

Chapter 3

Posting of workers before Finnish courts

Juha Tuovinen

Introduction

Traditionally, Finland has not received a large number of migrant workers, posted or otherwise. After World War II, Finland was a rather closed nation with a restrictive policy on inward migration and foreign investment in the economy in general. The language, which was perceived as difficult, and the cold climate were also considered to be factors that kept migration low. Those who did come were usually partners of Finns or those employed in particular fields, such as musicians.¹ But over the years since the accession to the EU and the Schengen Agreement in 1995 and 1996 respectively, and the eastern enlargement in 2004, the level and type of migration has changed.

The most active sectors from the point of view of posting of workers are construction and metalwork. Nearly half of all foreign workers work in the construction sector, which is also where around half of all migrants are employed.² However, it should be noted that the information on foreign workers is unreliable as there is no central authority collecting or compiling data. The accuracy of the data that has been collected is therefore questionable.³ Construction and metalwork are also the sectors with the most occurrences of litigation in Finland, especially the former. However, in general, litigation about the rights of posted workers has been minimal, with only a handful of reported cases in the Labour Court.

This chapter examines the case law of the Finnish courts as available on legal databases. Section 1 sets the scene by surveying the legal framework on posted workers. Section 2 discusses the two connected debates surrounding posted workers in Finland: the circumvention of the legal framework for taxation on the one hand, and the lack of respect for the rights of workers on the other. The subsequent case law analysis builds on these themes in two ways. In the first place, the litigation about the Olkiluoto nuclear power plant is a landmark case demonstrating how the legal framework is undermined in a myriad of different ways. The second, and related, case, and a small number of other cases, demonstrates the lack of oversight and protection that the legal system is able to provide. The final part briefly elaborates and reflects on these topics.

1. Korpela M. et al. (2014) *Temporary Migration in Finland*, at 67-8.
2. Eskola K. and Alvesalo A. (2010) *Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset*, Helsinki, Työterveyslaitos.
3. Eskola K. and Alvesalo A. (2010) *Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset*, Helsinki, Työterveyslaitos.

1. Overview of the legal framework on posted workers

The conditions of employment in Finland are protected through various laws that regulate the terms of employment in general, while specific laws apply to certain types of workers, such as posted workers. The law relating to posted workers (447/2016) defines which parts of Finnish law apply to posted workers.⁴ The Law on Employing Young Workers, Occupational Health and Safety and the Occupational Health Care Act (*Työterveyshuoltolaki*) apply in full. In addition to these, most workers in most industries are covered by collective sectoral agreements.

The Employment Contracts Act (*Työsopimauslaki*, 55/2001) is the general piece of legislation that regulates the beginning and end of a contract of employment as well as the respective duties between employer and employee. The Occupational Health and Safety Law (*Työturvallisuuslaki*) regulates workplace safety. The Collective Agreements Act (*Työehtosopimuslaki*) regulates collective bargaining agreements.

The central piece of legislation regulating the use of posted workers is the Posting of Workers Act, 1999 (*Lakilähetetyistätyöntekijöistä* 1146/1999). The Act reproduces the Posted Workers Directive (96/71/EC) quite closely. There are certain notable exceptions, however. In the first place, the law also applies to those workers who come from outside the EU, and it extends the scheme of the Directive to third-country nationals. The law also allows the application of the labour laws of the country of origin to the employment relationship, where these are more favorable than the Finnish law. However, the Finnish law sets the minimum standard for workers' rights in line with Article 3(1) of the Posted Workers Directive.

The law was amended in 2005 (1198/2005). Many of the changes were intended to enhance the supervision, and the law added provisions requiring a company to have a representative in Finland, and mandating an employer to keep records of the salaries paid to posted workers. To this end the law created requirements for companies sending posted workers to have representatives in Finland, where they did not have a place of business in the country. The law also contains the requirement that records are kept and made easily available to the labour law authorities.

Furthermore, the Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006) (*Lakitilaajanselvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä*, short Contractor's Law, *Tilaajavastuulaki*) serves a double purpose in so far as it aims to prevent the formation of a grey economy and ensure fair competition between companies. To this end it requires that the contractor requests, and that the subcontractor provides, certain forms of information, including registration with the relevant tax authorities, a copy of the trade register, proof of pension insurance for the employees and proof of payment of the fees, a declaration of the applicable collective agreement, a declaration of the way in which healthcare will be provided for, and in the case of the construction industry, a declaration of the manner

4. The old Act 1147/1999 regulated this prior to the coming into force of the new law.

in which accident insurance has been organised. The law applies to all situations where labour is contracted out, whether or not they involve posted workers.

The working conditions of posted workers are covered by the sectoral collective agreements, which lay down the level of salaries, holidays, permissible absences and more. The sectors that are covered can be quite specific; the construction industry, for example, has eight different industries, ranging from painting to asphaltting. These agreements contain detailed sets of rules applicable to all those employees within a sector whether they are members of the labour union or not. Importantly, they set out the wages to be paid for each type of work undertaken. Only the agreements that would be declared generally applicable would apply to inbound posted workers. The coverage of the outbound posted workers by these agreements remains an open question and depends on the particular agreement. Several agreements set out special provisions (for example, on travel expenses and allowances) that apply to assignments abroad.

From an institutional point of view, working conditions are enforced by the Labour Protection Directorate (*Työsuojeluvirasto*) and the labour unions. The Labour Protection Directorate performs investigations into compliance with various labour laws, either of its own accord or by employer's or employee's request. Labour unions provide assistance to their members, including legal assistance where they feel their rights have not been respected. There are of course doubts as to what extent posted workers become members of the union. For example, research shows that labour union membership was much lower at Olkiluoto 3, which has a higher level of posted and migrant labour than other construction sites where the source of labour was domestic.⁵ Compliance with the Contractor's Law is supervised by the Southern Finland Regional State Administrative Agency, which is responsible for the entire country.

2. National legal debates on posting

The use of posted workers has increased exponentially as well as being the source of the vast majority of problems associated with foreign labour.⁶ While reliable figures are difficult to come by, the number of registered posted workers has grown from 4,400 in 2006, to 16,800 in 2008, and to 23,500 in 2010.⁷ The political debates were frequently framed around the government's desire to increase the foreign workforce, which was a cause of concern to those worried about the effect this would have on the domestic employment situation, in particular the high degree of unemployment already prevalent in the country.⁸ Other concerns fed into these broader concerns, especially the ability of companies to hire labour while circumventing relevant labour laws and minimum wages, and in doing so, circumvent taxes.

5. Nathan L. and Sippola M. (2011) National unions and transnational workers: the case of Olkiluoto 3, Finland, *Work, employment and society*, 25 (2), 292-308.

6. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 4.

7. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 62.

8. Eskola K. and Alvesalo A. (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkitat tapaukset, Helsinki, Työterveyslaitos, 4-5.

The legal debates on posted workers broadly mirror two categories: tax avoidance and the working conditions of the workers.

2.1. Tax avoidance

In terms of tax avoidance, it has been noted that ‘posted workers and those who employ them operate largely outside of the reach of the authorities’.⁹ In 2010, there were approximately 31,000 posted workers employed in Finland. The tax authorities had no record of 24,000 of them.¹⁰ It is estimated that there are hundreds of foreign enterprises operating in Finland that the tax authorities do not know about.

The situation at the Olkiluoto power plant is emblematic. No official records exist of around 300 foreign companies that have been involved in the work. The construction of the power plant is by now almost a decade overdue and has cost many times over the estimate. An inspection into the construction site found numerous violations, including not being allowed onto the site at a convenient time as well as a significant disregard for the documentation requirements.¹¹

Even where the registration with local officials is in order, it does not guarantee that the reporting regulations are being observed. Of the registered companies, only approximately one third filed the required periodical reports or paid employer contributions.¹² As tax avoidance has been the subject of a number of government reviews and legislative initiatives in general, often in various ministries with overlapping competences, this has led to a regulatory framework that is difficult to enforce.¹³

2.2. Working conditions and their enforcement

The second common theme of debate relates to the habitual mistreatment of posted workers and non-compliance with working conditions. In a comprehensive report on the functioning of the legal scheme in relation to foreign workers, the rapporteur concluded that ‘in spite of the letter of the law, the rights of migrant workers are routinely trampled on’.¹⁴ News stories about the working conditions of migrant workers are often coupled with a narrative of how this in turn affects Finnish workers. They are also often focused on particular legislative initiatives meant to improve working conditions.

9. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 4.

10. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 6.

11. Juntunen M. (2011) Tilaa javastuulaki ja senvalvonta – ongelmat erityisesti työehtosopimuksen noudattamisen valvonnanasa. <https://www.theseus.fi/bitstream/handle/10024/25320/Marjo%20Juntunen%20-%20Julkaisu.pdf?sequence=1>

12. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus.

13. The government has issued research reports and convened working groups: Hirvonen M., Lith P. and Walden R. (2010) “Suomenkansainvälistyväharmaatalous.” Eduskunnantar kastusvaliokunnan julkaisu 1; Hirvonen M. (2011) Raportti ulkomaisen työvoiman sääntelyn toimivuudesta.

14. Hirvonen M. (2011) Raportti ulkomaisen työvoimansääntelyn toimivuudesta, at 5.

Every year, the labour protection authority is unable to verify compliance with labour rights from several hundred operating companies because they do not keep appropriate or up-to-date information. With foreign employees overall, the labour protection authority was able to ascertain that the working conditions were in order in roughly one third of cases. A report commissioned into the treatment of foreign workers noted that in general the rights of posted workers were systematically being disregarded.¹⁵

The same report concludes that the labour protection agency is only able to deal with the most outrageous cases of mistreatment. In general, the protection of labour rights is left to the employee. It is unlikely that those employees, relatively satisfied with wages that are significantly higher than in their home countries, unorganised and dependent on the employer, would take these matters to court. All in all, it is most likely that posted workers suffer significantly from the disregard of their labour rights.

3. Overview of national case law

The Finnish court system is made up of general courts and specialised courts. Civil claims would be brought in the district courts (*käräjäoikeus*). Specialised courts deal with claims arising in terms of specialised legal regimes. The Labour Court is one such court that is particularly important for the present study, as it is where the issues raised in labour relations would most likely end up.

There are only four relevant cases before the Labour Courts (*työoikeus*). However, this excludes district court (*käräjäoikeus*) judgments, as these are unavailable except in hard copy at the respective courts. Nevertheless, there is reason to believe that such case law would be relatively limited (see section 3 below on case law).

The central theme running through the cases is that they relate to the question of the applicable collective agreement. Additionally, there has been a preliminary reference to the Court of Justice of the European Union (CJEU) from the Satakunta District Court in relation to questions about workers at the Olkiluoto 3 nuclear power plant construction site.

3.1. Cases involving the interpretation of collective agreements – applicable wages

The Olkiluoto 3 nuclear power plant represents a unique chapter in the employment of posted workers in Finland. Not only have the numbers of workers employed on the project, and the media attention it has sustained, been far greater than other similar

15. Hirvonen M. (2012) Ulkomaistat yövoimaa koskevan sääntelyntoimivuus: Poliisihallituksen toimiannosta tehty tutkimus.

projects, but in terms of litigation it has also resulted in a referral to the CJEU on a matter related to posted workers from Finland.¹⁶

The litigation began in the district courts by the Electrical Workers' Union (*Sähköalojen ammattiliitto*) against *Elektrobudowa SA* (L 11/9634 and L12/100). The case was brought by the Electrical Workers' Union and was already unusual in being brought at all. In general, posted workers do not join domestic labour unions in Finland and labour unions never take cases to the courts.¹⁷ As such, the case is probably unique in the country in that over 100 Polish electricians had joined the Electrical Workers' Union.

The case concerned 186 Polish electricians who had been hired to work on the construction of the power plant. In total they represent a small minority of migrant workers at a worksite on which around 3,400 workers, or 30%, were Finnish, with the rest coming from over 50 different states.¹⁸ The Construction Union had struggled to gain control over the worksite and did not have the necessary membership on the site to organise a boycott. Additionally, the employer consortium was unwilling to co-operate, in one instance not allowing union representatives access to the site by arguing that this violated nuclear safety. How the union ultimately came to represent the Polish workers is a long-winded story where both the union and the workers were struggling to find a way of co-operating. Ultimately, the efforts of the union to organise the labour force at the construction site led to the self-organising and frustrated Polish workers to join the union, which then took over their claim.¹⁹

Once filed, the claim was for EUR 7.6 million and EUR 6.6 million for work done between January 2009 and June 2015. They had contracts under Polish law and had been posted to work in Finland. The workers maintained that they were not being paid what they were owed under the terms of the collective agreement applicable to employees in Finland.

The case considered whether the collective agreement applied to the workers in question. In interpreting the agreements, the court felt that it needed to take into account the Posted Workers' Directive in order to select the applicable agreement. So, the district court referred six questions to the CJEU on this and related issues. The first five dealt with the legal standing of the labour union to bring a claim such as the present one in a Finnish court. The court rejected the argument and went on to consider the substantive challenge. Here the court had to consider whether the Posted Workers' Directive permitted the calculation of a minimum wage based on the categorisation of workers into pay groups and whether various employment benefits should be considered part of the minimum wage.

16. *Sähköalojen ammattiliittory v Elektrobudowa Spółka Akcyjna* Case C-396/13 Judgment of 12 February 2015 (hereinafter *Sähköalojen ammattiliitto*).

17. Hirvonen M. (2011) Raportti ulkomaisen työvoimansääntelyn toimivuudesta, at 108.

18. Lillie N. and Sippola M. (2011) National unions and transnational workers: the case of *Olkiluoto 3*, Finland, *Work, Employment and Society*, 25 (2), 292-308 at 299.

19. The story is told in detail up to 2011 at Lillie N. and Sippola M. (2011) National unions and transnational workers: the case of *Olkiluoto 3*, Finland, *Work, Employment and Society*, 25 (2), 292-308.

Regarding the calculation of the minimum wage, the district court had asked whether the Posted Workers' Directive precluded the categorisation of workers into pay groups, as provided by the relevant collective agreement. The court answered this question by stating that the relevant provision of the Directive is 'quite clear' that the calculation of the minimum wage is a matter for national law.²⁰ The court adds that these rules must be universal and transparent and must not be left to the choice of the employer.

The court also finally considered the various benefits and whether they would be included as constituent elements of the minimum wage. Here, the court had to decide whether it was the national laws and customs or the wording of the Directive that would be decisive. In this respect the court could rely on its pre-existing case law to determine which benefits could be considered part of the minimum wage.²¹

The case then reverted to the national district court, which approached the Labour Court for its opinion on which of the collective bargaining agreements was to be applied. In its judgment (TT: 2016-107), the court decided that the applicable agreement was the collective agreement for the electrical installation sector of the building industry, and from 2010 onwards, the electrical sector's collective agreement. In the course of the argument, however, it became apparent that a number of companies applied the main collective agreement for the technology industry. There was no reference to this collective agreement in the district court, nor did either of the parties rely on it in their submissions, so the Labour Court could not produce a finding on the matter.

Back in the district court, Elektrobudowa amended its argument to claim that the workers were covered by the main collective agreement for the technology industry. This argument was based on the fact that in substance the work carried out by the employees of Elektrobudowa was installation work, rather than the electrical work claimed by the labour union, and therefore covered by the main collective agreement for the technological industry. The Electrical Workers' Union continued to argue that the work done by the employees fell within the collective agreement for electrical work. The fact that another agreement could plausibly also apply did not change this. The labour union also pointed out that Elektrobudowa had, in its contracts with the contractor, bound itself to apply the Blue Book. The district court asked the Labour Court to clarify whether the main collective agreement for the technological industry was to be applied to the workers at Olkiluoto 3.

The Labour Court, taking a number of stakeholders' viewpoints, arrived at the conclusion that it should be the collective agreement for the electrical installation industry in the building automation sector, thus siding with the Electrical Workers' Union.

The case is telling in a number of ways. First, it represents a rare case brought by a union on behalf of posted workers, and one that was successful, where the workers prevailed in their claim and were compensated for the lost wages. Second, and more generally, it displays the complexity of litigating labour rights in the Finnish system.

20. *Sähköalojen ammattiliitto* at paragraph 39.

21. *Sähköalojen ammattiliitto* at paragraph 36.

While the dispute is sizeable in terms of the litigants and sums of money involved, the district court has also seen it as necessary to refer to specialist courts on three different occasions, which then had to involve a number of other parties. These steps have taken years to complete and have involved significant costs for everyone involved.

Two more cases raise questions about the payment of the correct level of wages. The first (TT: 2006-63) regarded a dispute between the Heating, Ventilation and Air Conditioning (HVAC) Installers' Union (as it had changed its name from the House Builders' Union) and the Builders' Union. Thus, it was the Builders' Union that brought the case, asking the Labour Court to confirm that posted workers would be placed in a particular wage category. The judgment was relatively brief and focused on the terms of the agreement. The labour union claimed that the provision would be applied to those workers who were already in Finland when the agreement was signed and to those who had commenced employment. The respondent Employers' Union argued that only those employees who commenced employment after the agreement was signed would be covered by it. Its arguments rested on both the wording of the agreement as well as the fact that before it was signed there was no control over the experience of the posted workers. The Court sided with the industry association, resting its arguments on the wording of the agreement.

3.2. Disputes regarding the nature of the employment

Three cases question the proper classification of employees. The first of the cases dealt with the lawfulness of hiring employees through particular types of temporary contracts. The first case in 2009 took place within the context of aviation (TT: 2009-90). Finnish airline Finnair had entered into a so-called wet lease agreement (an agreement between airlines for the provision of an airplane and crew) with a Spanish airline. The labour union for flight attendants (*Suomenlentoemäntä- ja stuerthdistys*) brought the case, alleging that Finnair had acted against the collective agreement by not applying the required collective agreement to the leased workers, and that the industry association (*palveluajentoimialaliitto*) had neglected its duty to supervise the conditions of the agreement, and that both the company and the association had done so knowingly, requesting the court to impose a punitive fine on both.

The case dealt with the flights between Helsinki and Phuket in the winter of 2008-2009. The labour union and the company could not reach an agreement as to the working conditions for these flights. Accordingly, the union claimed this represented a violation of the collective agreement. The airline denied this on the grounds that wet lease agreements pertained to the entire aircraft including its staff and would not as such fall within the relevant provision of the collective agreement. At this point the Court asked an interim question about the applicability of the Posted Workers Directive and whether it would affect its decision.

The Court found that the company was not under the obligation to apply the collective agreement to those employees that fell within the wet lease. While the Court found that the collective agreement itself had not been intended to exclude those employees, it had

to be read within the framework of free movement of labour in the EU. The Court argued that in its jurisprudence, the CJEU has held that the Directive sets out exhaustively those working conditions that are to be applied to posted workers and that anything above this could be considered a restriction on the free movement of labour. The Court also made the point that it would reach this decision even without the regulations of the Posted Workers Directive in light of Article 49 of the Treaty on the European Union. As such, the airline and industry association won the case.

The second aviation case before the Labour Court that resulted in a request for a preliminary ruling from the Labour Court to the CJEU was a matter between the transport union and a private company.²² The case concerned the lawfulness of hiring temporary workers for certain jobs related to transporting fuel to various airports in Finland. The labour union brought an action in the Labour Court to impose a punitive fine in terms of the law on collective agreements. The defendant argued that its use of temporary workers was justified because they were replacing workers on sick leave or supplementing staff shortages during particularly busy times.

The Labour Court referred the case to the CJEU for clarification on the scope of Article 4(1) of the Posted Workers Directive. That provision requires that ‘prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented’. The domestic court asked whether this implied that the Finnish scheme was contrary to the Directive in that it allowed the use of temporary workers outside of the exceptions explicitly listed in Article 4(1). The CJEU’s response was that, while the Article restricted the scope of the legislative framework to be adopted, it did not require any particular singular framework to be adopted. At the time of writing the case was pending before the Labour Court.

In the third and final judgment in this category, the court also handed down a judgment in a dispute between the industry association for the car and road transportation and the labour union in the same sector (TT: 2009-41). The case was a referral from the district court and related to a case of non-payment of wages. An Estonian company had been contracted by a Finnish company to deliver certain goods in a number of central European countries. The Estonian company argued that it was due to be paid wages in terms of the collective agreements in place in Finland for professional road traffic. It rested its argument in part on laws regulating posted workers. The Finnish industry association argued that the workers were not posted workers at all within the meaning of the legislation, which the court accepted, as the workers had not been posted to Finland in the way that the implementing legislation required. The case, then, does not deal with a case of posting as such, but rather arguments about posting that were made in a case involving migrant workers.

22. *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuotery, Shell Aviation Finland Oy* Case C-533/13, Judgment of 17 March 2015.

3.3. Lawfulness of strike action

Finally, we find a case (TT: 2002-67) that deals with the lawfulness and consequent damages of a strike and, although the case involved posted workers, the law regarding posted workers was relevant only tangentially. The case was brought by the industry association for housebuilders (*talotekniikkaliitto*) for a breach of industrial peace by the Builders' Union in terms of the collective bargaining agreement. The trade union had announced various forms of industrial action as a protest over the lack of certainty about the working conditions of workers from Estonia. The case was won by the industry association because the industrial actions were in breach of the collective bargaining agreement. One judge dissented on the grounds that, from the report filed by the Employers' Union, the wages paid were below what would have been due in terms of the legislation for posted workers, and as such the strike action would have been directed at a legitimate target and not the contents of the collective agreement. The case, then, while directly related to the interpretation of the collective bargaining agreement, dealt with posted workers to the extent that they set the context for the facts of the case.

Discussion

As anticipated, the case law regarding posted workers in Finland is relatively limited. Broadly speaking, all of the cases related to the application of the collective agreement in one way or another. *Sähköalojen ammattiliitto* is a landmark case dealing with a large-scale and problematic building site, and as such it stands out in almost all respects. One case dealt with the interpretation of the collective agreement. Three cases dealt with the proper classification of workers hired by Finnish companies. Each of these cases was brought by the labour union, in what can be considered as an effort to protect their members' working conditions from being undermined by cheaper foreign and/or temporary workers.

A number of points may be made regarding the case law considered above. In the first place, the relatively low number of cases is notable. The cases considered, of course, excludes first instance cases in the district courts. Nevertheless, some factors could indicate that even there the number of cases would be on the low side of the spectrum. First of all, if there were a high number of cases, some would be appealed or referred to the Labour Court and we would find more case law from the superior courts. At the moment that is not the case and the two referrals from the district courts to the CJEU are the sole examples. Second, using the Finnish court system is often a slow and costly way of enforcing your rights. This is especially true if the supervisory mechanisms – such as the inspectorate – are able to function properly. While there are serious concerns as to whether this is in fact the case, the existence of such a system, even one that does not function, would further discourage faith in the formal system. Third, there are also good reasons to believe that posted workers would not want to rely on the judicial system because of the nature of their position within the Finnish labour market. The position of these workers is already often precarious, as they can be easily dismissed and they may often be unaware of their rights. The lack of litigation may then align with the

impression of the state struggling to protect the rights of migrant workers in general and posted workers in particular.²³

The second set of points relates to the cases that have been brought. The first point relates to who has brought the case. In all but those cases where the issues of posted workers were secondary, the case was brought by a labour union. These cases were all attempts to prevent employers from employing cheaper labour, either by trying to ensure that the posted workers were placed in the appropriate category within the labour agreement, or that the labour agreements were not circumvented by hiring temporary staff. It could be said, then, that these cases have been brought not only to solve the dispute, as it exists, but also to prevent employers from adopting general practices that would be disadvantageous to the employees. Similarly, the motivation for bringing a claim is often to protect the interests of the Finnish members of the labour union as much as those of the immigrant workers. In many ways the interests of labour unions and posted workers coincide, as Finnish employees benefit from not having to compete with employees accepting lower wages.

The subject matter of the cases is the second point. The largest number of posted workers is employed in the construction sector, and this is also where most cases emanate from. The explanation for these cases may lie in the structure of the aviation industry, where, as a transnational transportation industry, cases of migrant labour may be more common.

The third point is that although the major case regarding the Polish employees at Olkiluoto 3 is still not resolved, most of the other cases brought by the labour unions have prevailed in their claims and been won by the labour union. This would indicate that labour rights are being breached and while not all cases reach the courts, the cases that do may be indicative of broader employment law trends.

Finally, the Olkiluoto 3 litigation stands out as an attempt to litigate the rights of posted workers. It is the only claim where unpaid wages are pursued through the courts, and is both long and complex. Given that the potential gain in terms of unpaid wages is relatively high, it may be that in this case the litigation is worth it. However, given the uniquely huge size of the building site within the Finnish context, and the number of workers involved in it, it is unlikely that another similar attempt to litigate rights would be made.

Conclusion

In a report about the functioning of the regulation of foreign labour in Finland, it was noted that although some cases dealing with immigrant workers had been taken to court, the number of these cases was marginal.²⁴ A representative of a labour union has

23. Hirvonen M. (2011) Raportti ulkomaisen työvoiman sääntelyn toimivuudesta; Eskola K. and Alvesalo A. (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset, Helsinki, Työterveyslaitos.

24. Hirvonen (2011) Raportti ulkomaisen työvoiman sääntelyn toimivuudesta.

mentioned that they do not see litigation as an option for enforcing the rights of posted workers because of the long and expensive nature of the Finnish legal system. It has also been frequently noted that posted workers who are dependent on their employers, sometimes satisfied with their working conditions and who usually find it easy to return to their home country, are unlikely to protest too much.

This chapter has analysed the reported cases decided in Finnish courts that dealt with issues involving posted workers. The case law is sparse, which might be indicative of the lack of litigation in general. It may also be indicative of the labour unions not being able to adequately protect the rights of posted workers, as has been discussed in the academic literature. These are the actors who can bring cases to the courts, and while they have done so at times, the lack of case law may indicate that the courts do not offer a viable option for the protection of labour rights.

References

- Eskola K. and Alvesalo A (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset. [Abuses of foreign labour – Cases investigated by the police] http://www.julkari.fi/bitstream/handle/10024/134976/Ulkomainen_tyovoima_2010.pdf?sequence=1
- Hirvonen M. (2011) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus. https://www.poliisi.fi/tietoa_poliisista/julkaisut/prime101/prime231_fi.aspx?docID=25796
- Hirvonen M., Lith P. and Walden R. (2010) Suomen kansainvälistyvä harmaa talous Eduskunnantarkastusvaliokunnan julkaisu. 1 https://www.eduskunta.fi/FI/tietoaeduskunnasta/julkaisut/Documents/trvj_1+2010.pdf
- Juntunen M (2011) Tilaa javastuulaki ja sen valvonta – ongelma erityisesti työehtosopimuksennoudattamisen valvonnassa. . <https://www.theseus.fi/bitstream/handle/10024/25320/Marjo%20Juntunen%20-%20Julkaisu.pdf?sequence=1>
- Korpela M., Rantanen P., Hyytiä J., Pitkänen P., and Raunio. M. (2014) Temporary migration in Finland, in Carrera S. and Pitkänen P. (eds.) Transnational migration in transition: state of the art report on temporary migration, Tampere, University of Tampere, 81-113.
- Lillie N. and Sippola M. (2011) National unions and transnationalworkers: the case of Olkiluoto 3, Finland, Work, employment and society, 25 (2), 292-308.

List of cases

- Court of Justice of European Union, Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna Case C-396/13 Judgment of 12 February 2015.
- Court of Justice of the European Union, Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry, Shell Aviation Finland Oy Case C-533/13, Judgment of 17 March 2015.
- Labour Court, TT: 2002-67.
- Labour Court, TT: 2006-63, Judgment of 22 June 2006. (<https://www.finlex.fi/fi/oikeus/tt/2006/20060063?search%5Btype%5D=pika&search%5Bpika%5D=TT%3A%202006-63>).
- Labour Court, TT: 2009-41, Judgment of 11 May 2009, (<https://www.finlex.fi/fi/oikeus/tt/2009/20090041?search%5Btype%5D=pika&search%5Bpika%5D=TT%3A%202009-41%20>).

Labour Court, TT: 2009-90, Judgment of 9 October 2009, (<https://www.finlex.fi/fi/oikeus/tt/2009/20090090?search%5Btype%5D=pika&search%5Bpika%5D=%20TT%3A%202009-90>).

Labour Court, TT: 2016-107, Judgment of 4 November 2016, (<https://www.finlex.fi/fi/oikeus/tt/2016/20160107?search%5Btype%5D=pika&search%5Bpika%5D=TT%3A%202016-107%2C%20>).