The Employment Law Review

Third Edition

Editor

Erika C Collins

Law Business Research

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THE EMPLOYMENT LAW REVIEW

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EDITOR'S PREFACE

Erika C Collins

Employment relations in 2011, and legislative and judicial developments in the area of labour and employment law, continue to be coloured by the financial downturn that began in 2008 along with related economic uncertainty, including the recent sovereign debt crisis throughout the Eurozone. As was the case last year, the 'Year in Review' and 'Outlook' sections of nearly every chapter in this edition detail efforts by countries both to address the continuing effects of the economic downturn and to implement regulations aimed at preventing similar crises in the future. Governments continue to seek ways to decrease financial burdens on businesses, including the costs of labour, in an apparent effort to increase competitiveness and stimulate business. In Italy and Greece, for example, new rules regarding collective bargaining permit companies to agree to company-level collective labour agreements that are less favourable to employees than the sector-level collective agreements that otherwise would govern. And in the United Kingdom, the government confirmed its commitment to the Red Tape Challenge, a deregulation programme expressly aimed at reducing the burdens on businesses. On the flip side, many governments also sought to implement rules and regulations aimed at preventing the types of behaviour that are viewed as having caused or contributed to the ongoing financial crisis. In Brazil, for example, the Central Bank has approved a resolution aimed at reducing risk-taking in banking activity by tying executive compensation to long-term results, through the requirement that specified percentages of incentive compensation are paid in company equity and/or deferred over a period of several years. And in Ireland, the Prevention of Corruption (Amendment) Act 2010, signed into law in December 2010, and the Criminal Justice Act 2011 both provide for protection for whistle-blowers who report certain offences.

Another trend during 2011 has been an increasing focus, in a number of jurisdictions, on privacy and protection of individuals' personal data – a topic that can be of utmost importance to employers, who typically collect and hold a great deal of personal, and sometimes sensitive, information about their employees. There has long been a dichotomy between the US and EU approaches to data privacy. In the US the workplace is not considered private, and the US has taken a sectoral, 'patchwork'

approach to data protection that consists primarily of reacting to data privacy issues as they have arisen in various industries. Accordingly, where privacy rights exist in the US they are largely the product of industry-specific laws. In the EU, by contrast, there is an overarching right to privacy stemming from the European human rights charter that all European countries are party to, and the EU data protection directive applies to all handlers of personal data, whether they are financial institutions, employers or internet retailers. It appears from recent developments that the EU approach is winning the day. In the last year, a number of countries – including, notably, India, Korea, Malaysia, Mexico and Singapore – have passed or implemented data privacy and protection laws that follow the EU model.

The third edition of *The Employment Law Review* includes several enhancements meant to better serve employers and employment-law practitioners operating in the global arena. These include two general-interest chapters – one addressing employment issues in cross-border mergers and acquisitions and the other social media in the workplace – as well as a new section in each country chapter addressing translation requirements for employment documents. This edition also boasts the addition of seven new countries, bringing the number of covered jurisdictions to 51. As with the first two editions, this book is not meant to provide a comprehensive treatise on the law of any of these countries but rather is intended to assist practitioners and human resources professionals in identifying the issues and determining what might land their client or company in hot water.

The third edition of *The Employment Law Review* has once again been the product of excellent collaboration, and I wish to thank our publisher and all of our contributors, as well as Michelle Gyves, an associate in the international employment law practice group at Paul Hastings, for their tireless efforts to bring this book to fruition.

Erika C Collins
Paul Hastings LLP
New York
January 2012

Chapter 16

FINLAND

Petteri Uoti and Loviisa Härö[1]

I INTRODUCTION

In Finland, employment relationships are governed by statutory law, collective agreements and individual employment contracts. The most significant acts governing employment relationships include the Employment Contracts Act, the Working Hours Act and the Annual Holidays Act. The Act on Cooperation within Undertakings ('the Cooperation Act') regulates employers' cooperation obligations towards employees. Data protection issues relating to employment are governed by the Act on Protection of Privacy in Working Life and the general Personal Data Act.

In Finland, employment disputes are generally heard by ordinary courts of law. Disputes concerning the interpretation of collective agreements and industrial actions are heard by the specialised Labour Court.

II YEAR IN REVIEW

i Finland's central labour market organisations agreed of a framework agreement

Finnish central labour market organisations negotiated and signed a framework agreement at the end of 2011. Over 90 per cent of all wage earners are covered by the agreement. The parties have agreed on a cost framework, thus wages and other issues were left to be agreed within labour unions and companies.

ii Increased number of discrimination and equality-related matters

During recent years, the number of discrimination claims has risen significantly. This development has also continued in 2011. Employees referring to equal treatment

1 Petteri Uoti is a partner and Loviisa Härö is an associate at Dittmar & Indrenius.

or discrimination in relation to all sorts of employment-related claims has become customary. Equality and non-discrimination claims typically relate to a candidate not being appointed to a position, an employee not receiving certain benefits from the employer or an employee being made redundant.

iii Use of precautionary measures to prevent industrial actions

During the past few years the amount of industrial action has increased. Typically, industrial action is taken to speed up negotiations for a new collective agreement. Employers have been exasperated by the level of administrative fines imposed for taking illegal industrial action as the fines are rather small compared to possible damages. Therefore, the use of precautionary measures to prevent illegal industrial action has emerged. The use of precautionary measures has opened up the means for employers to intervene in illegal industrial action in advance.

III SIGNIFICANT CASES

i Employer's obligation to pay bonuses to employees on strike (KKO 2010:93 and KKO 190/2011)

The Finnish Supreme Court considered whether employees are entitled to receive a bonus despite the fact that they were participating in an illegal industrial action. Employees had organised an industrial action which was later held as illegal by the Finnish Labour Court. The company then refused to pay performance bonuses to the employees who had participated in the industrial action. The company referred to an amendment made to the performance bonus agreement, denying bonuses for employees participating in illegal industrial action due to the economic losses caused by the action. The Finnish High Court ruled that the employer can not set restrictions on the employee's right to performance bonuses due to the fact that employees have participated in industrial action. Such a clause restricts a union members' right of freedom of association which also includes the freedom to take part in industrial action.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

There are no form requirements for the Finnish employment contracts. Accordingly, employment contracts may be concluded in writing or orally. Employers are, however, obliged to provide employees with a written statement of the following key terms and conditions of employment by the end of the first pay period unless such terms are specified in a written employment contract:

a the domicile of the parties;
b the commencement date of employment;
c the expiry date and the grounds for fixed-term employment (if applicable);
d probationary period (if applicable);
e the place of work;
f the employee's principal tasks;

g the applicable collective agreement (if any);
h the pay period and the grounds for the determination of pay;
i regular working hours;
j annual holiday entitlement; and
k period of notice.

References to the applicable laws and collective agreements are sufficient for defining the specific terms and conditions of employment.

The agreed terms and conditions of employment may only be changed by an agreement between the employer and the employee.

ii Probationary periods

It is customary in Finland to agree on a probationary period. Probationary periods may last up to four months. During a probationary period, either party may terminate the employment relationship with immediate effect for no other reason than the probationary period itself. The termination must, however, relate to the purpose of the probationary period (i.e., the termination cannot be discriminatory or otherwise based on grounds that do not relate to the employment relationship). Once the probationary period has been completed, the employment relationship becomes permanent.

iii Establishing a presence

A foreign company can hire employees directly or through an agency without being officially registered to carry on business in Finland.

A foreign company may also have a permanent establishment in Finland for the purposes of Finnish income taxation, regardless of the formal establishment of its presence. This criteria may be fulfilled, for example, if the foreign employer has an office in Finland.

If a foreign company has a permanent establishment in Finland, it must register itself as an employer and, inter alia, file periodic tax returns and annual employer payroll reports, pay the employers' social security contribution and, with certain exceptions, withhold tax on paid wages.

In any event, a foreign employer must take out pension insurance, accident insurance and group life insurance for Finnish employees. The company may, however, be exempted from paying the employers' social security contribution. The exception relates to posted foreign employees holding a certificate which confirms that the social security system of his or her home country will apply to the employee.

V RESTRICTIVE COVENANTS

During the employment relationship, an employee is under a statutory obligation to refrain from working for a competing company or engaging in activities causing manifest harm to the employer.

The parties to an employment relationship may agree on non-competition for a particularly serious reason related to the business of the employer. The seriousness of such reason is defined by the employee's status and duties as well as the nature of the

employer's operations (e.g., the employer's need to protect business or trade secrets). A non-competition agreement may be concluded for a maximum of six months. The period may be extended to 12 months provided that the employee is deemed to receive reasonable compensation.

With regard to other post-termination restrictive covenants, such as non-solicitation of customers and employees, no specific restrictions exist. Under certain circumstances, however, such provisions may be considered unreasonable and therefore invalid.

VI WAGES

i Working time

The primary rules governing working hours are set out in the statutory law and the applicable collective agreements. According to the Working Hours Act, an employee's regular working hours shall not exceed eight hours a day and 40 hours a week. The working hours may also be arranged to be no more than 40 hours per week on average within a maximum period of 52 weeks. Under the collective agreements, working time is typically 37.5 hours per week.

Only certain tasks specified in the Working Hours Act may be performed during the night (i.e., between 11pm and 6am). Night work may generally be performed in period-based work, shift work and in certain professions specified by law. The maximum number of consecutive night shifts is seven.

ii Overtime

Additional work generally refers to work that is performed on top of the regular working hours at the employer's initiative but not exceeding eight hours per day and 40 hours per week. Overtime work is performed in addition to the regular and additional working hours. Overtime work is performed at the initiative of the employer and with the consent of the employee.

Customarily, any hours worked over 40 hours per week or eight hours per day constitute overtime, which is compensated with an overtime supplement of 50 to 100 per cent of the normal hourly rate. Employees may, upon agreement, be given additional leave in lieu of overtime pay.

Overtime work must be limited to 138 hours in a four-month period and 250 hours per year. The maximum yearly overtime may be exceeded by 80 hours by a local agreement between the employer and the employee representatives, provided that the limit of 138 overtime hours per four months is not exceeded.

VII FOREIGN WORKERS

All employees who perform work in Finland in an employment relationship are covered by Finnish labour laws. There are certain exceptions to the rules for employees who are temporarily posted to Finland.

Employing foreign employees in Finland is not limited as such. The employers are, however, under an obligation to ensure that the foreign employees have the required permits (if any) and that the labour law is applied to their employment relationships.

EU citizens and citizens of Liechtenstein and Switzerland may work in Finland without a specific worker's permit but they must register their right to reside in Finland if their stay lasts longer than three months. Citizens of Sweden, Norway, Denmark and Iceland may reside in Finland for up to six months without registering their stay.

Foreign employees who are non-EU citizens and equivalent persons need a worker's residence permit for engaging in remunerated employment in Finland.

VIII GLOBAL POLICIES

There are no general rules regarding the establishment of internal company policies. The establishment of internal rules and regulations is typically voluntary. There are, however, certain statutory exceptions to the rule. The exceptions include, among others, an equality plan and a personnel plan. Typically, such statutory policies must also be regularly addressed in cooperation negotiations with the employee representatives or at least when the policies are introduced.

Company policies may be incorporated into employment contracts by reference. In addition, established internal practices may also become binding on the parties to the employment relationship.

IX TRANSLATION

No language requirements are set out in Finnish law (i.e., no requirements regarding the language used in communication or in agreements exist). However, to avoid any disputes arising, it is important to prepare documentation and communication in such a language that the employees fully understand the content. Translation is thus recommended if employees have a limited knowledge of the English language.

As mentioned above, translation may also prevent disputes concerning the literal interpretation of, for example, an employment agreement. An agreement can be found unlawful if the employee states that he or she has not understood the meaning of the agreement.

X EMPLOYEE REPRESENTATION

In Finland, the employer's consultation obligations towards the employees are governed by the Cooperation Act. The Act applies to employers who regularly employ at least 20 employees in Finland.

The Act contains detailed provisions regarding the employer's obligation to inform and consult employees in given circumstances. The consultations may be held between the employer and individual employees, a group of employees or their elected representatives (i.e., shop stewards and industrial safety delegates). These elected employee representatives are well protected against termination of employment.

According to the Act on Personnel Representation in the Administration of Undertakings, the personnel of a company that employs at least 150 employees in Finland is entitled to elect a representative to the managing board or corresponding body of the company. Altogether, one to four personnel representatives may be nominated to such bodies. The personnel representatives typically form one-quarter of the members of the body in question.

The Act on Cooperation within Finnish and Communitywide Undertakings regulates the information and consultation obligations at the European level through establishment of European works councils. Some amendments to the legislation were made in order to implement the recast European Works Council Directive 2009/38/EC. The main changes were related to information and consultation procedures and the management of a European Works Council.

XI DATA PROTECTION

i Requirements for registration

The information and data that may be collected on the grounds of an employment relationship is strictly regulated by law. Accordingly, the following general requirements must be fulfilled in addition to compliance with the specific requirements imposed by the data protection legislation:

a the employer or anyone operating on its behalf must process personal data lawfully and carefully and in compliance with good data processing practice (the duty of care);

b the employer must define the purpose of the processing, the regular sources and the regular recipients of recorded personal data before the data is collected (the planning duty); and

c the grounds for processing personal data must always be appropriate and justified (the requirement of appropriate and justified grounds).

In addition, an employer is bound by a strict necessity requirement that cannot be deviated from, even with employee consent. Accordingly, the employer is only allowed to process personal data that is directly necessary for the employee's employment relationship. The employer must prepare a privacy statement regarding the personal data file.

The employer must collect information concerning the employee primarily from the employee himself. In order to collect information from other sources, the employee's consent must be obtained. If information from other sources has been collected, the employee must be notified thereof before the data can be used for making decisions concerning the employee.

Companies are not generally obliged to register with the data protection authorities. An undertaking regularly employing more than 20 employees in Finland must, however, address certain data protection related issues through the employee cooperation and consultation procedure.

ii Cross-border data transfers

The prerequisite for transferring any personal data is that the provisions of the Finnish data protection legislation shall be complied with. The same rules apply to a transfer of personal data in Finland and within the European Union and the European Economic Area. Accordingly, if a transfer of data is allowed between two Finnish entities, a comparable transfer to another EU Member State or to an EEA Member State is allowed as well.

The transfer of personal data outside the European Union or the European Economic Area is allowed only if the country in question guarantees an adequate level of data protection. As a general rule, a data transfer need not be registered with the data protection authority provided that the transfer can be carried out by using the safe harbour licence of the company (if applicable) or using the European Commission's standard data transfer clause contract terms. Such transfer may also be carried out by obtaining an explicit consent for the transfer from the affected employees.

iii Sensitive data

The processing of sensitive data is generally prohibited except in certain situations specified by law. Sensitive personal data includes information that relates to race or ethnic origin; the social, political or religious affiliation or trade union membership of a person; a criminal act, punishment or other criminal sanction; the state of health, illness or handicap of a person or treatment received or other comparable measures directed at the person; the sexual preferences or sex life of a person; or the social welfare needs of a person or the benefits, support or other social welfare assistance received by the person.

iv Background checks

In principle, it is possible to carry out pre-employment checks in Finland. Nevertheless, the use of credit checks, background checks and medical and drug screening is strictly regulated by law. The most central issues that an employer should note are the following:

a only enquiries that are directly necessary for the application process to be carried out are allowed (the necessity requirement); and

b no enquiries regarding the applicant can be made without his or her direct consent, or in some cases, without a prior notification of an intended enquiry.

Background checks performed by the Finnish Security Police are available only for the most central positions in corporations. A prior written consent from the applicant is also required. A job applicant is not entitled to obtain an extract from the criminal record concerning himself or herself to present it to an employer. The only way to find out information on the applicant's criminal record is through a background check.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Termination of employment may only take place if the reasons for the termination are weighty and well-justified. An employment contract concluded for an indefinite period may be terminated either on individual grounds that relate to the conduct and performance of an individual employee (i.e., dismissal), or on collective grounds that relate to the economic and production situation or the restructuring of the company (i.e., redundancy). Fixed-term employment contracts can basically not be terminated prior to the end of the fixed term.

The termination of employment on individual grounds is allowed if the employee neglects or seriously breaches the duties that fundamentally relate to his employment (e.g., the employee's lengthy absence from work (without permission), abuse of alcohol or drugs, dishonesty, bad behaviour, or similar). An employee threatened with being dismissed on individual grounds is entitled to be heard on the grounds for the dismissal.

Employers are not liable to pay severance compensation for legally correct terminations, but employees are entitled to compensation for wrongful dismissal equal to three to 24 months' salary. Wrongful dismissal does not, however, entitle the employee to claim reinstatement.

An employee is entitled to his or her salary during the notice period. The statutory notice periods range from 14 days to six months, depending on length of service. Within certain limits, the parties to an employment relationship may deviate from the statutory notice periods by agreement. Collective agreements may contain provisions that may become applicable instead of the statutory or agreed notice periods.

A severance contract pursuant to which the employer and the employee agree on a severance payment is an alternative to consider. In such an agreement, the employee can waive his right to challenge the termination of his employment relationship.

ii Redundancies

An employer is entitled to make one or several employees redundant, if (1) the work has diminished or been materially reduced due to economic or production reasons, or due to the restructuring of the enterprise and (2) the reduction of work is permanent. In addition, it is required that (3) the employee cannot reasonably be repositioned or retrained within the employer's organisation. An employee whose contract has been terminated on collective grounds has a right of precedence to the vacant positions similar to those the employee was dismissed from during nine months following the expiry of the employment.

The redundancies must fall on employees whose work actually diminishes or ceases. If the work diminishes for many employees, but only some need to be dismissed, the choice has to be fair. The collective labour agreements require that, among other things, the employee's skills, length of employment and number of dependants are considered.

An employer has no right to dismiss an employee who is on family leave. If a pregnant employee is made redundant, the redundancy is deemed to have taken place due to the pregnancy, unless evidence to the contrary is provided by the employer.

Furthermore, shop stewards, industrial safety delegates and personnel representatives may only be made redundant under exceptional circumstances specified by law and collective agreements.

The procedure for termination varies depending on the size of the employer. Employers that regularly employ fewer than 20 employees in Finland have a rather simple consultation obligation. The employer must discuss the reasons for the termination with the relevant employees as early in advance as possible.

An employer who regularly employs 20 or more employees in Finland is obliged to comply with the strictly regulated employee cooperation and consultation procedure before making final decisions on the redundancies or major business decisions resulting in redundancies.

Typically, the cooperation consultations are conducted between the employer and the representatives of the employees affected by the planned redundancies. During the consultations, the parties discuss the grounds for, the effects of and the alternatives to the planned redundancies in order to reduce the negative effects of the planned measures. Also, retraining and repositioning the employees whose employment contract is going to be terminated shall be discussed. The purpose of the consultations is to reach a unanimous result.

Unless an agreement is reached, the minimum consultation period is two weeks if the negotiations concern termination of fewer than 10 employment contracts. If at least 10 contracts are terminated, the minimum period is six weeks.

The employer is not under an obligation to pay severance compensation relating to redundancies. Nevertheless, a failure to conduct consultations according to the Cooperation Act results in a liability to the employee who is made redundant. The maximum indemnity is €31,570 per redundant employee. In addition, the employer may be obliged to pay the employee compensation for a wrongful dismissal. If the employer fails to comply with the re-employment obligation, the company is liable to compensate the actual damage suffered by the employee due to the failure.

No prior approval from any government agency is required for making employees redundant. The employer must, however, inform the local employment authorities of certain specific issues relating to the redundancies. The employer must also inform the employees of the public services supporting their re-employment and their right to an increased daily allowance for participating in the re-employment scheme drafted by the public employment authorities.

XIII TRANSFER OF BUSINESS

The personnel issues relating to a transfer of business are governed by the Finnish Employment Contracts Act, which corresponds to Council Directive 2001/23/EC on acquired rights of employees. According to the Employment Contracts Act, all employees engaged in the business concerned at the time of the transfer are automatically transferred to the acquirer of the business. Correspondingly, the acquirer has an obligation to take over all such employees on their existing terms and conditions of employment.

The basic requirement for a transaction or an arrangement to constitute a transfer of business is that the transferred entity is an economic entity, namely, an organised

grouping of resources that has the objective of pursuing an economic activity, and that these characteristics are retained after the transfer.

The transfer of employees is mandatory and automatic; it does not require making new employment contracts or other agreements with the transferring personnel. The employees cannot object to the transfer effectively. However, the employees have a special right to terminate their employment relationships as from the date of the transfer, regardless of the period of notice otherwise applied to their employment relationships.

XIV OUTLOOK

i Increased number of discrimination charges

Direct or indirect discrimination on the basis of gender, age, health, nationality, sexual orientation, trade union or political activity, or any other comparable circumstance is strictly prohibited. Discrimination might occur during an employment relationship, but also in connection with recruitment or termination of employment.

The number of claims regarding alleged discrimination has increased significantly during recent years and the tendency is expected to continue. Discrimination charges are typically raised in connection with other claims relating to, for example, unfair termination of employment. Nevertheless, individual claims regarding discrimination have also become more and more common.

Should a company breach its non-discrimination obligations, it may be ordered to pay the employee compensation in addition to compensating for the actual damage caused by the breach. In most severe cases, the representatives of the employer may be sentenced to criminal penalties.

ii The increased use of local agreements

One of the most significant trends in the Finnish labour market is the increased number of local agreements concluded between an individual employer and its employees or their representatives. Within certain limits, the local agreements enable the employers to adjust the terms and conditions of employment to the current situation at the workplace instead of applying the terms and conditions of collective agreements, which are typically nationally applicable. Certain statutes also contain provisions that may be deviated from by local agreement.

Appendix 1

ABOUT THE AUTHORS

PETTERI UOTI

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Petteri Uoti is a partner in Dittmar & Indrenius's dispute resolution practice and a highly recognised expert in employment law. His dispute resolution practice is focused on commercial and competition law litigation and arbitration in Finland and abroad. He also frequently acts as an arbitrator in commercial arbitration proceedings. Mr Uoti's labour law practice is focused on mergers and acquisitions, company restructurings and employment dispute resolution, including litigation and arbitration. He frequently advises employers on a broad range of employment law issues, including establishing human resource policies in Finland, drafting of employment-related contracts and individual and collective dismissals. Mr Uoti's clients consist mainly of multinational and foreign businesses and their subsidiaries in Finland, as well as Finnish large to medium-sized companies. He also represents governments and international organisations.

His professional memberships include: Finnish Bar Association, International Bar Association, European Employment Lawyers Association EELA (Finnish Board Member).

Petteri Uoti graduated from the University of Helsinki in 1988 and joined the Employers' Federation of the Finnish Metal Industry the same year. He qualified as a judge in 1990, and joined Dittmar & Indrenius in 1992.

Mr Uoti has written several books and articles on employment law and dispute resolution. He lectures regularly on both topics.

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Loviisa Härö is an associate in Dittmar & Indrenius's Employment & Pensions practice group. She graduated from the University of Helsinki in 2011. Prior to joining Dittmar & Indrenius the same year, Ms Härö gained experience at two other Finnish law firms.

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