

The employer's general health and safety duty of the is stated in the Labour Protection Act. According to that, the employer has to look after all that is necessary for the protection of a worker, taking into account the nature of the work, the working circumstances, the age, sex, and professional skills of the worker etc. In temporary agency work the agency shall, in co-operation with the user enterprise, follow these obligations.⁵⁷

The duties of an employer related to the working time are, according to the Employment Contracts Act, at least partly transferred to the user enterprise. In Chapter 1 Section 7 of the same Act it is stated that along with the right to the direction and supervision of work, also the obligations related to the performance of the work and working arrangements are transferred. This means mainly deciding on working time and obligations related to health and safety. The decisive factors concerning the division of the rights are the extent to which these relate to daily working conditions and the period a given worker has been employed in the user enterprise.⁵⁸

The contents of the duties the user enterprise regarding working time are regulated in the Working Hours Act (1996). In this way, the regulation on the over-time working limitations concerns also the user enterprise.⁵⁹ This complies with the principle of equal treatment as well. The temporary agency workers are not allowed to be treated differently from the other workers in the user enterprise.

Under the rules on temporary agency work it is, to some extent, possible to agree on the division of the obligations between the agency and the user enterprise.⁶⁰ However, it is not possible to transfer all the employer obligations to the user enterprise. The new mandatory rules of law cannot be departed from, and the general principle of the protection of workers has a restricting impact on employment contracts and contracts between the agency and the user enterprise. One might say that prior to the new Employment Contracts Act the situation was quite problematic since much more room for contractual arrangements was left to the parties.

3.4.1 Fixed-term contracts in temporary agency work

The use of a temporary agency worker is widely based on demand for temporary labour force. There is no special reason related to temporary agency work in the labour legislation, which would justify making consecutive fixed-term contracts. Neither does established custom itself constitute a reason that would make it possible to consider it as a basis for a fixed-term employment relationship. If there is no adequate reason for making a fixed-term contract in temporary agency work, the employment relationship is considered a relationship for an undetermined period. The various circumstances have to be analysed case by case.⁶¹

However, temporary agency work is often short time work performed in different companies. In the preparatory works of the Act it is stated that the nature of

⁵⁷ Sädevirta, p. 31.

⁵⁸ Government Bill (157/2000).

⁵⁹ Ibid.

⁶⁰ Government Bill (157/2000).

⁶¹ Sädevirta, p. 86-87.

work usually justifies the use of fixed term contracts.⁶² This is also the common practice followed in the business.

Fixed-term employment relationships in temporary agency work might be part-time relationships as well. In these contracts the working time might have been agreed to vary between zero and maximum weekly working hours. The obligation of an agency to offer additional work to part-time workers according the Employment Contracts Act (Chapter 5 Section 2) covers both of these situations.⁶³

3.4.2 Collective agreements in temporary agency work

The new Employment Contracts Act, Chapter 2 Section 9, has a rule on the collective agreement applicable to temporary agency workers. According to the Act, the provisions of a normally or a generally binding collective agreement applicable to the user enterprise, have to be followed in situations where there is no normally or generally binding collective agreement which the agency is bound by.⁶⁴ If neither the user enterprise nor the agency is obliged to follow any collective agreement, it is possible to agree on the applied terms in the contract of employment. However, the Employment Contracts Act and the other labour legislation set limits also to these contracts.⁶⁵

Prior to the new Employment Contracts Act there were no special rules on the agency's obligation to follow any collective agreements. There were only a few normally binding collective agreements covering temporary work agencies, and it was unclear whether a generally binding collective agreement followed in the user enterprise could be applied to agency workers as well. This caused lack of protection of workers. The new legislation has improved workers' position. The approach has been to guarantee equal minimum terms to all workers and to protect sound competition between companies.⁶⁶

The European Commission has adopted a draft EU Directive designed to provide a minimum level of protection to temporary agency workers and to help this sector to become a flexible option for employers and workers. The main rule would be that the minimum terms applied in a user enterprise should also apply to temporary agency workers. However, this rule would not be mandatory. In addition to this, an agency employer would be under a duty to pay remuneration to workers in a situation where the workers are available for work, but the agency is unable to offer them any job. In the future, this proposal might affect also the labour legislation in Finland.

4. REMAINING PROBLEMS IN WORKERS' PROTECTION

Basic rules concerning also workers' protection and labour law are laid down in the Constitution of Finland. The right to work and the freedom to engage in commercial activity is also guaranteed by stating that everyone has the right, as

⁶² Committee report 2000:1.

⁶³ Sädevirta, p. 88.

⁶⁴ See Government Bill 157/2000.

⁶⁵ Sädevirta, p. 112.

⁶⁶ Sädevirta, p. 113 and the Government Bill (157/2000).

provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. According to the Constitution, public authorities shall take responsibility for the protection of the labour force and for the promotion of employment in order to guarantee everyone the right to work. Also, provisions on the right to receive training that promotes employability should be laid down by an Act. No one shall be dismissed from employment without a lawful reason.⁶⁷

One of the general requirements of the Constitution is that the basis of the rights and obligations of private individuals shall be regulated at the level of Parliamentary Acts. However, the labour legislation does not fully respond to this requirement as will appear later in this study.

4.1 Dependent and independent work

Although the elements of the employment relationship are clearly stated in the law, in practice it is not always simple to establish whether an employment relationship exists or not. One might say that the separation and differentiation of direction and supervision has proved to be a great challenge for working life, but also for legislation.⁶⁸

Differences between employment relationships and other situations may be examined by defining criteria which exclude certain groups from the scope of employment relationship. One group consists of persons that are expressly excluded from the scope of the Employment Contracts Act. The status of these persons is regulated elsewhere. Persons who belong to this group are, among others, the state and municipal officials, trainees, family carers and informal carers. The last two groups are interesting also from the point of equality. Family carers and informal carers are mostly women. In case law these workers have been considered as workers who perform their work in an employment relationship.⁶⁹

Some groups remain outside the scope of employment relationship. This will be the case with the highest management group of the company, for example, the managing directors, or workers who are in an independent position and perform the work for themselves as entrepreneurs or as self-employed persons. Managing directors and other leading persons of the company have to agree on their terms of employment in individual manager contracts.⁷⁰ As regards entrepreneurs and self-employed persons, commercial contracts define the rights and obligations of the parties.

Voluntary work is normally performed outside the scope of employment relationship and the rules in Employment Contracts Act are not considered applicable.

⁶⁷ Constitution Sections 18 and 80.

⁶⁸ Koskinen – Mikkola, p. 26.

⁶⁹ Equality publication 2000:8, p. 15-16.

⁷⁰ Ibid.

4.1.1 Fixed term employment relationship

Even though the legal protection of fixed-term workers has been improved, in practice, the uncertainty of the continuation of the employment still creates many problems. The same uncertainty exists also in other forms of work. Under the Employment Contracts Act, the maximum trial period that can be agreed is four months starting from the beginning of the work (with specific, work-related training over four months, trial period can be agreed to last six months). In a fixed-term employment relationship shorter than eight months, the trial period may not exceed 50 per cent of the duration of the employment period. However, working in a fixed-term employment relationship has in some cases amounted to a prolonged trial period. Especially when several consecutive fixed-term employment contracts are made, the worker might feel that he or she is constantly on a trial period. Insecurity of the future is a constraint for workers to invoke the regulation protecting them. Workers do not want to make complaints since they are afraid of losing renewal of the contract.

Also, the limitations on making a fixed-term contract, mentioned above in section 3, only relate to agreements made on the initiative of the employer. It is true that in some sectors young highly skilled professionals do not want to bind themselves too long with one employer. They want to be free to sell their skills to the employer with the best offer. However, the issue of initiative can also be unclear, for example, in the times of high unemployment when, in practice, only fixed-time jobs are available. In these cases it is not easy to find out how and why a given contract was actually decided between the two parties.

The financial insecurity of fixed-term work is obvious. Moreover, it may be difficult for a fixed-term worker to get a loan from a bank or buy something on hire purchase. Insecurity of the future affects not only financially but in other forms as well. For example, workers in fixed-term employment relationships might not get any pay on sick leave and they do not usually work long enough to get the right to annual leave. Combining work and family life is also difficult. Despite the strong employment security level in Finland and legislation on equality, pregnancy and use of family leaves is still a risk for a fixed-term worker. A fixed-term worker does not have any right to come back to the previous work after a family leave as the contract period is usually over. Even if the worker gets another work offer there is no right to a pension accrual during the time of family leave. Furthermore, a fixed-term worker on a family leave might lose the right to annual leave⁷¹ and to maternity leave pay, which is paid according to some collective agreements⁷². Knowing that the majority of fixed-term workers are young women, these problems do not affect only the lives of these individuals and their families, but even wider circles in the society.

The principle on equal treatment in the Employment Contracts Act presupposes that workers in the same kind of position should be treated equally. However, an objectively justified reason may give the employer the right to deviate from this main principle. Discrimination of fixed-term workers might occur in training arranged by the employer or in offering supplementary work. Furthermore, the “last in first out” rule, which is commonly accepted in workplaces and also among workers,

⁷¹ See the equality publication 2000:8, p 49–50.

⁷² The person is, however, entitled to have maternity benefits according to the Sickness Insurance Act.

imposes the threat of lay-offs and termination of the employment relationships on fixed-term workers.

Fixed-term employment contracts are terminated without giving notice at the end of the contract period or on completion of the agreed work. When the employer needs new employees within nine months after the termination of an employment relationship for an undetermined period, he shall offer the same or similar work to this former employee who continues to seek work via an employment office. In fixed-term employment relationships or even in consecutive fixed-term relationships, the worker does not have the above-mentioned privilege to new work during the agreed period or afterwards. Only if there has not been a justified reason to make fixed-term contract and the employment relationship is therefore considered to be made for an undetermined period, is the worker entitled to the protection just explained. In this way, too, fixed-term workers are in a less advantageous position than permanent workers.⁷³

4.1.2 Part-time work

In typical part-time work the wage is paid according to the hours worked. Part-time workers get their wage paid during the sick leave only for the hours marked in the shift list. The Working Hours Act requires that the shift list should be given to the worker as soon as possible and in any case at least one week before the work according to the list is supposed to start.⁷⁴

In many cases part-time workers would be willing to accept more work than is offered them.⁷⁵ However, the reason to make part-time employment contracts is usually the employer's wish to use the workforce as efficiently as possible.

In the new Employment Contract Act the standpoint towards part-time work is less restrictive than towards fixed-term employment contracts. No justified reason for part-time work is needed, except when a full-time worker is unilaterally transferred to part-time work. On the other hand, the new regulation will, at some point, promote equality between sexes as well since women work in part-time employment relationships more often than men.⁷⁶

4.1.2.1 Zero-hour work and invitational work

A very problematic type of part-time work is work done under a zero-hour employment contract. This group of workers could also be placed somewhere between part-time, fixed-term and full-time workers. These contracts are usually made for an undetermined period, but the working time is defined from zero till maximum weekly working time allowed by law or by a collective agreement. The contract does not impose on the employer a duty to offer work, but the worker has an obligation to be available for a possible work. The use of workers of this type is hard to control, since they do not appear from the shift list of the firm.⁷⁷

⁷³ Sädevirta, p. 83.

⁷⁴ Working Hours Act Chapter 7 Section 35.

⁷⁵ See the publication of Labour ministry of Finland Nro 135.

⁷⁶ See the equality publication 2000:8.

⁷⁷ Laaksonen (1999), p. 17 and 66.

In industry, many of these workers work permanently for the employer, but they do not have the security enjoyed by those working full-time, and not even that of the fixed-term worker. The employer might circumvent the rules on job protection and lay-offs simply by not calling the worker to work. It is also easy to deny these workers their right to salary on sick leave.

Some employers avoid the risk of paying the salary on sick leave by informing the worker of available work only a day before the actual work shift. Zero-hour working carried out in the form of invitational /stand-by work is therefore the most flexible and insecure type of employment relationship. The worker is in a fixed-term employment relationship only when he or she is invited to work and as long as the work continues, for example, from 3 hours till 18 hours at one shift. One may say that this group of workers is outside the scope of the protection of workers.⁷⁸

These workers work mostly in the service sector (office work, health care, hotel- and catering, cleaning etc.). For example, an airhostess in the airline company might be hired to do seasonal work on this basis. The rest of the year she has to wait if the employer happens to offer work.

This kind of system is not covered by legislation.⁷⁹ No rule on minimum working time is recognized in the labour legislation. Even though there are provisions to this effect in some collective agreements, minimum protection should be included in legislation too.⁸⁰

4.1.3 Homework and workers' tools or machinery

The definition of the employment relationship in the Employment Contracts Act Chapter 1 Section 1, underlines the employer's right to the direction and supervision of work. However, it is also stated that application of the Act is not prevented merely by the fact that the employee performs the work at home or in a place chosen by him or her. Further it is stated that even if the worker is using a machine or another tool that he or she owns or possesses, the worker is not excluded from the scope of employment relationship. The borderline between a worker and an independent entrepreneur has to be drawn on the basis of specific characteristics of the work and the occupation by means of an overall evaluation of the situation.⁸¹

The question of labour safety arises in homework situations. Because of the Constitutional right to privacy of home, the Labour Inspection Act (1973) prohibits inspection in the worker's premises, except for a particular reason. Such a reason is established when there are grounds to suspect that labour safety rules are violated or there is an imminent danger related with the facilities used by the worker or an accident has already happened.⁸²

⁷⁸ Laaksonen (1999), p. 65-66.

⁷⁹ Laaksonen, (1999), p. 66.

⁸⁰ Laaksonen (1999), p. 17 and 66.

⁸¹ Committee report 2000:1.

⁸² The questionnaire on special problems concerning telework.

The above-mentioned Constitutional right also affects to the applicability of other labour laws such as the Working Hours Act. According to the preparatory works of the Act (Government Bill 34/1996) the employer must have a real opportunity to supervise the work during the work time. The regulation does not require any direct or continuous supervision of the worker, but the opportunity to supervise is considered adequate also in praxis.

However, homework and work which is otherwise performed in such circumstances that the employer cannot be expected to supervise the use of working time, are excluded from the scope of the Working Hours Act. As new information technology makes it possible to do work flexibly outside the actual work place, it also seems to increase the amount of workers without working time protection.

The same new technology which makes it possible to work flexibly is in case law not always recognized as means to supervise the work. The ambiguity of the situation is indicated by a number of decisions made by the Labour Council of Finland. The Labour Council has stated in case (1373-01) concerning a salesperson, that if the employer has a possibility to decide when the work, performed outside the company, begins and ends, then the work falls into the scope of Working Hours Act. A similar decision was (1380-01). In this decision it was also stated that the employer had a chance to get the information of the progress of the work by a mobile phone. Besides to getting and returning the employer's car, the worker had to start the work and end it at the office. The most confusing part of the decision is where the Labour Council states that the work outside the office was usually done within the normal working hours. Had this not been the case the interpretation could have been as follows: if working outside the office requires working overtime, then it falls out of the scope and protection of the Working Hours Act, including the limits on overtime work.

An opposite decision was made, for example, in case (1371-00) where information of the worker's activities inside and outside the office was available to the employer beforehand in a weekly plan and in an electronic calendar. It was also possible to check this information afterwards through documents concerning the worker's trips. Nevertheless, the Labour Council stated that all this material was meant for other purposes than supervising the use of working hours, and the work outside the office did not fall into the scope of Working Hours Act. A similar decision was made in case (1379-01) concerning forest employees (buyers, sellers, logistic employees etc.) These workers used to take care of their paper work and telephone contacts at the office. After the employer had provided them with mobile phones and laptops these workers still spent 20 – 80 per cent of their working time at the office. They were the entire time available through their mobile phones and made daily reports of their activities into the company's information system. The employer had not even asked the information of the working hours before the actual performance of work. The information about completed tasks reached the employer much faster than before. However, the interpretation of the majority of the Labour Council was that the work outside the office was not covered by the regulation on working hours, since the information of working time was given to the employer only after the performance of the work.

4.1.3.1 Telework

The definition of employment relationship is applicable to the teleworker. However, problematic issues also in telework are related to the Working Hours Act and some social security benefits that are connected to working time. For example, defining the time of sickness of the worker, which entitles the worker to sickness benefit, might be difficult if the working time is varying. Further on, a teleworker who falls outside the scope of the hours of work regulations only gets a monetary compensation but not a paid annual leave. The employer is obliged to pay the amount of compensation that is calculated to cover an approximate "lost holiday pay".⁸³ The questions of labour safety and constitutional limitations to labour inspection concerning home workers are also present with teleworkers who work at home or in a place of their own choice.

4.1.4 Groups excluded from the scope of the Employment Contracts Act

4.1.4.1 Voluntary work

The rules in the Employment Contracts Act are not applicable to voluntary work. In practice, voluntary work sometimes supplements work performed by permanent workers. Especially in health care, social services and sport related activities the distinction between professional and voluntary work is not always clear. In these situations there is a risk that the obligations of an employer can be circumvented.

A typical feature in voluntary work is that it is usually done with people and by females. Voluntary work in male dominant industry is an unknown concept. For example, in the Finnish Red Cross there are hundreds of voluntary workers keeping company with and doing small services for old or handicapped people. There are also hundreds of workers doing the same work in normal employment relationships and covered by collective agreements. However, blood donors for example are often more than surprised to find out that nurses and doctors around them are actually paid for their work.

In many other associations the protection of the workers is not as clearly arranged as in the Red Cross. Trade unions have dealt with cases where people have been expected to work for less than the minimum wage because it has been considered improper to ask for material remuneration due to ideological or religious reasons.

According to the proposal for the new Labour Protection Act the employer is responsible for eliminating harm or imminent danger for the voluntary workers' safety and health. The rule would, however, concern only situations where voluntary work is based on a contract made with an employer and is performed in a work place. Furthermore, it is stated in the proposal that the Act would be applicable only if the voluntary work performed is similar to the work done by the other workers in the company.⁸⁴

⁸³ The publication of Labour ministry of Finland Nro 135.

⁸⁴ Committee report 2001:13.

4.1.4.2 Contracts on work governed by separate provisions

In the Decree on Employment (1363/1997) there exist two kinds of training. Training based on a benefit paid to the employer and training based on a benefit paid to the unemployed person. When the benefit is given to the employer, the prerequisite is that the employer makes an apprenticeship contract or an employment contract for an undetermined period with the unemployed person or arranges an opportunity to work for an unemployed person who is difficult to employ in the labour market.⁸⁵ In the Decree it is stated that the employment agency makes an agreement with the employer who arranges the work for the unemployed person. The work is performed in an employment relationship and the benefit is paid to the employer. If the trainee gets the benefit, there is no employment relationship.

According to the Act on Labour Market Support (1542/1993) the employment agency may assign an unemployed person who receives monetary support to work as a trainee. The work place can be arranged by the unemployed person himself but has to be notified with the employment agency. Although the agency makes an agreement with the employer the trainee is not in an employment relationship with the employer or with the employment agency. The trainee is not a party to the agreement though it includes terms that concern his or her work. However, in these cases the employer has to take care of the health and safety of the trainee.

Family care refers to persons who undertake to care for another person, to bring up a child, or to provide day and night care in a private home other than the home of the person who is taken care of. The Act on Family Care (312/1992) covers these situations. The Act is applicable only to family care work based on a commission contract between the caretaker and the municipal social office. A person who has concluded this kind of contract is not in an employment relationship with the social office nor with the person under care.⁸⁶ The position of a family caretaker is defined in the Act and the commission contract.

The Act on Family Care is not mandatory. In the contract made between the caretaker and the municipal social office it is possible to depart from the rules of the Act concerning payment, termination of the contract and the caretaker's right to leisure time. On the other hand, the Act states the issues which must be determined in the commission contract. These are, for example, the amount of wages, the duration of the care taking and the rights of the person under care.

The Act on Social Services (710/1982) provides for benefits to guarantee the care taking of an old, handicapped or sick person at his or her home. The services are based on an agreement between the caretaker and the municipal social office. The caretaker is a family member or so called "outside caretaker". The person who concludes the agreement is not in an employment relationship to the municipal social office nor to the person who is taken care of or his or her provider. A Decree (318/1993) issued under the Act states in more detail the contents of the agreement between the parties, the amount and grounds of the payment as well as the leisure time of the caretaker.

⁸⁵ The Statute on Employment Section 19.

⁸⁶ The Act on Family Cares Section 1.

The municipal social office has a right freely to decide the type of the agreement used in these situations. By virtue of a special provision (1366/1992) in the Municipal Pension Act, work related pension is, however, always awarded to the caretakers envisaged in the Decree (318/1993) as well as to family caretakers.

4.1.4.3 Managing directors

Statements concerning the status of the managing director have varied in case law as well as in legal writing. The Supreme Court of Finland has in many cases⁸⁷ stated that managing directors of limited companies and cooperatives are not in an employment relationship since these persons are legal organs of the corporations. This view, which is based on a formal approach, can be said to represent establish practice today. Previously the Labour Council has in some cases stated that the managing director was an employee of a limited company.⁸⁸

However, the title of managing director does not always mean that the person is not an employee. There are statutes, for instance the Act on Societies (1989), in which a managing director is not mentioned among the legal organs. In these cases directors may be considered employees if the criteria of an employment relationship, especially those concerning subordination and dependency, are fulfilled.

4.2 Work of an ambiguous or disguised nature

So far, bilateral work relationships have been analysed in this text. This means that there are two parties in the arrangement. The worker is engaged to work personally for the employer against wage under the direction and supervision of the employer. There are, however, many employment relationships where there is in fact a third party between the worker and the actual user of worker's service. In such a case, the relationship becomes triangular in the sense that obligations and rights, or, at least, some of them may be divided between three parties. This is typical for temporary agency work, but also for situations where work has been sub-contracted or externalised/contracted-out (see also part 4.4.2).

4.2.1 Temporary agency workers

The new Employment Contracts Act is a central improvement regarding the terms and conditions of employment in temporary agency work.

Still, there are problems in agency work connected with the fact that the legal rights and obligations of an employer do not rest with the same legal entity. The question about the status of the workers who do not work permanently and who may be working for different employers is common today. The new rule in the Employment Contracts Act Chapter 1 Section 7, clarifies the legislation regarding the employer's obligations that are directly connected to work and the working arrangements. However, it leaves space for interpretation, especially when an

⁸⁷ The Supreme Court of Finland, cases KKO 1983 II 68, 1986 II 40, 1968 II 167, 1990: 114, 1992: 172, 1989: 136.

⁸⁸ See Labour Council cases (1189-86) and (1223-88).

agreement on the division of the employer's rights and obligations has not been made and there is a long period of work in question.⁸⁹

For example, in March 2002 the Finnish Engineers' Association which is one of the member unions of the Finnish Confederation of Salaried Employees STTK, asked for advice from their central organisation in a case where a person had made an contract of employment with a temporary working agency. The contract was made in a general form stating that the worker is willing to work in fixed-term contracts as agreed with the agency and the user enterprises. The agency sent him to work in a user enterprise where the assignment was supposed to last about three months. However, the user enterprise needed workforce continuously and the worker went on working in the same place performing the same tasks for two and a half years. At that time the shop steward of the user enterprise agreed with the company that the collective agreement of the user enterprise was applicable to this worker, too. In February 2002, the user enterprise wanted to reduce workforce. The agency announced that worker's assignment in the user enterprise was over and dismissed him without prior notice on account of the completion of the agreed work. The worker and his union were not satisfied with this and they started negotiations with both enterprises. So far it is not clear if an agreement can be achieved. If these negotiations fail the worker is willing to let the union take the case to the court. If this happens it would be one of the first temporary working agency cases based on the new Employment Contracts Act. In this case, for example, the provisions concerning fixed-term work and temporary agency work are combined with the provision in Chapter 6 Section 5, which reads: "If the employer allows the employee to continue to work after the expiry of the contract or the notice period, the contractual relationship shall be deemed to have been extended indefinitely."

The last provision is quite clear when there is only one employer involved in an employment relationship. Even though temporary work agencies are recognized in the Employment Contracts Act the problem of several employers still remains unclear. This case is, however, only one example of the problems arising in situations with several employers.

4.2.2 Relationships with several employers

The Finnish labour legislation is still based on the traditional one worker - one employer relationship. The ratio of the Employment Contracts Act is to determine the basic rights and obligations of these two parties. The possibility of performing the work for several employers at the same time, being dependent on them and subordinate and supervised by many is noticed only in few provisions. In the traditional interpretation the employer's supervisory position has been highly emphasised. In employment relationships with many employers the direct supervision can be unclear, divided or even vanished. Some of these problems are answered in Chapter 1 Section 7 of the Employment Contracts Act concerning the transfer of rights and obligations. Still, there are cases where the primary employer may not have any power to continue the work in the user enterprise. For the worker this means an obligation to work according to all the instructions given by several employers, user enterprises or customers, no matter how contradictory these

⁸⁹ Sädevirta, p. 54.

instructions may be. In order to keep a job one has to be able to please all the parties involved in the arrangement.

The situation is clear when several employers act as parties of an employment contract and only one worker enters into that. In these cases there is only one employment relationship and all the employers are responsible for the payment of wages and other employment costs. For example, the Finnish Insurance Court has stated⁹⁰ that when a child carer had several families as employers and these families had paid wages separately, the pension security had to be guaranteed by all the employers.

The interpretation might be the same even if the worker has made separate contracts with the employers in question, but it is not possible to tell who is the primary employer. The problems that occur in the given situations are largely the same as in temporary agency work. The division of the employer's obligations, the implementation of the right to the supervision and the worker's dependency on these employers constitute a major part of the problems concerning these employment relationships.⁹¹

4.2.3 *Entrepreneurs and self-employed persons*

The Employment Contracts Act defines only the contract of employment, not the concept of a self-employed person or an entrepreneur. The difference between a worker and an entrepreneur is made only by stating the characteristics of the employment relationship in Chapter 1 Section 1 of the Act. In principle, the definition is clear and there are only two categories of people performing the work, workers and independent entrepreneurs. Also self-employed persons fall in the latter category; this concept is used only informally to emphasise the fact that these entrepreneurs do not have any workers working for them.

In practice, however, it may be difficult to clearly and legally establish the status of the work performer. Most cases can be decided easily with the aid of the traditional criteria of direction and supervision. Nevertheless, there is also a "grey area" between the worker and the entrepreneur. A satisfactory definition of direction and supervision has proved to be a great challenge for working life and also for legislation.⁹²

The problems in the interpretation of law usually occur in various borderline cases where the evaluation of the situations has to be done by analysing the actual circumstances as a whole. Salary payment praxis, compensation of expenses, possibility to choose the time and place of work and the person who actually does the work, whether the work is done for several different companies etc., are all significant factors. In fact, the situation needs to be assessed through a total evaluation. To make it difficult to disguise an employment relationship in a commercial contract, the name or form given to the contract has little emphasis in this process.⁹³

⁹⁰ The case 12.12.1985 (269:85), 2171. See also case (171/90).

⁹¹ See Paanetoja, p. 105.

⁹² See Koskinen – Mikkola, p. 26.

⁹³ Committee report 2000:1.

The European Court of Justice has in several cases distinguished three essential criteria of an employment relationship when evaluating whether there exists an employment relationship⁹⁴:

- the provision of services of some economic value for a certain period of time;
- remuneration;
- subordination.

Additionally, the Court has paid attention to four criteria in evaluating whether the criterion of subordination was fulfilled. The Court did not conclude that these criteria would constitute an exhaustive list to be used in all cases. The Court asked the following questions:

Does a person have:

- the freedom to choose the services he or she performs?
- the freedom to choose his working hours?
- the obligation to carry out the instructions of the person for whom the services are performed?
- the obligation to observe the rules set out by the person for whom the services are performed?

By referring to these objective criteria, the Court has expressed its reluctant view towards the possibility of giving discretion to either the parties themselves or to national legislation in determining the scope of application of the provisions in question. Whether an employment relationship exists is therefore to be evaluated in accordance with objective circumstances in an individual case.⁹⁵

A person who employs himself or herself, organises the work, and owns the working equipment, is responsible and carries the risk for the production and, therefore, does not work for the employer, is considered to be a self-employed person.⁹⁶ The Court mentioned also additional criteria which may be used when making a difference between a worker and a self-employed person. Freedom to engage one's own assistants as well as the irregular nature of work and limited duration usually mean that a person is considered self-employed.⁹⁷

During the past ten years the increase of entrepreneurship and self-employment has become highly common. Freelancing, franchising etc. have become more typical than before. According to the Statistical office of Finland every third person working in the private sector is either an independent entrepreneur or works in a micro company. An estimation about the growth in the amount of self-employed persons since 1995 is tens of thousands of people. Exact figures are hard to find for the statistics have changed during the years and are still different for different kind of enterprises. Besides, if a person works as a salaried employee and as an

⁹⁴ 75/63 Mrs M.K.H. Hoeckstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (1964) ECR 177, 53/81 D.M. Levin v. Staatssecretaris van Justitie (1982) ECR 1982 and 66/85 Deborah Lawrie-Blum v. Land Baden-Württemberg (1986) ECR 2121.

⁹⁵ See Huttunen, p. 36.

⁹⁶ See the publication of Labour ministry of Finland Nro 135.

⁹⁷ Huttunen, p. 38-39.

entrepreneur at the same time, the main source of the incomes is the basis on which he appears in statistics.

Reasons for the growth of this kind of employment can be found in companies networking and concentrating only in their main business, growing demands for flexibility in business life and the increase of subcontracting. On the other hand, workers have been motivated to start businesses of their own in order to become self-employed and in this way to share the risks of the employer. When the worker is turned into an independent entrepreneur, payments and benefits can vary according to the success of the business.

The worker is not always in a position to decide freely about his or her status at work. There may be threat of redundancy due to shortage of work, or the employer may plan to save expenses by giving the job to another entrepreneur. Typical for this kind of self-employment is that the worker has been offered two choices, either to purchase or rent a room and/or the equipment necessary for the work, or to be made redundant. The employer who sells or lends the equipment to the worker saves costs and avoids the obligations of labour legislation.⁹⁸ Even when the tasks in fact remain the same the worker's status may change.

Further, the independency of a self-employed person can be questioned in cases where the employer in practice still has the right to the direction and supervision. This happens, for example, in situations where the former employer becomes the only orderer for the work⁹⁹, or when a physiotherapist still depends on appointment arrangements controlled by the former employer. Self-employment is supposed to be a voluntary choice. It should not be possible to terminate an employment relationship just because the worker refuses to become a self-employed person. There are, however, differing views taken on this point in case law, and as long as there is a work and incomes available, very few people are willing to start the process to clarify their status.

As examples of an overall evaluation in borderline cases and consideration of the actual circumstances, decisions of the Labour Council can be mentioned. In case (1148/1983) a company doctor was occupied in a health care centre working with equipment he did not pay any rent for. The patients were from different companies. The health centre took care of the appointments and accounted the payments to the doctor. The doctor was not considered to be a worker of the health care centre since the requirement of adequate direction and supervision was not met. In the traditional evaluation of borderline cases criteria like freedom to choose the time and place of work, practice of the work and also the freedom to accept commissions or not, have been in a central position.¹⁰⁰ Also in another case (1179/1985) the Labour Council found that no employment relationship existed since the person in question did not work under the direction and supervision of the employer. The worker had right to decide the time and place of work and the way he performed the work. One may say that the more general the direction and supervision is, the more probable it is that the work is not considered to be done in an employment relationship.

⁹⁸ The publication of Labour ministry of Finland Nro 135.

⁹⁹ The equality publication 2000:8, p. 17.

¹⁰⁰ Koskinen – Mikkola, p. 107.

Entrepreneurship and self-employment have become more and more general for various groups of workers. They used to be typical for transport, forest industry and barbershops, but nowadays the trend is very well known also in health care, social services and information technology professions. The composition of men and women in these groups varies. Self-employed men work as truck drivers, forest-machine contractors and IT experts. Women are in majority, for example, among physiotherapists, nurses and those taking care of children, old or handicapped people. As these groups are not covered by the Employment Contracts Act, the rules of that Act on equal treatment do not apply to them.¹⁰¹

Entrepreneurs and self-employed person remain outside the scope of employment and social security. It is up to themselves to arrange the terms and conditions of their work, such as working hours, annual leaves, occupational safety and health services and pensions. These are, however, often found too expensive. Also, there is no job security, incomes vary according to business trends and the risks of investments have to be borne in full. The new Employment Contracts Act does not provide any help. Compared to workers enjoying the protection of that Act, the standard of legal protection for these people is in many ways low. In relationships where there is a *de facto* dependency on a client, the need for better protection is obvious.¹⁰² When a person becomes an entrepreneur only because the employer wants to save expenses, it is quite clear that the work is expected to be done against much smaller compensation than before.

Especially in truck driver business self-employment has become highly common. In this sector there is also a group of involuntary entrepreneurs. In this group the entrepreneur often works for the former employer to whom he pays hire purchase amounts for the truck. These payments may be one of the reasons for the huge amount of working hours that has appeared in labour inspections. In 1999, labour inspectors checked the working time practices in 1100 companies (all over the country) in Finland. Only 15% of the companies were in the transport business, but the amount of violations against working time regulations was most typical in this sector. For example, it turned out that “normal” illegal overtime hours varied between 400-500 hours per year although the highest amount for one driver was 1800 hours. Though some have voluntarily accepted the situation there are also many among these entrepreneurs whose circumstances at work do not always respond to the standard set in the legislation.

4.2.4 Subcontracting

In practice, fundamental questions involved with the self-employment and entrepreneurship are often connected to subcontracting. As described in the previous section the former worker of the company may become a subcontractor of that same company. In these situations the problem has been the distinction between worker and entrepreneur. The most central problem has concerned the employment security of workers and how subcontracting is defined in labour law.

The term ‘subcontracting’ means the provision of goods or services to the other contracting party, the client. In the legislation subcontracting is not defined as a

¹⁰¹ The equality publication 2000:8, p. 17.

¹⁰² The equality publication 2000:8, p. 17.

specific type of a contract. The concept refers to various kinds of co-operative contract relationships between companies (business contracts, contracts of purchase, job contracts, hiring contracts, commission contracts etc.). There has been an increase in subcontracting and outsourcing of work over the past few years. The externalisation of work is most typical in industry, but it has increased since the mid-90s in all sectors¹⁰³. Especially in the metal and electronics industry the increase of subcontracting has been remarkable. The manufacturers of the final products, for example Nokia, have transferred to subcontracting or contracts made with subcontractors. As a result, the number of self-employed workers and micro companies has grown.¹⁰⁴ This tendency has changed the way of action among subcontractors and increased the need for co-operation.¹⁰⁵

4.2.4.1 The situation of the workers of the user company

Transferring the work outside the company can reduce the amount of work available to the company's own workers. Even if the work is still done in the company, the workers face the risk of redundancy. The provisions Chapter 7 of the Employment Contracts Act, concerning grounds for collective dismissals, do not guarantee full job protection in subcontracting cases.

The amount of work may decrease because of operations taken by the employer who has the right to end, reduce, or expand his business. The Labour Court of Finland has handled subcontracting questions in several cases (for example 1998:72 and 1994:77). The judgements have not been favourable towards the workers of the use undertaking. The reduction of costs is approved to be a legal basis for subcontracting and dismissals or lay-offs resulting from the decision. The employer must, however, observe the rules on equal treatment in choosing the workers to be dismissed¹⁰⁶. In firms regularly employing at least 30 worker, the change must also be handled in a negotiation procedure with the workers' representatives as provided in the Act on Co-operation in Undertakings (1978). Finally, if the business operation takes the form of a transfer of undertaking, the workers must as a rule be taken on by the subcontracting firm in accordance with the well-known rules governing such transfers.

In order to secure the jobs in the user enterprise and the level of conditions of work agreed in the collective agreements, the central trade unions and employer organisations have also agreed on provisions concerning the use of outside workforce, such as agency workers, self-employed persons and subcontractors. According to a general agreement made between the Confederation of Finnish Industry and Employers TT and The Central Organization of Finnish Trade Unions SAK, the contractor is obliged to follow the collective agreement applicable to the field, as well as the relevant labour and social legislation. If, due to the subcontracting, the labour force of the user company exceptionally has to be reduced, the company has to make an effort to offer to the workers other tasks in the company. If this is not possible, the subcontractor should be advised to employ the suitable workers released from their work because of the subcontracting. In addition,

¹⁰³ Koskinen-Mikkola p.53

¹⁰⁴ See Appendix, Finnish Industry by branches.

¹⁰⁵ See <http://www.hallinto.oulu.fi/viestin/vaitost/Lehtinen.htm>

¹⁰⁶ Koskinen – Mikkola, p. 54.

it is not allowed to form the employment contract as a contract between two entrepreneurs.¹⁰⁷

In a collective agreement made for the paper industry, however, there are much more far-reaching restrictions on the use of outside labour force¹⁰⁸. Part of the provisions have been found in violation with the freedom of competition and therefore illegal. In decision 1995-A-48 of the Supreme Administrative Court and in decision 1995:43 of the Labour Court it was held that, as the provisions were found not to be in harmony with competition law, they could not be legal according to labour law, either. At the moment, the provisions are still in force at least on paper, but the question about the relationship between labour law and commercial law is still alive. Also, at the European level collective bargaining is sometimes seen as a threat for the principles of free movement of goods or free competition. The decisions of the Court of Justice of the European Communities have, however, been more tolerant in this respect than those of the Finnish courts.¹⁰⁹

4.2.4.2 The situation of the subcontractor's workers

In subcontracting the workers are under the direction and supervision of a subcontractor. The work may be performed at the client's facilities or in some other place that is not under the control of the employer. The employer and the client may both have the right and possibility to supervise the workers of the subcontractor. Economical dependency on both of these parties is typical for small subcontracting firms.

When the worker of a subcontractor is sent to work in a user company the problems are quite similar to those arising in temporary agency work (see part 4.5). The rights and obligations of the worker, the employer and the user enterprise may be unclear. In fact, the worker may work under the direction and supervision of the subcontractor and the user company. The subcontractor is responsible for the payment of wages and for the other employer duties. However, the worker has to work under those circumstances that prevail in the user company. Chapter 1 Section 7 in Employment Contracts Act, concerning the transfer of rights and obligations of the parties, is applicable in these situations, too. In the proposal for the new Labour Protection Act the duty of the user enterprise to look after the safety and health of the worker of the subcontractor is also strengthened. This improves the position of the subcontractor's workers during the time they work at user enterprises' facilities.¹¹⁰

In the construction field subcontracting and self-employment have been known for a long time. This was regulated as a special kind of teamwork already in the old

¹⁰⁷ See TT-SAK general agreement 1997 and Koskinen – Mikkola, p. 183.

¹⁰⁸ The employer is not allowed to use outside workforce in normal producing and maintaining tasks inside the factory. Outside workforce can be used only temporary in some limited tasks, but in no case in vacancies connected with producing process of the factory.

¹⁰⁹ Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie.

(Compulsory affiliation to a sectoral pension scheme - Compatibility with competition rules - Classification of a sectoral pension fund as an undertaking.) and Case C-22/98. Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV. (Competition - National legislation allowing only 'recognised dockers' to perform certain dock duties - Meaning of 'undertaking' - Special or exclusive rights.).

¹¹⁰ The Committee report 2001:13, p.63.

Employment Contracts Act (1970). The work team consists of workers who all enter into an employment relationships with the employer even though they may have a representative who gets the workers together, speaks for them, deals out the work etc. Because of the nature of the business fixed-term contracts are common and workers move a lot. This has also created a number of 'fly by night' companies and dishonest people who suddenly disappear, if not with the workers money, at least, with their tax and social security payments. The construction workers' union has always struggled against this kind of phenomena. In recent years when the problem has been recognised also by tax officers and good results are achieved when the police, tax officers and union officials together make surprise checks in construction sites.

However, new versions of the old problem have already come up. Some companies have found out the way to use immigrant workers as cheap labour. A considerable part of the business is based on the idea of using workers who can't speak the language of the country and do not even know the basics of labour law or their rights. In addition, they are the few workers in Finland who usually are not members of the unions and do not know whom to turn to in a case of abuse.

In construction business some companies were revealed using mainly Estonian and Russian workers to whom they offered fixed-term jobs with less than the minimum wages. As a cover these companies also had some of these workers, about 20 % of them, in they payrolls, with work licences and all the other papers in order. Unfortunately, the union and the officers started to wonder how the same people could be in so many places at the same time. In another company the foreign workers were paid less than Finns performing the same work. The employer's explanation about the reason was the difference between applicable collective agreements. With the help of the local office of the construction workers union this "misunderstanding" of the scope of the collective agreement was solved and the wages were equalised. However, new contracts were never offered to these foreign workers.

In a case concerning cleaning companies the lawyer of the workers' central organisation made a request for action to the Labour Inspection Board when it turned out that at least one cleaning company hired only foreign workers. The recruitment policy was to offer fixed-term jobs at the hallways of the University and in cafés which are popular among foreigners and only to people who could not speak the Finnish language. When the work was done the workers were paid something, no receipt was given and the huge difference between promised and paid wages was explained with taxation and social security payments – which were never paid, of course. As the company was operating as a subcontractor in a dock area the local labour inspector was already familiar with some of the problems in the business. According to him their only hope was to get enough inspectors to check out the whole area. The jobs were contracted-out and subcontracted etc. so often that the workers had real difficulties to know who they were actually working for a given day.

4.2.5 Combinations

Ambiguous or disguised forms of working mentioned above can also be combined in several different ways. The more complicated these combinations are the greater challenge they are to labour legislation and its application. A few simple

examples can illustrate these situations, even though it is impossible to describe all the versions that human imagination can create.

Teleworking is very often also homework done by employee's own equipment. Freedom to choose the time and place of the work, difficulties in supervision of the work and the value of the worker's own tools might create a combination where the existence of employment relationship can be questioned.

Fixed-term employment contracts with temporary agencies are often made on a part-time or zero-hour basis. These situations are, however, covered by the obligation to offer an additional work to a part-time worker according to the Employment Contracts Act Chapter 2 Section 5.¹¹¹ Only in practice the primary employer, the agency, is not the one who has the possibility to arrange job opportunities in user enterprises. The situation is reversed in those user enterprises which have diminished their chances to take care of their employees' job security by outsourcing the work to subcontractors. In addition, when neither the subcontractor can guarantee job security, it seems that all these arrangements may result in a decline in the workers' job security.

5. MACHINERY AVAILABLE TO THE WORKER

Freedom of association is guaranteed in the Constitution that especially mentions the freedom to form trade unions.¹¹² These rights are confirmed also in the Employment Contracts Act.¹¹³ The provisions protect not only the right to be a member of an organization, but also the right not to belong to any organization.

The level of organisation among Finnish workers is very high, 80 per cent on the average in 2002. Part-time workers, workers in fixed-term employment relationships as well as those who have started working in an employment relationship and later become self-employed or entrepreneurs are usually members of the unions. Nowadays some trade unions have even changed their rules so that even the self-employed persons and entrepreneurs who do not have workers of their own can stay or join in the union. Therefore the negotiation mechanism included in collective agreements is used to solve the problems of also these groups. This concerns cases where the person in question is ready to give his or her case to the union to be handled. Should this machinery not be available, the fear of loosing all working opportunities easily makes a person reluctant to start legal proceedings against an employer or a client.

The process starts at the workplace with negotiations conducted between the shop steward and the employer. If these negotiations fail, the union and the employer or his organisation continue the efforts to find a satisfactory solution for the problem. In practice, most disputes are solved at the workplace or at the union level.

If there are no union level negotiations or if they fail, disputes on collective agreements can be taken to the Labour Court which has a tripartite composition.

¹¹¹ Sädevirta, p. 88.

¹¹² The Constitution of Finland, Section 2 Chapter 13.

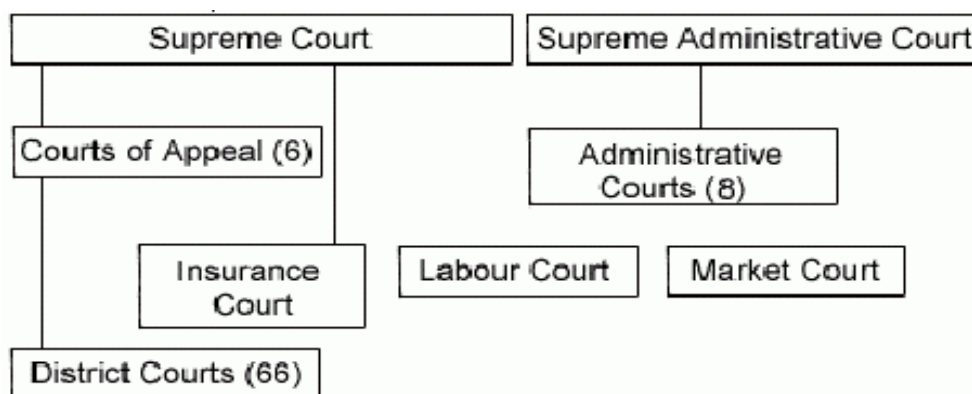
¹¹³ The Employment Contracts Act, Chapter 13 Section 1.

Disputes relating to individual employment relationships and statutory labour law, for example the Employment Contracts Act, are heard by District Courts. The County Administrative Courts deal with disputes concerning individual civil service relationships.

In the Labour Court and the District Courts the decision usually concerns the worker's right to some specific benefits (time of notice when the employer has terminated the employment relationship, overtime payments, right to annual holidays etc.). Whether the worker falls into the scope of labour legislation or not is in these cases decided as a preliminary question.

Decisions of the Labour Court are not subject to appeal. District Court judgments are subject to an appeal before a Court of Appeal. The decisions of the Courts of Appeal usually remain final. The Supreme Court may, however, grant leave to appeal in cases where a precedent is necessary. The appeals against the decisions of the County Administrative Courts are dealt with in the Supreme Administrative Court which is the final arbiter of the legality of the acts of public authorities.

The Insurance Court handles cases falling within the field of social insurance, e.g. accident insurance and pensions. Such cases are usually first heard by an appellate board, whose decisions are then subject to appeal in the Insurance Court. Some of the decisions of the Insurance Court are subject to appeal to the Supreme Court.



A special legal authority, the Labour Council,¹¹⁴ gives advisory opinions in questions concerning the application of the most important statutes on workers' protection.¹¹⁵ Binding decisions are given in petitions concerning the exceptions allowed under mainly the Hours of Work Act. In accordance with the tripartite principle, the Labour Council is composed of Government representatives (including the chairperson) and representatives of workers and employers. Labour protection authorities, organizations of employers and workers, and courts of law, may request advisory opinions. Even though the opinions of Labour Council are not binding they

¹¹⁴ Set up by the Act on the Labour Council and Exceptions Concerning Labour Protection Exemptions (608/1946)

¹¹⁵ For example application of the Annual Holidays Act and the Working hours Act.

have in practice been deviated from only exceptionally, and both the binding decisions and the advisory opinions have been widely used as precedents.¹¹⁶ A person's employee status is an issue frequently raised before the Labour Council.

CONCLUSIONS

It emerges clearly from this study that different forms of work form a part of the recent labour market development in Finland. For a long time the duration of the employment contract, fixed or indefinite, was a central matter in labour law. Rules on other flexible forms of working were rare in general and did not exist in the previous Employment Contracts Act.¹¹⁷

Many issues concerning new forms of work have now been addressed to in legislation or in jurisprudence. Over the past few years the changes in the regulation concerning fixed-term employment relationships have been considerable. The protection of part-time workers and temporary agency workers has also improved. Less regulation has been directed towards other atypical forms of work.¹¹⁸

The trend of the regulation regarding fixed-term and part-time workers is similar. The general rule is equal treatment of these and full time workers. One may say that these forms of work have been normalised. Also, the EU directives increase the security of those workers who work in these flexible employment relationships.

Special regulation on temporary agency work did not exist until the new Employment Contracts Act was passed. The Act has brought the treatment of hired labour force and that of the workers of a user company closer to each another. According to the new legislation, the temporary agency worker is expected to enjoy protection flowing from a collective agreement, either the one binding his or her employer, or, in the second place, the one applicable to the user company. This regulation highly protects temporary agency workers and increases equality between employers and workers by setting the minimum terms in temporary agency work.¹¹⁹ However, in the long run the effects of the new Employment Contracts Act are still quite insecure. The effects depend on how general it becomes to conclude collective agreements in the temporary agency business, and, before all, on the contents of these contracts.¹²⁰ Also, the effectiveness of the Act remains to be confirmed by future case law.

The labour legislation is still to a large extent based on the traditional worker - employer relationship. The Employment Contracts Act which defines the characteristics of an employment relationship makes a difference between a worker and an entrepreneur. The employer's right to the direct supervision of a worker is highly emphasised when evaluating the circumstances of an individual case. One may say that labour law still holds to the idea of the worker who only performs work

¹¹⁶ Bruun, p. 180 and Suviranta, p. 131.

¹¹⁷ See Koskinen – Mikkola, p. 157.

¹¹⁸ See Koskinen – Mikkola, p. 157.

¹¹⁹ Koskinen – Mikkola, p. 163 and Saloheimo, the equality publication 2000:8, p. 45.

¹²⁰ Saloheimo, the equality publication 2000:8, p. 45.

in one position or status. It does not recognize the worker's varying positions and roles.

In practice it is sometimes problematic to find out whether a person is a worker or an entrepreneur. As already emerges from the text, cases concerning self-employed persons and subcontractors do not fit into the traditional division. The so-called "grey area" between the worker and the entrepreneur creates many difficulties in the implementation of the legislation.

Since the new Employment Contracts Act does not necessarily and totally respond to the needs arising from the new forms of work, further regulation would be in place. The protection of workers is widely connected to employment relationship, as defined in the Act, but in the future more attention should be paid to situations where the circumstances are *de facto* similar to an employment relationship. The terms of work should be equal for persons in similar circumstances.¹²¹ Equal protection of workers in similar positions is possible to obtain by expanding the scope of labour law to cover all people performing work in an actual position of dependence.

The Labour Ministry of Finland is soon starting a follow-up study assigned to it in a statement of the Parliament. The study will examine how the new Employment Contracts Act answers to the new demands of the changing work life. The objective of the study is, among others, to clarify the scope of the labour legislation. Also, the status of workers who perform their work in different kinds of relationships and the application of the minimum terms of generally binding collective agreements will be examined. Business restructurings and the legal status of workers in these are to be addressed as well. Furthermore, the study aims to find the compatibility of working life and family life.

¹²¹ Committee report 2000:1.

Appendix 1

Labour Market Population by activity

	1990	1995	1996	1997	1998	1999	2000
	1 000 persons						
Main population	4 986	5 108	5 125	5 140	5 153	5 165	5 176
Population aged 15-74	3 737	3 839	3 850	3 862	3 878	3 890	3 901
Labour force	2 586	2 481	2 490	2 484	2 507	2 557	2 589
Employed	2 504	2 099	2 127	2 169	2 222	2 296	2 335
Unemployed	82	382	363	314	285	261	253
Not in labour force	1 151	1 358	1 360	1 379	1 370	1 333	1 312
Labour force rate, %	69,2	64,6	64,7	64,3	64,7	65,7	66,4
Unemployment rate, %	3,2	15,4	14,6	12,7	11,4	10,2	9,8
Employment rate (persons aged 15-64), %	74,1	61,1	61,9	62,9	64,1	66,0	66,9
Employed	2 504	2 099	2 127	2 169	2 222	2 296	2 335
Hours worked							
Part-time work	238	245	245	238	253	277	286
Full-time work	2 267	1 853	1 882	1 930	1 968	2 017	2 047
Unknown	-	-	-	2	1	1	2
Employer							
Private	1 793	1 469	1 508	1 547	1 588	1 656	1 692
Local government	482	463	462	475	480	484	486
Central government	226	162	152	143	149	149	151
Unknown	3	5	5	4	5	7	6
Industrial status							
Self-employed persons and assisting family members *	388	325	324	322	317	321	319
Wage and salary earners	2 116	1 773	1 803	1 846	1 905	1 975	2 016
Unknown	0	0	0	2	0	0	0
Industry							
Agriculture and forestry *	222	170	159	153	144	144	142
Manufacturing	556	457	461	463	475	488	494
Construction	201	115	118	130	139	149	149
Trade, hotels and restaurants	395	301	316	329	339	355	354
Transport and communications	179	163	160	164	170	168	171
Activities auxiliary to financial intermediation, insurance and business services	268	228	241	240	249	267	287
Public and other services	681	659	667	684	700	719	732
Industry unknown	3	6	6	7	8	6	6
Hours worked, million hours	4 415	3 719	3 805	3 861	3 912	4 053	4 019

Source: Statistics Finland, Labour Force Survey

* Traditionally the self-employers and assisting family members have worked in agriculture. While meaning of agriculture and forestry has decreased in other sectors self-employment has increased. Especially during the high unemployment in 1990's.

Appendix 2

Labour Market Unemployment according to sex

	Unemployed, 1 000 persons			Unemployment rate, %		
	Total	Males	Females	Total	Males	Females
1990	82	49	33	3,2	3,6	2,7
1991	169	106	62	6,6	8,0	5,1
1992	292	178	114	11,7	13,6	9,6
1993	405	235	170	16,3	18,1	14,4
1994	408	235	174	16,6	18,1	14,8
1995	382	204	178	15,4	15,7	15,1
1996	363	186	176	14,6	14,3	14,9
1997	314	160	154	12,7	12,3	13,0
1998	285	143	142	11,4	10,9	12,0
1999	261	130	131	10,2	9,8	10,7
2000	253	122	131	9,8	9,1	10,6
2001	238	117	121	9,1	8,6	9,7
Youth (15-24 age group) unemployment stood at 19.8% in 2001. According to the Labour Force Survey of Statistics Finland, 24.0% of the unemployed were long-term unemployed (unemployed for a year or more) in 2001.						

Source: Statistics Finland, Labour Force Survey

Appendix 3

Employed people according to age and sex 2001/2 and 2002/2

1 000 persons	2002/2	2001/2	2001/2 - 2002/2 Change, %
<i>EMPLOYED</i>	2336	2293	1,9
<i>Age</i>			
15 - 24	233	226	3,3
25 - 54	1797	1801	-0,2
55 - 74	306	267	14,7
15 - 64	2317	2275	1,8
<i>MEN</i>	1200	1200	-0,1
<i>Age</i>			
15 - 24	116	110	5,5
25 - 54	927	947	-2,1
55 - 74	156	143	9,4
15 - 64	1186	1187	-0,0
<i>WOMEN</i>	1136	1093	4,0
<i>Age</i>			
15 - 24	117	115	1,2
25 - 54	870	854	1,9
55 - 74	150	124	20,9
15 - 64	1131	1089	3,9

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Abbreviations

KKO The Supreme Court of Finland

SAK The central Organization of Finnish Trade Unions

STTK Confederation of Technical Employee Organizations in Finland

TT Confederation of Finnish Industry and Employers

TN The Labour Council

VakO The Insurance Court