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PROTECTION OF THE WEAKER PARTY – TO WHOM IS LABOUR LAW STILL APPLICABLE?

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Summary

National law is affected by a number of different international regulations and agreements. International agreements provide for rules aimed at harmonizing certain requirements and understandings that different countries should follow. In labour relations, international standards are set at two different levels – on the one hand, by the International Labour Organization (ILO), and on the other by regional standards – by the Council of Europe and the directives and regulations adopted by the European Union.

All these international rules have important implications for national labour law. However, such international norms do not provide a clear personal scope – that is, it is not clearly defined to whom such international norms apply. Although the various international rules do not directly define the persons to whom those norms apply, – the implementation of international rules remains a matter for national law. Thus, the concept of both employee and employment relationship is shaped by national law.

The exception here is the European Union, where the European Court of Justice has given an autonomous meaning to the concept of worker (particularly in the context of freedom of movement for workers). Although the concept of a worker and of an employment relationship has been developed by the Court of Justice of the European Union, Member States retain the right to define the employment relationship in accordance with the law in force in the respective Member State.

The main factor in shaping employment relationships is the employee's dependence on the person providing the work, and the person providing the work also has an obligation to pay remuneration for the work performed.

Although the scope of those rules is defined differently by different international rules, the characteristics generally applicable to the definition of an employee and the employment relationship are similar to those used in national law.

Introduction

Internationally, employment relations are regulated at different levels. Most intensively, industrial relations are regulated internationally at the level of the International Labour Organisation (hereinafter – ILO). The ILO has adopted both conventions and recommendations aimed at setting standards for employment relations and ensuring the protection of workers' rights. The ILO conventions do not define who is a worker and what constitutes an employment relationship. Once Member States have ratified the ILO conventions, the implementation of ILO standards is a matter for national law, and it is up to the Member State to decide to whom and to what extent to apply the standards laid down by the ILO.

In addition to the ILO standards, the case law of the European Committee of Social Rights (hereinafter – the Committee) on the application of the European Social Charter is also important. The European Social Charter does not define to whom, for instance, working conditions must be applied. Although the European Social Charter is largely addressed to the Member States, it is important to clarify who is meant by the European Social Charter as a worker.

The European Union, through its directives and regulations, lays down standards for employment relations by ensuring that the conditions for certain aspects of employment relations (e.g., collective redundancies, minimum health and safety requirements, etc.) are the same in all EU countries. In addition, the interpretations of the European Court of Justice on the concept of worker and the characteristics associated with it play a significant part.

All of these organisations have an important role to play in shaping the conditions of employment relations, and Member States must take these conditions into account if they wish to develop national labour law.

One important question is to whom one should apply these standards and when? What is the definition of an employment relationship, who is the employee? An important question is whether and to what extent international labour standards could apply? Is it possible to identify a universal concept of worker for the three organisations mentioned above, to which the international labour standards could be applied, or do the various intergovernmental organisations have different understandings of the concept of worker and the employment relationship?

This article is divided into four parts. The first section analyses the scope of ILO conventions and recommendations. The second chapter analyses the concept of worker and employment relationship as provided for in the European Social Charter. The third chapter discusses the concept of worker and employment relationship in the light of European Union Law. The fourth chapter explores the concept of workers and employment relationship in the light of Estonian labour law.

1. International Labour Organisation standards and characteristics of an employment relationship

The International Labour Organisation has adopted conventions and recommendations since its formation. ILO conventions and recommendations have not generally defined the scope of application of these instruments.[1] In general terms, the ILO has taken as its starting point a single concept of worker and employment relationship, without giving it any more specific meaning. The fundamental conventions of ILO have also failed to specify to whom specifically these conventions should extend. Thus, e.g., the Freedom of Association and Protection of the Right to Organise Convention, 1948 provides that the convention shall extend "…to workers and employers without distinction whatsoever…"[2] The Convention itself does not specify who specifically is meant by worker and employer.

The ILO itself has given no formal definition of either the employment relationship or the worker. However, the Committee of Experts on the Application of Conventions and Recommendations has stressed in practice that the type of employment relationship, as well as the persons who might be protected by international standards, remains a matter for national decision. It is for each Member State to define the characteristics of the employment relationship, and it is through this that compliance with international labour standards is ensured.

While the ILO has not defined in its conventions to whom and to what extent these standards should apply (leaving open the notions of worker and employment relationship), in 2006 the ILO adopted Recommendation 198 on the characteristics of an employment relationship.[3] In accordance with that recommendation – Employment Relationship Recommendation – this recommendation applies to "…workers who perform work in the context of an employment relationship…". The Recommendation is addressed to the Member States, and consequently the ILO has indicated which indicators Member States could use when they wish to define an employment relationship. The ILO does not, however, provide a definitive list of the elements through which an employment relationship could be defined.

In the Recommendation, the ILO has identified the following possibilities for defining an employment relationship:

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[1] See also De Stefano V. Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards, 2021 Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790766 [viewed 07.11.2021.].

[2] The Freedom of Association and Protection of the Right to Organise Convention, 1948, No. 87. Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 [viewed 07.11.2021.].

[3] Employment Relationship Recommendation, 2006, No. 198. Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:R198:NO [viewed 07.11.2021.]; See also THE EMPLOYMENT RELATIONSHIP: An annotated guide to ILO Recommendation No. 198, Available: http://old.adapt.it/adapt-indice-a-z/wp-content/uploads/2015/11/ILO_GUIDE_Recommendation_198.pdf [viewed 07.11.2021.].

1. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;
(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

In addition to the above, the ILO Recommendation 198 stresses that for the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

In addition, the ILO Recommendation 198 highlights the conditions that Member States could take into account when they need to determine the employment relationship:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

Analysing the guidelines set out in the above Recommendation, it can be concluded that the ILO, in this Recommendation, is basing its approach to the employment relationship on features that have been defining labour law and employment relations for a long time. However, the named Recommendation is addressed only to Member States in a situation where they should define the employment relationship and its content. Whether such a definition proposed by the ILO and such characteristics are also applicable in the implementation of the ILO Conventions remains unclear. While the implementation of the ILO Conventions takes place through national law, in the final stage, in order to determine whether and to what extent international labour standards apply, the national understanding of

the employment relationship and the characteristics of the employment relationship that are applied to determine the employment relationship is still essential.

2. Employee notion in the European Social Charter

The European Social Charter (hereinafter – the Charter) contains different rights that are focused upon the employment relations. The European Social Charter uses notion of worker, but it does not give any explanation, who is the worker and what are the characteristics of a worker.

In principle, the rights set forth in the Charter apply to all workers in the economy of a state party, regardless of the sector (for example, public and private sector) and form of employment (employed or self-employed, home workers, etc.).[4] However, there are explicit exceptions in particular regarding foreign workers. The Appendix to the ESC, which outlines the personal scope of the Charter, generally limits the application *ratione personae* to "nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned".

In the case of collective employment, however, the European Committee of Social Rights has concluded that collective rights (e.g., the right to negotiate a collective agreement) should be guaranteed to both employed and self-employed workers. As the nature of employment relationships is changing, such changes must also be taken into account for rights arising from employment relationships. As the European Committee of Social Rights has stated,

> *... the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider. This has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers. These developments must be taken into account when determining the scope of Article 6§2 in respect of self-employed workers.* [5]

Following those observations, it can be stated that the European Committee of Social Rights does not understand the notion of worker in its strict sense, but the notion of worker can be much broader to include all workers who are in one way or another subordinated to the person providing the work. However, it should be pointed out here that, particularly in the context of collective employment

[4] The Revised European Social Charter. An Article by Article Commentary by Karin Lukas. Elgar Commentaries series, 2021, pp. 9–10.

[5] Irish Congress of Trade Unions (ICTU) v. Ireland, Complaint No. 123/2016, European Committee of Social Rights, 12 December 2018. Available: http://hudoc.esc.coe.int/fre/?i=cc-123-2016-dmerits-en [viewed 07.11.2021.].

relationships[6], the European Committee of Social Rights has extended the rights conferred on workers to include both employees (those working under an employment contract) and self-employed persons.

3. The concept of an employee in European Union law

According to European Union law, it is important to distinguish between the fact that the concept of employee has a dual function. On the one hand, the concept of employee is a concept of primary law of the European Union. The concept of employee is linked to the principle of free movement of workers. As this is a concept in EU primary law, the ECJ shapes the features of this concept according to the needs of the European Union.

On the other hand, EU secondary law – directives and regulations -–do not define the concept of employee and employment relationship, merely stipulating that the directive extends to employees[7] or that the concept of employee and employment relationship is determined by national law[8]. As a new elaboration, recent European Union directives governing certain aspects of the employment relationship no longer refer to the possibility of the employment relationship being determined by national law but must also take into account European Union case law in addition to national law.[9] Thus, the Member States of the European Union are not so free in shaping the characteristics of the employment relationship but must take into account the positions of the CJEU.

What, in the light of European Union case law, must Member States take into account when shaping and clarifying the employment relationship?

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[6] See, e.g., Tavits G. Collective labour relations and digital economy – do they co-exist? In: Legal Science: Functions, Significance and Future in Legal Systems II (PDF). The 7th International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019, Riga. Collection of Research Papers, Riga: University of Latvia, pp. 412–424, DOI: 10.22364/iscflul.7.2.33.

[7] Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC). Available: https://eur-lex.europa.eu/eli/dir/1989/391 [viewed 07.11.2021.].

[8] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0023 [viewed 07.11.2021.].

[9] See, e.g., Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union. Available: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019L1152 [viewed 07.11.2021.]; also Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.188.01.0079.01.ENG [viewed 07.11. 2021.].

The Court of Justice of the European Union has identified the following important aspects to be considered when assessing the employment relationship[10]:

- economic activity
- dependence
- genuine nature of the activity
- remuneration

The characteristics above are required to be followed and assessed by Member States. In doing so, the Court of Justice of the European Union has paid considerable attention to dependence from the employer. The competence of the person to decide the place and manner of work is relevant. If such an opportunity is limited, it should be rather regarded as employment relationship. However, the Court of Justice of the European Union distinguishes between employment relationships and relationships between a service provider and the self-employed.

In the case law of the European Union, the members of the company's management board have also been granted the status of employees.[11] Thus, the Court has ruled that a member of a company's board of directors may, in certain cases, be treated in the same way as an employee. This can be feasible in particular situations. Where a member of the company's management board does not have a shareholding in a particular company and is invited to be a member of the company's management board, he is subject to the instructions of the general meeting, this may be an employee-employment relationship.

The European Union has sufficiently clearly defined the scope of the various directives and regulations. They are applicable to employees. Although in certain cases this must be determined by national law, the European Union developed a clear enough case-law in defining the concept of employee, which the Member States must follow.

4. Definition of employee and employment relationship in Estonian national law

According to the Estonian Employment Contracts Act, the concepts of an employee are not defined. The Employment Contracts Act (hereinafter – ECA)

[10] For the extensive summary, see Risak M., Dullinger T. The Concept of 'Worker' in EU Law: Status Quo and Potential for Change, ETUI, 2018. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190912 [viewed 07.11.2021.]; For recent case law: Gramano E. On the notion of 'worker' under EU law: new insights, March 15, 2021. Research Article. Available: https://doi.org/10.1177/2031952521998812. [viewed 07.11.2021.]; also: CJEU judgement of 31 August 2020, in Case C-692/19, B v. Yodel Delivery Network Ltd. Available: https://curia.europa.eu/juris/document/document_print.jsf?docid=225922&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=8111564 [viewed 07.11.2021.].

[11] CJEU judgement of 12 May 2014 in Case C-229/14, Ender Balkaya v. Kiesel Abbruch- und Recycling Technik GmbH. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=165652&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=711336 [viewed 07.11.2021.].

defines the characteristics of an employment contract and the precondition for an employment contract. Pursuant to § 1 of the ECA, the existence of an employment contract is presumed, if one person has to work under the authority of another person.[12] There is also a presumption that if such work is performed, a remuneration must also be guaranteed for it. Consequently, an important feature of an employment relationship is the existence of a relationship of subordination and the obligation of the other party to pay remuneration for the work.

In its case law, the Estonian Supreme Court has developed the characteristics of an employment relationship.[13]

In a situation where the contract features the characteristics of both an employment contract and another contract for the provision of a service governed by the law of obligations, so that the employment contract must be presumed, the assumed employer has the burden of proving that the parties entered into another kind of contract.

In order to identify the nature of the contractual relationship at issue, it is necessary to compare the characteristics of the contracts. In order to rebut the presumption provided for in § 1(2) of the ECA, the assumed employer must prove, in particular, that the employee was not subject to his or her management and control and was significantly independent in choosing the manner, time and place of work. Besides, other circumstances of the individual case must be taken into account. The law does not provide for establishing a legal relationship solely on the basis of the title of a written contract or the terms used in it. Identifying the legal nature of the disputed agreement presupposes its interpretation. The will of the parties to enter into an employment contract and the actual wish of both parties must be revealed.

In order to identify the nature of the contract, it is practicable to take into account, among other things, the following facts: who organized and managed the work process, who paid for work equipment, materials, equipment, premises and other work-related costs, whether the work was paid for periodically, whether the employee had to be ready for work, whether the employee acted for several employers or received all or a substantial part of his income from the alleged employer, how did the parties interpret the disputed relationship outside the dispute, e.g., in relations with other persons or in the performance of their other duties. In this way, taking into account, *inter alia*, the entries in the employment register and the party's disclosures in other proceedings may be justified. The criteria on the basis of which the legal relationship is identified and relied on must be considered as a whole.

Thus, a significant part of Estonian case law also pays attention to the existence of a relationship of subordination and the identification of these criteria.

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[12] Employment Contracts Act. Available: https://www.riigiteataja.ee/en/eli/502112021003/consolide [viewed 07.11.2021.].

[13] Judgement of Estonian Supreme Court of 20 May 2020 in Case 2-18-6908. Available in Estonian: https://www.riigikohus.ee/et/lahendid/marksonastik?asjaNr=2-18-6908/47 [viewed 07.11.2021.].

In Estonian law, attention must be paid to another category of employees – an employee with independent decision-making competence. Pursuant to the Employment Contracts Act, the application of an employment contract is excluded if the employee is significantly independent in deciding on working hours, workplace and ways of working. However, the category of an employee with independent decision-making authority is provided for in the Sport Act[14]. According to the Sport Act, an athlete can act on the basis of an employment contract as an employee with independent decision-making competence. At the same time, independent decision-making competence means that the athlete decides for himself/herself regarding the working hours, place of work and way of working (in essence, it means a situation where the athlete is free to organise his/her training). How to classify an employee with independent decision-making competence in the employment relationship system is still problematic in Estonian labour law. If the athlete is an employee with independent decision-making authority, it is difficult in such a situation to identify the necessary relationship of subordination that would shape both the employment relationship and the protection required by the employment relationship in general.

Conclusion

The conventions and recommendations adopted by the ILO do not clearly define the employees who should be protected by international labour standards. The concept of employee and employment relationship must be defined by each Member State. If ILO Recommendation No. 198 of 2006 sets out certain criteria that a Member State can use, whereas the use of such criteria is left to the discretion of the Member State. As the ILO 2006 Recommendation also places a high priority on the criterion of subordination, it is one of the main criteria for identifying the employment relationship.

In its practice, the European Committee of Social Rights does not rule out the application of employees' rights to the self-employed. Above all, employees and the self-employed are on an equal footing in collective labour relations, though it is currently unclear whether and to what extent employees and the self-employed can enjoy the same rights when it comes to protecting individual employment rights.

The most comprehensive approach to the concept of employee exists at EU level. In case of the implementation of different directives, it is up to the Member States to define the concept of employee and the concept of employment relationship. Concurrently, the Court of Justice of the European Union has developed considerable case law on the concept of employee.

To sum up, it may be argued that there is no universal concept of employee. Nevertheless, the following circumstances are decisive for an employee: doing

[14] Sport Act. Available: https://www.riigiteataja.ee/en/eli/511032020002/consolide [viewed 07.11.2021.].

work for someone else; the relationship of subordination to the party in whose favour the work is performed, as well as the obligation of the other party to pay remuneration for the work performed. The more intensely a person is subject to another party, the more likely is that there might be an employment relationship and that such an employee is subject to all the rules of international law, as well as to those of national employment law.

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