

Marjo Ylhäinen

**Key concepts and changing labour relations in Finland**  
**Part 1 Country report**

Nordic future of work project 2017–2020: Working paper 5. Pillar VI





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## Preface

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In the future of work project funded by the Nordic Council of Ministers, more than 30 researchers from the five Nordic countries study:

- What are the main drivers and consequences of the changing future of work in the Nordic countries?
- In what ways will digitalisation, new forms of employment, and platform work influence the Nordic models?
- What kind of renewal in the regulation of labour rights, health and safety, and collective bargaining is warranted to make the Nordic model fit for the future?

Through action and policy oriented studies and dialogue with stakeholders, the objective is to enhance research-based knowledge dissemination, experience exchange and mutual learning across the Nordic boundaries. The project runs from 2017 to 2020, and is organised by Fafo Institute for Labour and Social Research, Oslo.

The project is divided into seven pillars. This paper is part of Pillar VI Labour law & regulations, and this paper presents the labour law framework in Finland and discusses the concepts of employer and employee. The aim is to provide a basis for an analysis of whether and how changing labour relations pose a challenge to Nordic labour law.

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Marjo Ylhäinen

# 1 Introduction and legal basis<sup>1</sup>

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## 1.1 Overall approach and the key concepts

The history of the regulation of the employment relationship in Finland is strongly rooted on the idea of a typical employment; an employee that performs the work under the supervision of the employer in premises that belong to the employer.<sup>2</sup> It has been said that the development of the labour market and the growing diversity of different work forms is not yet been really acknowledged in Finland.<sup>3</sup>

Although the above-mentioned interpretation of the overall picture of the regulation of employment in Finland is on the one-hand an exaggeration, the regulation still reflects such a labour market and organization of work that has industrial work and its organization as its central context. The regulation was mainly built after the second world war on the basis of – internationally speaking – late industrialization carried out by strong companies. It still is a presentation of employment in the industry. The historical development of the regulative model signifies that employees who benefit most from the protective ideas of labour law regulation work at the industrial sector and, while the Finnish labour market is strongly gender segregated, are male. The sectors and work which is dominantly female, is typically more fixed-term and part-time contracts with less profitable remuneration.

The key concepts in labour law are attached to contractual relations; employment contract on one hand and collective agreement on the other. Dependent wage-work is the object of labour law regulation. The general framework of the regulation of employment is attached to the concept of employment relationship (*työsuhde, arbetsförhållande*). In jurisprudence there is long tradition in separating the concepts of employment contract, employment contract relation and employment relationship. Although there are differences in the scope and dimensions of these concepts, the *definition* of employment contract and the definition of employment relationship are equivalent.

Employment contract is a legal concept, characteristics of which are defined in the Employment Contracts Act (ECA). ECA is to be applied to contracts that simultaneously fulfill all the characteristics stipulated in the Act. The ECA is applied to contracts that are entered into by an employee, or jointly by several employees as a team, who personally agree to perform work for an employer under the employer's direction and supervision in return for pay or some other remuneration.

Both protection of the employee that labour law legislation provides and social security benefits that relate to work, most significantly the unemployment benefits, are connected to the existence of employment relationship, therefore the interpretation of the characteristics of employment relationship is highly important regarding

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<sup>1</sup> Research assistant Eljas Ryhänen has assisted with writing of this report by gathering the information on recent changes and writing pieces of the preliminary draft on those matters. My sincere thanks to him.

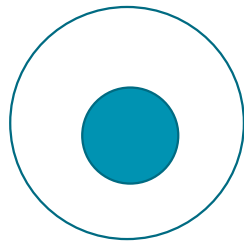
<sup>2</sup> Marjo Ylhäinen, From Obedience to Initiative? Precarious Work and changing subjectivities in labour law discourse. *Subjectivity, Citizenship and Belonging in law. Identities and intersections*. Ann Griffiths, Sanna Mustasaari, Anna Mäki-Petäjä-Leinonen (eds.) Routledge 2017, pp. 232-252. p. 241.

<sup>3</sup> Niklas Bruun & Anders von Koskull: *Työoikeuden perusteet*. (Introduction to Labour Law.) Talentum 2012.

the rights – and obligations – of the employee. The interpretation of Unemployment Act, which is needed in order to make a decision whether person is entitled to unemployment benefits is of importance here. The unemployment authorities have been key institutions that in practice influence the interpretation of the concepts of unemployed person and independent entrepreneur.<sup>4</sup> To date there has been no systematic legal analysis on the practices concerning the interpretation of the characteristics of employment relationship by different institutions or authorities.

If one or more characteristics the ECA requires are lacking, the working person is either self-employed, freelancer or small entrepreneur. Although the concept of independent entrepreneur is used in the Governmental Proposal, none of these concepts have a direct legal definition.<sup>5</sup>

Basically, the Finnish system is built on a binary model, where a working person either is or isn't an employee. However, in the context of this particular project, it would be more fruitful to outline it as a system that is built on a core formed by the characteristics of the employment contract e.g. employment relationship.



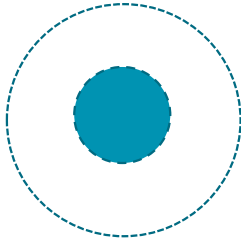
The inner circle of the shape above represents the concept of employment relationship which forms the core of the legal regulation of employment. This shape seeks to pinpoint 1) the centrality of the concept of employment relationship and 2) the lack of legally defining other modes of work, which means that they are excluded. The inner circle seeks to portray the core of protection. Furthermore, the external circle seeks to accentuate how the employment related rights flourish from that special definition, leaving other forms of employment outside that scope. In this picture the solidness of the lines has also a certain meaning. The solid inner line circle reflects the stability and solidness of such employment relationship that fulfills not only the characteristics but also the idea of an ideal employment relationship behind those characteristics. The solidness of the external line pinpoints on one hand that the rights of the employee are at their peak in this kind of employment relationship and on the other hand, the duties as well.

The Finnish system carries a certain reluctance what comes to new forms of work. The more the employment relationship differs from an ideal type, the vaguer the rights of the employee become. The second shape seeks to pinpoint the vagueness the “new work” brings on the employment contract.

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<sup>4</sup> Satu Ojala, Tiina Saari, Pasi Pyöriä, Paul Jonker-Hoffrén: Atypical Labour Markets in Finland. Nordic Future Work Brief 9, March 2019.

<sup>5</sup> Government Proposal for the Employment Contract Act 157/2000 (GP 157/2000), p. 57. Available in Finnish and Swedish at <https://www.finlex.fi/fi/esitykset/he/2000/20000157>.



The interpretation of the characteristics of the employment relationship are therefore essential. The most important feature here seems to be employee's freedom and free choice e.g. the limitations of employer's right to direct – to supervise and control the work.<sup>6</sup> The more choice the employee has, the more likely the contract of employment will either entirely fall outside the scope of the Employment Contract Act or the more likely will the employee have somehow limited rights in comparison to the ideal model.

## 1.2 Legislative framework and the role of collective agreements

The legislative framework consists of mainly mandatory legislation and collective agreements which are central legal tools in regulating the minimum standards of work. They both limit the freedom of contract. Within individual labour law, the key legislative tool is ECA, which stipulates the scope of labour law as well as the essential duties and rights, including for example the conditions of termination, of the contracting parties. There are however several other laws that regulate the individual employment relationship and the conditions of work. The obligation for safety at work is stipulated in ECA but the more precise regulation is in Occupational Health and Safety Act (23.8.2002/738) and working time is stipulated in Working Hours Act (5.7.2019/872)<sup>7</sup>. There is also a special Annual Leave Act (18.3.2005/162). General

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<sup>6</sup> The question of the existence of employment relationship has also been dealt with in the Insurance Court. In an Insurance Court case (VakO 16.6.2016/5281:2014) the Court considered that A, who worked as an expert and lecturer for Finanssi ja Vakuutuskustannus Oy during ten years period, was an entrepreneur. The legal relationship between a and Finanssi ja Vakuutuskustannus Oy was not employment relationship. The overall assessment that the Court made in the decision accentuated A's freedom and independence while performing work as well as how the remuneration was counted and paid. A had influence on the contents of his lectures and had had the freedom to carry out the lectures relatively independently within the limits set by Finanssi ja Vakuutuskustannus Oy. He was paid for the fulfillment of the tasks and not for working per se. Although Finanssi ja Vakuutuskustannus Oy participated in course and lecture planning and ordered the place and time of work, in this case that didn't represent employers right to supervise and control work. A summary available in Finnish at [https://www.finlex.fi/fi/oikeus/vako/20160616\\_2014\\_005281](https://www.finlex.fi/fi/oikeus/vako/20160616_2014_005281).

<sup>7</sup> The new Working Hours Act (WHA) enters into force on 1.1.2020. It includes provisions that are intended to make arrangements of working hours and agreement on them between employer and employee more flexible. There is for example a specific section 13 on flexitime and special provision on overtime work regarding the flexitime agreement. In this paper I mostly use the old Working Hours Act (OWHA). The aim of the new WHA is to answer the problems created by the changing circumstances of work. Governmental Proposal 158/2018 for Working Hours Act (GP 158/2018) p.36-37.

non-discrimination laws, Gender Equality Act (8.8.1986/609) and Non-Discrimination Act (30.12.2014/1325) obligate employers as well and thus cover employment relationships. The conditions for and the legal effects of generally applicable collective agreements is also stipulated in ECA. In collective labour law, the central legal tool is the Collective Agreement Act (CAA). It functions as the legal basis for the normative effect of collective agreements and stipulates on the rights and duties of the parties and their members, including industrial peace.

Mandatory labour law legislation stipulates the minimum standards of all work that is done within the employment relationship. Some provisions, like the prerequisites of the termination of employment contract and concluding a fixed-term contract are mandatory. However, several key sections of the mandatory legislation are *semidispositive*. These provisions are mandatory only regarding to employment contract. By contrast, nation-wide unions and employers' organizations can in the collective agreement conclude also on terms of employment that reduce employees' benefits or terms of the contract deriving from mandatory legislation.

The applicability of collective agreements depends on the organization of the employer. Organized employers are obliged by CAA to apply the agreement made by their Organization to all their employees whether they are Union members or not (regularly binding agreement).<sup>8</sup> General applicability of the collective agreement binds unorganized employers who have employees working on tasks that fall under the scope of the agreement (generally binding agreement). In some cases, mainly if the regularly binding collective agreement is not applicable to certain work, the organized employers might also be obliged to follow the orders of the generally applicable collective agreement.<sup>9</sup> The generally binding effect concerns mainly the private sector as the coverage of the collective agreements in public sector is practically total.<sup>10</sup>

Union density has been diminishing over the past 10 years, but the intensity of the development isn't clear. According to a recent report union density moderately dropped between years 1989 ja 2013, from 71.9 % to 64.5 %. At the end of 2017 it was 59,4 %.<sup>11</sup> Inspection according to field of business shows that membership in Unions is at the highest on industrial field as and in public sector while in the services at private sector only 47,9 % are unionized. It should be noted that the number of union members in public sector services has also diminished despite that it is still relatively

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<sup>8</sup> CAA section 4 stipulates that the parties of the collective agreement can dispose on the applicability of the Collective Agreement to the members of the Union which is the party of the agreement. This section is however seldom used in practice.

<sup>9</sup> This situation may realize if the work in question diverts from employer's main field of industry and is organized as a separate and independent operational field. On this topic see Labour Court statement TT 2019:38 and TT 209:40 as well as Supreme Court judgements KKO 1990:180 and KKO 1992:187.

<sup>10</sup> In 2014 total of 84,3 % of employees were covered by a regularly binding collective agreement (66.2%) and 18,1 % were covered by the general applicability in the private sector. Lasse Ahtiainen: Työehtosopimusten kattavuus vuonna 2014. (The coverage of collective agreements in 2014.). Publications of the Ministry of Employment and the Economy 11:2016 p. 62. Available at

[https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/74850/TEMjul\\_11\\_2016\\_web\\_22032016.pdf](https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/74850/TEMjul_11_2016_web_22032016.pdf).

<sup>11</sup> Lasse Ahtiainen: Palkansaajien järjestäytyminen vuonna 2017. (Organization of wage and salary earners in 2017.) Publications of the Ministry of Economic Affairs and Employment 2019:10 p. 39. Available at <http://urn.fi/URN:ISBN:978-952-327-398-6>.



high.<sup>12</sup> The principle of general applicability of collective agreements is in effect in Finland. The collective agreement is usually seen as generally binding when it covers more than half of the employees in a branch. According to this principle, unorganized employers also have to comply with national agreements applicable to their line of business.<sup>13</sup>

The mandatory legislation and collective agreements are applicable only to work that is performed in employment relationship e.g. based on an employment contract and meeting all characteristics of an employment relationship. The minimum standards set by legislation or collective agreements have an automatic and compelling effect in employment relationships. Parties of the employment contract cannot agree on terms that would diminish them even if they both would agree. Parties cannot even agree upon the status of an employment contract, if the characteristics of the employment relationship are in fact fulfilled. However, in borderline cases the content of contract is taken into account as one factor of the overall assessment of the legal nature of the contract.

The definition in the ECA is important regarding to other labour regulation as well. While evaluating the applicability of for example Working Hours Act (WHA), the first question, whether there is an employment relationship or not, should be answered by assessing whether the legal definition in the ECA is fulfilled or not.<sup>14</sup> Other laws, like WHA, often have slightly different scopes of application, for example the applicability of WHA depends on the concrete supervision of work – or at least the possibility to concretely supervise and control work.<sup>15</sup> Likewise, Employees Pensions Act (EPA) (19.5.2006/395) section 1 stipulates that “*The employer is obligated to arrange and pay for pension provision for its employees in accordance with this Act for work carried out in Finland, unless otherwise provided herein.*” In section 2 employment relationship is defined with a direct reference to ECA’s definition.<sup>16</sup> The exemptions stipulated in the EPA include for example such employment relationships where the monthly salary is under 41,89 euros. The questions of applicability of a particular law are therefore secondary and remain unanswered if the requirements of the legal definition of employment relationship are not met.

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<sup>12</sup> Ahtiainen 2019 p. 41.

<sup>13</sup> It is required by ECA chapter 2 section 7 that in order to be generally applicable the collective agreement has to have nationwide applicability and it should be representative e.g. approximately 50% of the workers on a specific field should be covered by its regular applicability.

<sup>14</sup> For example, Labour Council statement TN 1428-08. Available in Finnish at <https://tem.fi/lausunnot>.

<sup>15</sup> For example, OWHA section 2 stipulates, that it is not applied to work that is performed in an independent manner. The new WHA section 2 provision 4 refers to work related special features that have an effect on working conditions where it cannot be considered a duty of the employer to monitor arrangement of the time spent on said work. The provision in OWHA referred to working at home or in conditions similar to homework.

<sup>16</sup> *For the purposes of this act... 2) employment relationship means an employment relationship based on Chapter 1 section 1 of the Employment Contracts Act (55/2001).*

### 1.3 Enforcement mechanism

The proper court for labour disputes is either general court of law or the Labour Court. The Labour Court only solves disputes that are based on collective agreements or require interpretation of the CAA or other collective agreements laws.<sup>17</sup> While the existence of employment relationship is the prerequisite of the applicability of collective agreement to a particular employment relationship by definition – a collective agreement shall concern conditions of employment relationship – the interpretation of the characteristics of that relationship falls outside the jurisdiction of the Labour Court.

The interpretation of collective agreements however includes interpretation of legislation. Firstly, Labour Court is obliged to take into account the mandatory legislation relevant to the matter, for example non-discrimination laws. Secondly, it is common to include sections of law in the collective agreements. Therefore, the decisions of the Labour Court judgements may have – and usually has – importance regarding to the interpretation of labour laws. The proper forum for other matters, e.g. claims that are based on legislation, is general court.

Labour Council is a tripartite organ that gives opinions (statements) on the application and interpretation of several labour laws (WHA, Annual Holidays act etc.).<sup>18</sup> Although it isn't part of the proper enforcement mechanism, it is nevertheless an important institution in interpretative matters. In several opinions it has interpreted also ECA as a preliminary question.<sup>19</sup> Labour Inspection authorities on the other hand, have practical importance. They can also require an opinion from Labour Council in order to find answers in compelling questions of interpretation. The Labour Council's opinions are not legally binding. Nevertheless, they are effective. The effectiveness of the Labour Council's opinions arises not only from the flexible and speedy process obtaining of comments compared to the court proceedings, but above all from the expertise of the Labour Council.<sup>20</sup>

Because the application of an employment contract is a condition for the application of several labour laws as explained above, the Labor Council has to evaluate, as

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<sup>17</sup> Collective agreements for civil servants Act (6.11.1970/664) and Collective Agreements for municipal officials Act (6.11.1970/669).

<sup>18</sup> Act on the Labour Council and Derogation Permits Concerning Labour Protection (499/2004) Sections 2 and 7.

<sup>19</sup> Labour Council's opinions should be taken into account in jurisprudential studies and they also have some significance as legal sources for interpretation. Seppo Koskinen, Työneuvoston lausunnot tutkimuksessa – näkemyksiä lausuntojen asemasta oikeuslähteenä. (Labour Council's opinions as legal source in legal studies.) *Työneuvosto työlakien tulkitsijana. (Labour Council as an interpreter of labour laws.)* Jaana Paanetoja and Minja Merk (eds.). Publications of the Ministry of Economic Affairs and Employment. Publication series Employment and entrepreneurship 10/2014, p. 28.

Available at

<https://tem.fi/documents/1410877/2859687/Ty%C3%B6neuvosto+ty%C3%B6lakien+tulkitsijana+27032014.pdf>

<sup>20</sup> Ahonen Päivi: Työneuvoston toiminta työntekijäjärjestön edustajan näkökulmasta. (The Perspective of employees' organization into the functioning of Labour Council.) Ministry of Economic Affairs and Employment of Finland Publications: Employment and entrepreneurship 10/2014, *Työneuvosto työlakien tulkitsijana. (Labour Council as an interpreter of labour laws.)* Jaana Paanetoja and Minja Merk (eds.). Publications of the Ministry of Economic Affairs and Employment. Publication series Employment and entrepreneurship 10/2014, p. 17.

Available at

<https://tem.fi/documents/1410877/2859687/Ty%C3%B6neuvosto+ty%C3%B6lakien+tulkitsijana+27032014.pdf>

a preliminary question, whether or not the characteristics of employment relationship are fulfilled in different kinds of employment situations. An individual employee is not eligible to request an opinion.<sup>21</sup> The decisions of unemployment authorities are of great importance in practice, however these decisions in a juridical analysis are not qualified as legal sources for interpretation.

Questions that are related to social security benefits e.g. income security, such as unemployment benefits and pensions are dealt with in Insurance Court as the highest court. These decisions have significance since the distinction between self-employed person and an employee may come up in cases concerning the right to employees' pension or unemployment benefit. Insurance Court also makes judicial decisions that concern the allocation of social security payments.

In the following, I will evaluate the concept of employment relationship as the central concept in Finnish labour law doctrine. I will analyze the characteristics of employment contract which also define who is an employee and who is employer. After that I will make some notions on the concept of employer.

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<sup>21</sup> A written request for opinion may be submitted by (Section 8): court of law a Regional State Administrative Agency; a central organization for employers or employees; a ministry dealing with the state's labour market policy; the Church Employers' Delegation for Collective Agreements; the Commission for Local Authority Employers; the Provincial Government of Åland, or the municipal delegation for collective agreements of the Province of Åland; the Cooperation Ombudsman, when the matter concerns the question of whether the Act on Co-operation within Undertakings or the Act on Co-operation within Finnish and Community-wide Groups of Undertakings should be applied to a particular company or group of companies.

## 2 The legal definition of employment relationship and the concept of employer

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### 2.1 Introduction

The concepts of employee or employer are not central in the Finnish labour law doctrine. It could be argued that this is, at least partly due to the development of labour law as a special field of law in Finland. The founding father of Finnish labour law, *Arvo Sipilä*, pinpointed in his studies in the 1930's and 1940's the class-neutral character and contractual nature of labour law. He specifically wanted to separate labour law from social policy and social law legislation. According to him, labour law should more strongly be attached to private law instead of social law, which objective was to enhance the position of most vulnerable people with the interest of society. Labour law was to enhance private not public interest. It was not class law and its purpose was not tied to working class. The subordination in the employment relationship was not economical nor organizational by nature but a consequence of employers right to supervise and control work. The idea of the protection of the employee and employee position was attached to the contractual relation and aimed to balance the power relation between the parties of the contract. In this sense, labour law was social.<sup>22</sup> Labour law was for employers as well as for employees. It should however be freed from the concepts of both employer and employee and place the relation between the two parties as the central concept.<sup>23</sup>

In the 1960's *Kaarlo Sarkko*, another Finnish labour law professor used the concept of employee status in his analysis of labour law. He accentuated the social and political character of labour law. In his opinion, the dependent position of the employee and the idea of the protection formulated the central nature of labour law. He analyzed the legal definition of employment relationship as forming a specific status of employee with certain rights and duties.<sup>24</sup> At that time there was a need to overcome the formal characteristics of employment relationship as the scope of different labour laws varied and there was a lack of coherence within the applicability of labour laws.<sup>25</sup> After Sarkko there hasn't been any serious attempts to accentuate the status or concept of employee. *Kairinen* has used the concept of employer in relation to agency work<sup>26</sup>, but the concept of employment relationship is clearly the prevailing concept in Finnish labour law.

### 2.2 An overall assessment

The regulation of employment relationship requires, as noted above, four characteristics that must be fulfilled. The concepts of employment contract, employment contract relation and employment relationship are essential while deciding whether a

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<sup>22</sup> Arvo Sipilä, *Suomen työoikeuden käsite ja järjestelmä sekä suhde sosiaaliseen lainsäädäntöön*. (The Concept and System of Finnish labour law and its relation to social law.) Helsinki 1938 p. 133-135.

<sup>23</sup> Sipilä 1938 p. 153; 209-210.

<sup>24</sup> Kaarlo Sarkko, *Työoikeus: yleinen osa*. (Labour law – general introduction.) Publications of the Finnish Lawyers' Association, B-series. Vammala 1975, p. 21.

<sup>25</sup> Sarkko 1975 p. 99-100.

<sup>26</sup> Martti Kairinen: *Työoikeus perusteineen*. (Labour Law and its foundation.) Työelämän Tietopalvelu OY. Masku 2009, p. 102.

person should be considered as employee or independent entrepreneur e.g. whether labour laws are applicable or not. The status of an employee requires that all the characteristics are simultaneously fulfilled.<sup>27</sup> These characteristics are evaluated one by one, but in borderline cases also the situation as whole should be considered in an overall assessment. This line of interpretation (overall assessment) has been confirmed in government proposal, juridical literature and case law.<sup>28</sup>

## 2.3 Contract

The first element is the contractual relation. According to ECA, contract seems to be the most important element of this relation. A binding contract is the distinctive feature between *talkootyö* (voluntary work made on behalf of someone else without committing to a contractual relation) as well as between employment and a hobby that is done for example within a sport club and that has a voluntary basis. The status of hobby, “ordinary hobby” is specifically excluded from the scope of application of the ECA (Chapter 1 section2). Employment contract can be concluded on any kind of work, whether the work to be carried out is physical or mental, isn’t relevant. It can be both active or passive activity. The purpose of the contract should also be considered. There should be an *intent* to profit from working in order to fulfill the characteristics of employment relationship.<sup>29</sup> The evaluation of the motives of the working person has not been widely considered in the legal literature nor in the court cases. This requirement is relevant for example in such borderline cases that concern hobby-like or hobby-related work.

A written contract is not required; oral or tacit contracts are valid as well. The existence of the contract can also be concluded from the circumstances under which the work is performed. The importance of the contract is highlighted for example in Labour Councils opinion on 24.6.2014 (TN 1458-14).<sup>30</sup> The opinion concerned persons from Thailand that had come to Finland in the purpose of picking and selling berries. The berry-pickers were required to have visas when coming to Finland. They had been invited by a company that sold berry products, which also guaranteed their status as required by the Aliens Act. Despite this, Labour Council considered in its opinion, that there was no contractual relation between the parties. The Labour Council stated, that it couldn’t come to the conclusion that the berry pickers worked under employment relationship. There were no formal contracts that would indicate the right to supervise and control the work. Neither did the company supervise or direct their work factually which would have indicated that there was a tacit agreement on working in employment relationship. Therefore, some of the characteristics of employment relationship were not fulfilled, there was no employment relationship and the pickers lacked the status of employees. The Holiday act was therefore not applicable.

The above description of the opinion of the Labour Council is illustrative while indicating that the actual position, the factual economic dependence nor the vulnerable position of the employed person is not necessarily significant while assessing whether there is an employment relationship or not. It also pinpoints the free will

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<sup>27</sup> GP 157/2000 p. 7.

<sup>28</sup> GP 157/2000 p. 57.

<sup>29</sup> GP 157/2000 p. 56.

<sup>30</sup> Labour Council opinion TN 1458-14 available in Finnish at <https://tem.fi/lausunnot>.

and voluntary entering into the contractual relation which might be challenging while assessing the precarious or atypical forms of work. The vulnerability of the person within “employment relationship” is however relevant in criminal cases that concern discrimination at work and trafficking.<sup>31</sup> While entering into contract the status of the employee is attached to the ideas of contract law. The idea of free will and free choice play an important role here.

## 2.4 Renumeration

The status of an employee also requires that some kind of remuneration is paid for the work. The form of remuneration – wage, gratuity, other compensation or even a possibility to earn<sup>32</sup> – is not relevant. The remuneration must have economic value. The payment of remuneration doesn’t have to be solely the employer’s burden and it can also consist of different kinds of financial support.

There is a special clause in the ECA that stipulates on the presumption that the work agreed upon is to be done against remuneration. Although commonly remuneration is agreed upon between the parties, the lack of agreement of the remuneration is not indispensable if it can be concluded from the facts of the working-circumstances that the work is not meant to be carried out without remuneration. Here the reference to the intent to make profit that employee has, might also be a relevant factor.

Wages are widely agreed upon in the collective agreements. In most cases there is a generally binding collective agreement which assigns the minimum wages. The generally binding effect is a legal effect of chapter 2 section 7 in the Employment contract act. It stipulates, that an employer who is not bound by any collective agreement as a member of employers’ organization, shall obey those orders of a generally binding collective agreement that concern the work the employee performs. In those cases where there is no generally binding collective agreement, the employee and the employer can freely agree upon the remuneration. The employment contract act only stipulates that the remuneration should be “reasonable”.

## 2.5 Working on behalf of the employer

Working on the behalf of the employer is one of the characteristics that distinguishes independent self-employed persons and the employees. An employee works for the employer and work profits directly the employer while the employee benefits from

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<sup>31</sup> The latest criminal case concerning trafficking of berry pickers is pending in the Vaasa Court of Appeal. <https://www.hs.fi/kotimaa/art-2000006201521.html> (site was visited 22.9.2019).

<sup>32</sup> In the Supreme Court case KKO:1997:38 the question of remuneration was evaluated in a case that considered whether hockey-playing constituted employment relationship or whether it was a hobby under the exemption rule of (old) ECA. A had a player-contract with a hockey-association on playing in a hockey team which competed on the second highest hockey series level. According to Supreme Court hockey playing on that level could be regarded as professional playing and considered the characteristics of employment relationship. A was only beginning his career, had played fewer matches and therefore had a lower income compared to some other players. The remuneration that the players received had however, according to Supreme Court, a special significance regarding their possibilities to earn their living. Furthermore, playing in the team was a prerequisite for future incomes as a professional hockey player and according to the contract, A’s opportunity to earn money wasn’t merely illusory. In this decision Supreme Court considered that even the future possibilities to earn may have significance in the interpretation of remuneration as one of the characteristics of employment relationship.

the work indirectly in the form of the remuneration. Employee's remuneration is paid for the work itself, and not for the end-products of the work. In the employment relationship the employer carries the economic risks of the business as well as makes the business decisions.

In the Supreme Court case (KKO:2009:65) the court pinpointed that central characteristics of entrepreneurship are independence, freedom and economical commitment to operating business (para 13.). In this case the Supreme Court considered the contract not to be employment contract while the business decisions were made by the working persons even though they didn't carry full economical risk of the operation. The successfulness of conducting the business depended purely on their business decisions (para 17 and 18.).<sup>33</sup> The Supreme Court case KKO:2008:99 involved the question whether a contract of construction work was in fact a contract of employment. The Supreme Court held that, despite the written agreement, the matters relating to the negotiation and performance of the contract - in particular working without charging value-added tax and the circumstances relating to the management and supervision of the construction work - showed that the construction work was done on behalf of the other contracting party, Therefore it constituted an employment relationship and the worker was not to be considered self-employed person.

## 2.6 Supervising and directing work

In the legal doctrine, the element of supervision and direction is twofold, which means that the abstract right to supervise and direct the work is part of the legal definition of the employment contract. This characteristic is the most important. While employer's abstract right to conduct and control work is sufficient to measure up the dependence as one of the features of employment relationship, in practice this feature is often evaluated through the factual circumstances where the activity of supervision and direction is relevant. Therefore, the factual circumstances of work are often relevant in borderline cases. The more the factual circumstances resemble the ideal type of organizing work, the more likely this element of the legal definition is to be met. Also, the conditions of the employment contract might be relevant considering employer's right to supervise and direct work. The circumstances and conditions of work should be considered in their entity, making an overall assessment. In the legal literature there is a wide consensus that despite the premise of equal importance of the different characteristics, the right to conduct and control work is the most important.<sup>34</sup>

In the employment relationship work is done in a subordinate position, following the orders given by the employer. The employer has the right to give orders regarding the place, time and manner of work. In legal doctrine and in the case law the assessment of this element consists of facts such as the conditions of remuneration, place of work, the ownership of tools, equipment and materials that the work requires, etc. Some of these facts are agreed upon in the contract of work which means that the parties of the contract can, in some extent, stipulate on the legal status of the contract of work.

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<sup>33</sup> The dispute in this case concerned whether a business contract between the parties was de facto an employment contract.

<sup>34</sup> For example, Kari-Pekka Tiitinen & Tarja Kröger: *Työsopimusoikeus*. (Employment law.) Talentum 2012, p. 18 and Kairinen 2009 s. 77.

There are several details considering contracting and the content of the contract that may have relevance in assessment of the nature of the contract. In the overall assessment of the contract the issues that should be considered involve for example following facts; how the object of work is defined, where and when the work will be performed, does the worker have some kind of position within employer's organization, how is the remuneration constructed and how high it is in comparison to regular salary of same kind of job and what are the conditions of paying the remuneration or are there requirements to personally perform the work. Furthermore the clauses on other rights and obligations may impact the interpretation, if there are clauses that limit worker's rights to engage her/him to work for third parties, what are the contractual duties of both parties, including duty to provide tools and materials for the work or the duty to pay social security payments as well as such conditions that define supervision and direction of work performance. The name of the contract might have significance when evaluating the mutual will of the contracting parties. Formal distinctive features don't necessarily have any meaning if the factual situation indicates that the employee is not independent. The doctrine of overall assessment therefore means that the agreed conditions should be equivalent to the factual circumstances. One should be able to conclude that there is no intent to circumvent the mandatory legislation.<sup>35</sup>

## 2.7 Team work

The Employment Contract Act chapter 1 section 1 also recognizes the possibility for more than one person jointly agree to perform work-tasks as a team. In this case the representative of the team makes the contract on behalf of the others, but each member has a separate employment contract with the employer. Also, this engagement means that they all personally commit to the tasks. The team should have a contract and they should agree how the work-tasks are divided among themselves. They also agree upon the division of the payment that the employer makes.

This mode of work is sometimes used for example among musicians who together as a band or orchestra undertake an employment contract or for contractors who jointly agree upon a building contract. The significance of this regulation has however diminished. It is still in use in the building trade and in the collective agreement for building trade there are wage clauses that concern team work.<sup>36</sup>

## 2.8 Some remarks on the concept employer

The evaluation of the characteristics of the employment relationship are the essential factors while deciding who is the employer. The employer is therefore also identified with the help of the characteristics. The employer is contractual partner that profits from the contract that is made for working under supervision and who is re-

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<sup>35</sup> According to ECA chapter 13 subsection 6.1 a contract that diminishes employees lawful rights is null and void unless otherwise has been legislated. The mandatory character of the ECA covers also the characteristics of the employment contract which means that such arrangements which aim to circumvention of the stipulation in ECA are prohibited. GP 157/2000 p. 55; 125–126.

<sup>36</sup> Collective agreement for construction trade p. 28-29. Available in Finnish at <https://rakennusliitto.fi/wp-content/uploads/2018/06/Rakennustuoteteollisuuden-tyoehotosopimus-1.5.2018-30.4.2020.pdf>.



sponsible for paying the remuneration. Kairinen makes the notion that that the concepts of Finnish labour law are developed to describe a static situation that prevails between one employer and one employee.<sup>37</sup> Joint or divided employer status has not been a specifically popular issue on labour law literature, which might even contribute to the difficulties in recognizing employee position in borderline cases, such as platform work.

There are however some features that can be considered or described as cases of joint or divided employer status in the meaning that the duties and rights can, at least partially, be addressed to more than one employer or employer unit piercing the corporate veil or where the duties and rights are divided between two employers.

Agency work, which is stipulated under ECA is an example of divided employee status. Here the rights of the employer are divided between the contractual employer and the user company. Few of the responsibilities are joint in the sense that both, the contractual employee and the user company are obliged to apply Non-Discrimination law and to take care of safety at work under Occupational Safety and Health Act.<sup>38</sup>

A specific kind of joint or divided employer position is attached to situations of transfer and change. The transfer of undertakings, which is stipulated under ECA chapter 1 section 10, has been considered as an example of joint responsibilities in legal literature.<sup>39</sup> Another example concerns collective redundancies. According to ECA chapter 7 section 4, the employer has a duty to look into possibilities to replace the employee, who is in danger of being redundant. As part of the redundancy process, the employer must offer other work tasks that are available, and which fit to the capabilities of the employee, in order to avoid the termination of employment. In jurisprudence this duty has been interpreted as a wide duty which extends the limits that judicially form employer.

In the Supreme Court case KKO:2010:43, the court pinpointed that the companies within the concern formed a united business organization where there was no competition between different units and companies. They also had common organization for employee management and the negotiations on collective redundancies were carried out on the company level therefore the concern was considered as a unit regarding to employer obligations in the case of collective redundancies. The formal contractual employer must entangle possible vacancies within the whole concern or within a group of companies that share functions or have same owners.<sup>40</sup> When evaluating whether there are justified grounds for collective redundancies, the starting point must be functional and economical independence of the unit in question and not the formal judicial construction of the employer. The independence of the unit might consist of for example as separate administration or personnel policy (Supreme Court case KKO:2015:7).

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<sup>37</sup> Martti Kairinen: Työnantajan käsite ja yritystoiminnan dynamiikka. (The concept of employer and the dynamics of business.) *Omistus, sopimus, vaihdanta*. The Faculty of Law of the University of Turku publications 2005, p. 50.

<sup>38</sup> More precisely in chapter 3.2.

<sup>39</sup> Kairinen 2005 p. 53.

<sup>40</sup> This principle was applied for the first time in Supreme Court case KKO:1998:77.

## 3 Legal responses to specific challenges

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### 3.1 Introduction

The challenges of new types of work-organization have been on the political agenda for some time. There are different kinds of policy-oriented studies and reports on the issue.<sup>41</sup> The European movement Justice for couriers is active also in Finland.<sup>42</sup> Furthermore, Unions have taken up the problems raising from especially platform work and the precarious employment relationships it utilises.<sup>43</sup> Recently a study on the rights of the platform workers was published.<sup>44</sup>

The new forms of employment are often performed in such circumstances, usually without concrete supervision by the employer, that they tend to fall outside several labour laws, for example WHA. Even if the law applies, it's structure may hinder the fulfillment of the rights of the employees. The phenomena of changing work relations have also affected legislation. In summer 2018 section 11 in chapter 1 in the ECA entered into force. This section regulates zero-hour contracts e.g. contracts with variable working hours. Its aim is not to limit zero-hour contracts in such cases they are appropriate, but the objective is to minimize the negative effects zero-hour contracts might have especially regarding to employees' rights.<sup>45</sup> In Finland altogether 31% of all in employment were non-standard workers in 2015. 10% of all in employment were self-employed while 14 % worked part-time. 13 % were temporarily employed. Agency work was marginal, being only 1 %.<sup>46</sup> The regulation of agency-work is however juridically interesting, as it might provide a possible model to regulate platform-work.

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<sup>41</sup> The Finnish Parliament's Committee for the Future has published a report on platform work in platform economy (Jakamistalous ja alustatyö. Eduskunnan tulevaisuusvaliokunnan julkaisu 3/2018, available in Finnish at [https://www.eduskunta.fi/FI/tietoaeduskunnasta/julkaisut/Documents/tuvj\\_3+2018.pdf](https://www.eduskunta.fi/FI/tietoaeduskunnasta/julkaisut/Documents/tuvj_3+2018.pdf)) and The Ministry of Employment and Trade made a report on the legislative framework of platform economy (Jakamistalouden säädösympäristö. Haasteet ja kehittämistarpeet. Työ- ja elinkeinoministeriön julkaisuja. Yritykset-sarja 44/2017 available in Finnish at [http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160356/TEMrap\\_44\\_2017\\_verkkojulkaisu.pdf](http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160356/TEMrap_44_2017_verkkojulkaisu.pdf)).

<sup>42</sup> <https://fi.justice4couriers.fi/>.

<sup>43</sup> For example Service Union United PAM has been active on requiring rights for people working on the platform economy. (<https://www.pam.fi/en/news/there-is-a-need-for-clear-rules-for-platform-work.html> site was visited 22.9.2019) On the other hand the Confederation of Finnish Industries (EK) has argued that there doesn't exist any severe problems of applying labour law in platform economy (<https://ek.fi/blogi/2019/07/30/markus-aimala-alustalous-ja-tyoikeus-paljon-metelia-tyhjasta/> site was visited 22.9.2019) and the issue has also been raised up by the Finnish Entrepreneurs association as a question of the rights of platform entrepreneurs (<https://www.yrittajat.fi/tiedotteet/611238-yrittajat-esittaa-parannusta-alustaloustoimijoiden-asemaan>, site was visited 22.9.2019).

<sup>44</sup> Maija Mattila, Työ ja työntekijöiden oikeudet alustalousessa. Ongelmista ratkaisuihin. Kalevi Sorsa -säätiö 2019. (Work and Workers' Rights in the Platform Economy – From Problems to Solutions.) (Available in Finnish at [https://sorsafoundation.fi/wp-content/uploads/2019/04/Alustalous\\_Web.pdf](https://sorsafoundation.fi/wp-content/uploads/2019/04/Alustalous_Web.pdf) and an English summary is available at <https://sorsafoundation.fi/wp-content/uploads/2019/04/Work-in-the-Platform-Economy-Summary.pdf>.)

<sup>45</sup> Government's Proposal to Parliament for legislation for employees who work flexible hours to improve their position 158/2018, p. 14-15.

<sup>46</sup> Ojala, Saari, Pyöriä and Jonker-Hoffrén 2019, p.1.

### 3.2 Triparty contracts and agency work

There is no legislation of triparty contract model. Agency work, which is regulated in the Employment Contracts Act (Chapter 1 section 7) is a specific kind of a binary model, where the rights and obligations between the parties are divided or, as regards to non-discrimination and safety at work, joint. As neither employer or employee is allowed to transfer obligations or rights derived from employment contract to a third party, ECA chapter 7 section 3 forms an exemption from this main rule. According to it;

*If, with the employee's consent, the employer assigns an employee for use by another employer (user enterprise), the right to direct and supervise the work is transferred to the user enterprise together with the obligations stipulated for the employer directly related to the performance of the work and its arrangement. The user enterprise must provide the employee's employer with any and all information necessary for the fulfilment of the employer's responsibilities.*

Legislation recognizes therefore three parties to an agency work employment relationship: the employee, the agency and the user enterprise. Agency is the contractual<sup>47</sup> employer. Because there isn't any employment contract relationship between user company and employee, agency work is based on the contract between agency and the user company. Employee's approval to this arrangement is required and the employment contract is made between the contractual employer and the agency worker.

The duties and rights of the employer are divided between the contractual employer and the user company. The user company benefits from the work of the agency worker and has the right to direct and supervise the work.<sup>48</sup> It is responsible for such obligations imposed on the employer, which are directly related to the work and its arrangements. These are mainly such duties and rights that are directly linked to work performance, such as arrangements of working time.

The responsibility is divided, although in the borderline cases the responsible employer will be decided *in casu*. There is no specific law-based regulation defining the contractual relationship between the agency and the user company, which is based on general contract regulation and legal principles.<sup>49</sup> The guiding principle here is, that the rights of the employee provided by the mandatory legislation, cannot be diminished by the contractual relation between the companies.

Therefore, if the user company for example has the employee working overtime, the employee has the right for compensation according to legislation or collective agreement regardless of the possible limitations in the contract between contractual employer and user company. The hiring company is obliged to pay the extra compensations to the employee who had worked overtime *in bona fide*. Hiring companies' rights towards the user company depend on the contract between them.<sup>50</sup>

All the general employment legislation is applied to agency work. The contractual employer is obliged to follow the mandatory rules that govern the termination of the

<sup>47</sup> In Finnish legislation the adjunct "contractual" is not used, instead solely term employer.

<sup>48</sup> GP 157/2000 p. 64 and Government Proposal to the Parliament for changing chapter 2 sections 6 and 9 in the Employment Contract act and the Act of Posted Workers 104/2011 p. 7. Available in Finnish and Swedish at <https://www.finlex.fi/fi/esitykset/he/2011/20110104>.

<sup>49</sup> Harri Hietala – Keijo Kaivanto – Esa Schön: *Vuokratyö*. (Agency Work.) Talentum 2014, p. 25.

<sup>50</sup> Tiitinen – Kröger 2012 p. 391–393.

contract as well as the provisions that limits the use of fixed-term contracts. For example, in Supreme Court cases KKO:2012:10 and KKO:2019:45 the court confirmed that the objective criteria that includes a justified reason for a fixed-term contract, must be met. If the contractual employer has a permanent need for labour, the employees shall be hired on a permanent basis regardless of the duration of a particular contract with the user company.

The agency has all the rights and obligations arising from the employment relationship with its employee, which are not by law or by agreement between the agency and the user company, and with the employee's consent, transferred to the user company. As an employer and contractor, the agency is responsible to the employee for compliance with the minimum employment terms and conditions specified in the employment law and collective agreement.<sup>51</sup>

According to travaux *préparatoires* of the ECA, in practice the obligations of the user company are mainly about deciding on the working time and some duties related to labour protection. The contractual employer (agency) has a duty to take care of other employers' obligations, such as payroll, with related social insurance contributions, co-operation obligations and annual leave. Decisive for the allocation of rights and obligations between parts is the extent to which they are related to the day-to-day work organization and the length of time the employee is employed by the user company.<sup>52</sup> Thus, monitoring the annual overtime, for example, and organizing occupational health care would normally be the responsibility of the contractual employer.<sup>53</sup> The Non Discrimination Act (NDA), which stipulates other discrimination grounds besides gender, shall be applied by both user company and the contractual employer. The contractual employer is responsible for applying the NDA to conditions of work, such as salary or principles of offering work to the employees. The user company is responsible for applying NDA while deciding on working arrangements, working hours and other matters that relate to work performance.

The contractual employer and the user company have joint responsibility for safety at work according to Occupational Safety and Health Act (OSHA) section 3. They are both responsible for taking care of safe work performance, although the penal responsibility is resolved on a case by case basis. The user company is therefore responsible for safety of the work, and it has to provide sufficient orientation to the work. The hiring company on the other hand is responsible that the employee has sufficient skills for the work, and it is also responsible for the arrangements of occupational health.

So, the minimum terms and conditions of employment in temporary agency work are derived from employment legislation and the applicable collective agreement. Even if there is no binding collective agreement, the terms and conditions of employment must be reasonable.

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<sup>51</sup> GP 104/2011 p. 7, Government Proposal to the Parliament for changing chapters 1, 2 and 13 in the Employment Act, the sections 4 and 6 in the Act on the Contractor's Obligations and Liability when Work is Contracted Out and section 3 in the Occupational Health and Safety Act 68/2008, p. 3 (Available in Finnish and Swedish at <https://www.finlex.fi/fi/esitykset/he/2008/20080068>).

<sup>52</sup> GP 157/2000 p. 63.

<sup>53</sup> Hietala – Kaivanto – Schön 2014, p. 113.

According to Chapter 2 Section 9 (10/2012):

”If the employer has hired out an employee to work for another employer, and the employer that hired out its employee is neither bound by a collective agreement as referred to in section 7, subsection 3, nor required to observe a generally applicable collective agreement in its employment relationships, at least the provisions of the collective agreement referred to in section 7, subsection 3 to which the user enterprise is bound or a generally applicable collective agreement shall be applied to the employment relationship of the hired worker (temporary agency worker).

If no collective agreement referred to in subsection 1 is applied to the hired worker’s (temporary agency worker’s) employment relationship, the terms and conditions pertaining to the worker’s pay, working hours, and annual leave must, at a minimum, comply with the agreements or practices binding on, and generally applied by, the user enterprise. “

If the contractual employer is obliged to apply a collective agreement<sup>54</sup> stipulating the agency work (hiring workers) that will be applied to the conditions of work for the employee. In case there is no such collective agreement, the employer shall apply collective agreement which bounds the user company. If neither contractual employer nor user company is bound to a collective agreement, terms and conditions are defined by the generally applicable collective agreement that the user company is obliged to apply as the minimum conditions for employment relations.

Some models of platform work resemble agency work. In a recent report that seeks to find solutions regarding sharing economy related issues there was a suggestion to utilize agency work model.<sup>55</sup>

### 3.3 Fragmented, empty or marginal contracts

In principle, neither the duration of employment nor the number of working hours is relevant regarding to the fulfillment of the characteristics of employment relationship. Neither are the employer’s duties conditioned by a minimum duration or amount of work.

The Employment Contracts Act stipulates that a *fixed term* contract has to have a justified reason; substitute, season-work, starting-of-a-business etc. if the fixed term has been agreed upon by employer’s initiative. Furthermore, if the employer has permanent need of workforce, the employment contracts must be made open-ended. For instance, if the employer continuously needs substitutes for permanently hired employees, fixed-term contracts are not justified.

Fixed-term contract ends after the agreed period without further notice. Fixed - term contract can also be terminated before that if the parties have agreed on a termination clause. In principle, person working with a fixed-term contract has mutual rights with those who are permanently hired. Different kinds of thresholds can be set up although; for example, in order to get right to use industrial health services one has to be employed for a certain period first.

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<sup>54</sup> In this case the contractual employer is a member of the employers’ organization which is a party of a collective agreement.

<sup>55</sup> Final report of the working group on sharing economy 2019 p. 48–49.

A fixed-term contract always needs a reasonable justification. The only exemption is an employment contract with a long-term unemployed person (ECA chapter 1 section 3a). According to this provision the employer may conclude a fixed-term contract with the maximum duration of one year if the person has been unemployed uninterrupted for the last 12 months without the justified reason.

If there is no justified reason, the fixed-term contract should be considered as permanent. Although the number of fixed-term contracts is not directly limited in the legislation, the larger the number of subsequent fixed-term contracts is, the more likely the consecutive contracts form one permanent contract. In practice, most of the court cases that concern the lawfulness of fixed-term contracts consider subsequent fixed-term contracts.

If the court finds that there isn't a justified reason for subsequent fixed-term contracts after the last contract has ended, the situation is considered as unlawful dismissal. It is like the unlawful termination of open-ending contract and the legal consequences are the same and the compensation for unlawful dismissal is paid. The same consequences also apply to the first fixed-term contract if there is no justified reason.<sup>56</sup>

(Marginal) *part time* contract may be open-ended or fixed term contracts. If a part-time contract is fixed-term, a justified reason is required. Employer also has the duty to provide extra-work for part-time workers if there is a general need for more working hours similar vacancy that the part-time employee has. Before hiring new employees, the employer must provide more working hours for the part-time worker (ECA chapter 2 section 5).<sup>57</sup>

Also *fragmented or empty contracts* are regulated in ECA. According to Chapter 1 Section 7 (377/2018):

Variable working hours clause

“Variable working hours clause means a working hours arrangement in which the employee’s working hours, as a specified period, vary between a minimum and maximum amount under the employment contract, or a working hours arrangement in which the employee undertakes to perform work for the employer when separately asked to do so.

Agreement on variable working hours may not be made at the employer’s initiative if the employer’s labour need to which the agreement relates is fixed.

Any agreement that the minimum working hours included in a variable working hours clause will be fewer than required by the employer’s labour need may not be made at the employer’s initiative. If the actual working hours over the preceding six months demonstrate that the agreed minimum working hours do not correspond to the employer’s actual need for labour, the employer must, at the employee’s request, negotiate an amendment to the working hours clause to correspond to the actual need. The negotiations must be undertaken within a reasonable time and the employee has the right to use an assistant in the negotiations. If no agreement is reached on new minimum working hours, the employer must present in writing relevant grounds justifying how the valid working hours clause still corresponds to the employer’s labour need.”

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<sup>56</sup> For example KKO:2015:65, KKO:2015:64, KKO 2008:29, TT 2018:15.

<sup>57</sup> For example Labour Court case TT 2019:45.

This relevantly new provision aims to enable flexible agreements of working hours when employers need labour cannot be anticipated. On the other hand, it seeks to safeguard rights for those employees' who work variable working hours.<sup>58</sup> Agreement on variable working hours can be based on employer's initiative only when employer's need for labour is not fixed or stable in that specific work that the agreement concerns. The purpose of the provision on variable working time is not to regulate the form of employment relationship. The employment contract can be either fixed-term or permanent and this provision doesn't by itself effect on the rights and duties of the contracting parties. The provision regulates only the clause of variable working hours. It tries to address such problems, the most visible in zero-hour contracts, that arise in situations where the employee in practice works longish hours, in the extreme cases full-time hours based on a zero-hour contract but has no guarantee of the working-hours in the future.<sup>59</sup>

With the enactment of ECA Chapter 1 section 11 the position of a person working variable hours was improved by legislating on; the right to paid sick-leave and payment on notice and the conditions of providing extra-work were clarified, to mention the most important changes.<sup>60</sup> The enactment on negotiations in order to agree upon permanent working hours if the employee in fact permanently works on a regular hour basis is not necessarily an improvement, but can also be regarded as an impairment to employee's position. The legal doctrine of *customary practice* that can be used as an argument in cases of alteration of the conditions of work. In such situations where the factual hours worked would be regularly stabilized on a certain level, the changes could have been regarded as a permanent change of the conditions of the employment contract.<sup>61</sup> Furthermore, the violations of the ECA Chapter 1 section 11 has no specific sanctioning.

The regulation covers also several other possibilities to work on a relevantly irregular basis. Flexible arrangement of regular working time would not be considered as a variable working hours clause. Indeed, working time may be subject to daily or weekly variability, since regular working hours are organized in the form of working hours or as provided by collective agreements. Likewise, the main feature of agreement on sliding working-time arrangements is, that daily or weekly working hours vary. Also, working time arrangements where the employee can decide on the length of his / her working time would not be considered as a variable working time under ECA chapter 1 section 11. When there is no exact agreement on working-hours or the work is paid for by a commission or other reward based on performance, it is typical that the employee may determine how much time is spent for working and where the work is done. Thus, the variability of working time is not due to the employer's need for labor but rather to the needs of the employee.<sup>62</sup> This type of contract might also mean that the employee is considered to be self-employed and the work thus falls outside the scope of ECA.

Skeleton agreement arrangements that are also used to cover a varied workforce need are not considered as arrangements for variable working hours. Typically, the

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<sup>58</sup> Government Proposal for improving the position of employees that work variable working hours 188/2017 (GP 188/2017), p. 14–15.

<sup>59</sup> GP 188/2017 p. 16–17.

<sup>60</sup> GP 188/2017 p. 18.

<sup>61</sup> On customary practice Tiitinen – Kröger 2012 p. 769–77.

<sup>62</sup> GP 188/2017 p. 30.

skeleton agreements agree on the terms of the employment relationship that are specifically met in more concise contract-specific employment relationship. This means, in practice, that each shift is a separate fixed-term employment relationship based on fixed - shift work - time.<sup>63</sup> If the “work gigs” or work tasks based on a skeleton agreement follow each other without interruptions the gigs must be assessed by bearing in mind the regulation of fixed-term contracts. A justified reason for the fixed-term contracts is required in these cases.

In a Supreme Court case KKO:2017:37 X Oy and A had concluded a skeleton agreement, whereby the terms of employment contracts of the employee to be recruited were agreed on the basis of “on demand“. After that A had worked in the company in periods for one and a half years. The duration of the last period was 10 months. A claimed that despite the skeleton agreement, his employment contract was to be considered permanent. The company had terminated his employment illegally and he was entitled to compensation under ECA chapter 6 section 4 and chapter 12 section 2. According to the skeleton agreement, every particular employment contract under the framework agreement was a fixed-term employment contract conditions of which were subject to the terms and conditions of the skeleton agreement. Working hours were to be agreed upon in the separate fixed-term contracts. Supreme Court stated, that the employment contracts which were made under the skeleton agreement were not to be regarded as contracts of indefinite duration, including the last one. The court reasoned in accordance with the wording of the agreement, that the purpose of the agreement was to set up the main terms for individual fixed-term employment contracts and it didn't construe an employment contract. Furthermore, the Court reasoned that by entering to that contract A had not committed himself to work. Instead the employment contracts were agreed upon in every individual case on a voluntary basis and A was free to abstain from any particular employment contract.

### **3.4 Artificial employment contracts**

In practice there are such contracts where the formal “employer” only undertakes certain administrative employer obligations, deducting taxes and report to government, but not key employer functions, such as the obligation to provide work and pay or exercising managerial prerogatives. There are several agents that provide this kind of services as part of the platform economy.

The artificial employment forms a challenge to the national legislation in the sense that this kind of work is usually done as self-employed person falling outside the scope of labour law. National law does not recognize such arrangement to be an employment contract as the characteristics of employment relationship are – at least in most cases -not fulfilled. This would require however in casu inspection. Based on national law, there is only possibility to be self-employed person or employee.

### **3.5 Platform work**

In a recent study platform related work was classified in two different groups. Work that is mediated through platform and platform work. The former includes different kinds of jobs – routine-work that is usually controlled by the platform in one way or another and expert-jobs where the experts compete for a job and the platform is used

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<sup>63</sup> GP 188/2017 p. 30.



as a tool or platform for the offers and controls for example payment actions. Platform also functions as a tool for evaluation in the former group. The latter mode, platform work, refers to new organization of work tasks. The platform company divides jobs in smaller tasks, controls work with different mechanisms, including user critiques. Typically work is performed as independent entrepreneurs. The latter mode is the one that truly challenges the “old work” by retaining control, as in the traditional employment, removing the protection attached to traditional employment, and eliminating freedom attached to entrepreneurship.<sup>64</sup>

In Finland there are companies that use platform mediated work model, like Treacher or Bolt. They often employ persons in fixed-term employment contracts. In the platform work model, platforms provide services rather than function as mediators of work. The business model is based on decomposing work into small tasks and outsourcing the responsibilities to individuals performing the tasks.<sup>65</sup> Companies like Foodora, Upwork and Uber are examples of this. As the working persons usually do their tasks with the intent of economical profit and work under the supervision of the platform company, their position resembles employees in the employment relation.<sup>66</sup> It is also common, that workers perform their work in different kind of legal relations through different platforms and for variable hours.<sup>67</sup> However in the light of the current legislation it is not possible to classify platform work on an “either – or” basis. The evaluation of supervising and controlling of work should be done by evaluating the factual freedom the employee has to decide upon work-related duties. This could be done for example by examining the consequences of refusal to follow the orders regarding the actual work performance.<sup>68</sup> To be classified as employee, platform-worker must fulfill all the characteristics of an employment relationship defined in an ECA. There have not been any cases in courts discussing matter about platform workers legal position from the ECA perspective.<sup>69</sup>

The classification of platform workers varies and depends on the platform in question. The classification is employer driven. Therefore, similar jobs in different platform companies may be done in employment relation in one company and as independent entrepreneur in another. The justice for courier’s movement that has made claims for the protection of employees – among the requirements for better protection -demands the possibility to conclude an employment contract for couriers.<sup>70</sup>

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<sup>64</sup> Mattila 2019 p. 18.

<sup>65</sup> Mattila 2019 p. 19-20.

<sup>66</sup> Mattila 2019 p. 21.

<sup>67</sup> Mattila 2019 p. 24.

<sup>68</sup> Similarities to this line of thought can be found in Supreme Court case KKO:2002:36 which involved the interpretation of the WHA. The court decided against the wording of the subsection 2.1 paragraph 3 of WHA which clearly stated that the act was not applicable to work that was done at employee’s home. Supreme Court argued, that because the employer had supervised and controlled employee’s work which was done at her home and eventually the employee was fired because she had neglected the orders considering the working time, the WHA was applicable and the employee was entitled to compensations stipulated in the WHA.

<sup>69</sup> Final report of the working group on sharing economy 2019 p. 23.

<sup>70</sup> <https://fi.justice4couriers.fi/2019/05/20/222/>.