THE LEGAL PROBLEMS OF OCCUPATIONAL AND HEALTH SAFETY IN ESTONIA

Kristi Joamets

Tallinn Law School Tallinn University of Technology

kristi.joamets@ttu.ee

&

Liina Luukas

Estonian Ministry of Interior

liina.lks@gmail.com

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Summary: Number of occupational accidents has decreased in recent years in Estonia. Article discusses whether the reason for this can be insufficient labour inspection legal system. The conformity of Estonian occupational health and safety regulation on supervision to the national law providing rules for labour inspection in this field is evaluated. More specifically, ILO conventions no 81 and no 129 and European Council directive 89/391/EEC are analysed to find out whether the high number of occupational accidents derive from the non-compliance of the international rules. Difficulties in following the international law rules are analysed, presenting and discussing also the problems appearing in the context of new labour relations in a changing society

Keywords: government supervision, occupational health, occupational safety, labour law, labour inspection

1 Introduction

People spend more than half of their life working. Job offers people economic security and mental satisfaction – a possibility of self-accomplishment. Therefore, it is important that the conditions under which people work, meet the requirements of law and assure the protection and safety of people at work.

Unfortunately, the number of occupational accidents has increased in recent years in Estonia. One reason for this can be Estonian insufficient legal national labour inspection system. Labour inspection is disserted in a variety of different legal acts, but none of them would be individually or in a whole appropriate for the effective supervision developed in many other European Union Member States.

Article discusses Estonian occupational health and safety legislation, supervision and praxis over occupational health and safety (OSH) requirements derived from the legal acts to find out what can be reasons for the insufficient labour inspection system. Could the reason be the inaccordance of national law to the international law? As main rules for OSH system derive from the international law then the ILO conventions no 81 and no 129 are analysed in parallel to the Estonian national legislation. However, as conventions no 81 and no 129 are similar and largely identical, with the exception of some specific technical nuances, article bases mainly on the convention no 81. Also, article analyses the applicability of the convention 81 and European Council directive 89/391/EEC on non-traditional labour relations assuming that not all the rules provided by those legal acts are applicable for such relations.

Research is an empirical qualitative study in which authors use a comparative analysis and legal dogmatic method to examine legal regulations and practice.

2 International conventions regulating occupational and health safety

The origin of monitoring working conditions can be attributed to two important principles. Firstly, the emergence of national labour inspection services accrued from the social pressure to regulate the national economic forces. In other words, the final years of the 19th century gave evidence of heinous and intolerable working conditions labour force had to bare in industrialized states. Something had to be done in order to stop the exploitation of women and children and the twelve to sixteen hour workdays. The aim was to increase wages so that people would not have to work for such a small salary which made them barely cope. Secondly, another reason was the need to protect the exploited layers of society. Resulting from that, a situation which allowed state to create a law protecting people from exploitation was developed.¹ In summary, it can be said that the reason for developing the monitoring of working conditions was the poor working conditions and the people's discontent with the situation. It was evident that something had to be done to change the situation and one solution for this was to regulate the supervision of working conditions.

From International Labour Organisation's (ILO) point of view, the application of the laws on labour depends on the efficiency of labour inspection. Labour inspectors are the ones who are obliged to examine how national labor standards are implemented in the workplace and provide employers and workers advice on how to improve the application of national law on matters like working hours, wages and OSH. In addition, labour inspectors notify the local authorities of the deficiencies of the national law. Labour inspectors play a vital role in ensuring that labour law is applied equally to all employees and employers. As the international community recognizes the monitoring of working conditions, the

1 PIRES, Robert. *Labour inspection and development: Some reflections*. Geneva, ILO, 2011, pp. 2–3.

ILO has made it a priority to promote ratification of the two Labour Inspection Conventions (no 81² and 129³).⁴ ILO conventions are socially legitimate and they have a strong influence as the conventions offer realistic solutions to the problems.⁵ ILO standards have increasingly been emphasised in many countries and have a very strong impact.⁶ Conventions are a source of guidance to provide a pattern on which successfully build a national policy, law and everyday practice.⁷

The first convention (no 81) was adopted in 1947 and it has been ratified by more than one hundred countries. The second convention was adopted in 1969 and it has been ratified slightly less – by more than 40 countries. Despite the fact that according to the ILO's constitution all the ratified conventions have the same legal force, eight core conventions (fundamental rights at work) and four priority conventions have been disserted differently for many years. The above-mentioned conventions belong to the four priority conventions.⁸ Priority conventions are important because they ensure an effective system of international labour standards.⁹

In order to understand what is provided by ILO conventions, it is important to understand what is labour inspection. For ILO, the role of labour inspection is to ensure the enforcement of national laws concerning labour law, dealing with the issues such as working conditions and workers' health and safety. Labour inspection is one of the key functions of any work organization system. The range of topics, which labour inspection comprises, may differ from country to country, but generally it involves the promotion of OSH. In addition, labour inspection comprises promotion of workers' fundamental rights, such as freedom of association, non-discrimination and the functioning of relevant employ-

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- 2 Labour Inspection Convention – Convention concerning Labour Inspection in Industry and Commerce.
 - 3 Labour Inspection Convention – Convention concerning Labour Inspection in Agriculture.
 - 4 ILO. *International Labour Standards on Labour Inspection*. [online]. Available at: <www.ilo.org/global/standards/subjects-covered-by-labour-standards/labour-inspection/lang-en/index.htm>.
 - 5 BRONSTEIN, Arturo. The Role of the International Labour Office in the Framing of National Labor Law. *Comparative Labor Law & Policy Journal*, 2005, 26 (3), pp. 346–347.
 - 6 GRAVEL, Eric, DELPECH, Quentin. International Labour Standards: Recent Developments in Complementarity Between the International and National Supervisory Systems. *International Labour Review*, 2008, 147 (4), p. 405.
 - 7 VON RICHTHOFEN, Wolfgang. *Labour Inspection: A Guide to the Profession*. Great Britain: Biddles Ltd 2002, p. 80.
 - 8 *Ibid*, p. 15.
 - 9 CASALE, Giuseppe, FASANI, Mario. *International Labour Standards and Guiding Principles on Labour Administration and Labour Inspection*. Geneva, ILO, 2012, p. 1. [online]. Available at: <www.ilo.org/public/libdoc/ilo/2012/112B09_185_engl.pdf>.

ment relationships and social dialogue. Labour inspection is ensured by labour inspectors.¹⁰

ILO conventions no 81 and 129 do not formulate the concept of governmental supervision. Conventions stress that every member of ILO who has ratified the above-mentioned conventions, must have a labour inspection system.¹¹ According to the convention no 81, the mission of the labour inspection system is to ensure, within the competence of labour inspectors, the enforcement of laws which regulate working conditions and workers protection, provide advice to employer and the employees how to follow the laws and inform the competent authority of the shortcomings that the existing laws do not regulate.¹²

Since the convention no 129 is in essence the same in meaning, ensuring the monitoring of working conditions, the missions in convention no 129 article 6 are essentially the same. The difference is due to the last point of article 6, that in addition to informing competent authorities of the shortcomings of the legislation, it also provides an opportunity to submit proposals to amend the legislation.¹³

The rights of labour inspectors are listed in article 81 of the convention no 81. According to the convention, they have a right to enter and control enterprise unannounced and organize surveys and checks to be sure of regulatory compliance. Therefore, they also have a right to interview workers, access various documents of the enterprise and take necessary materials and samples with them.¹⁴

Labour inspectors are allowed to use the foregoing rights only when they have an authorization. Again, the principles of the two conventions are quite similar in this matter, but there are some differences in the convention no 129. Convention no 129 does not contain a right to “demand the posting of notices which have been designated by law”. Under the article 16 of the convention no 129 there is added a provision (p. 2), which does not allow labour inspectors to enter the home of the head of and agriculture enterprise without the heads’ acceptance or without the permission of a competent authority.

In addition to the labour inspectors rights, there are also prohibitions. Prohibitions in both conventions have the same content and they are formulated in the article 15 of the convention no 81 and in the article 20 of the convention no

10 ILO. *Labour administration and inspection key to good global governance*, 2011. [online]. Available at: <www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_156165/lang-en/index.htm>.

11 Convention concerning Labour Inspection in Industry and Commerce RT II 2004, 40, 149, art 1; Convention concerning Labour Inspection in Agriculture RT II 2004, 40, 149, art 3.

12 Convention concerning Labour Inspection in Industry and Commerce RT II 2004, 40, 149, art 3 lg 1.

13 Convention concerning Labour Inspection in Agriculture RT II 2004, 40, 149.

14 Convention concerning Labour Inspection in Industry and Commerce RT II 2004, 40, 149, art 12, p 1.

129. First, labour inspectors are not allowed to be interested in the enterprises which are under their supervision. Second, labour inspectors, even after they leave their occupation, are not allowed to disclose the manufacturing and trade secrets which have been found out during their duty. If the labour inspectors do not follow the foregoing prohibitions, appropriate sanctions or disciplinary action is applied. Finally, labour inspectors are not allowed to disclose the complainant, who informed about the violation of law or about the deficiencies of complying it. It is also prohibited to notify the employer or his representative that the inspection was prompted by a complaint.

3 Requirements arising from The Safety and Health at Work Directive 89/391/EEC

Because of the common legal framework of the European Community the Member States have also formulated uniform conditions about OSH requirements.¹⁵ Most directives have been provided OSH requirements (specifically, more than half of the directives regulate just OSH), which show how serious workers' health and safety is considered.¹⁶ The most important law in the field of labour law is OSH Framework Directive 89/391/EEC (hereinafter directive 89/391). This directive is considered to be a novel approach to OSH field.¹⁷ The purpose of the directive is to introduce measures to encourage the improvement of workers OSH.¹⁸ The directive lays down minimum requirements but does not justify any reduction in levels of protection already achieved in the Member States. Therefore, when some Member States had already introduced similar measures to ensure better protection of workers health and safety before the adoption of the directive, then those Member States did not have to cut existing national standards. The same idea is repeated in article 1(3) of the directive. Directive 89/391 disserts mainly the responsibilities of employer and employee in ensuring OSH.

Article 3 of the directive 89/391 formulates the concept of employer, under which the employer is a natural or legal person who is in a work relationship with the worker and who is responsible for the enterprise or institution. A general obligation for the employer is formulated in the article 5(1) of the directive 89/391, according to which the employer is obligated to ensure workers' OSH in

15 HOWES, Victoria. Health and Safety Regulatory Framework – A Comparative Perspective. *The International Journal of Comparative Labour Law and Industrial Relations* 2003, 19 (1), p. 85.

16 HAVERLAND, Markus, ROMEIJN, Marleen. Do Member States Make European Policies Work? Analysing the EU Transposition Deficit. *Public Administration*, 2007, 85 (3), Oxford: Blackwell Publishing, pp. 757–778, p. 761.

17 BARNARD, Catherine. *EC Employment Law*. Oxford: Oxford University Press Inc. 2006, p. 381.

18 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, *ELT L 183/1*, 29.06.1989, art. 1, p. 1.

all work-related aspects. It is important to notice that according to the art 5(3) an employer is responsible despite the workers' obligations in the field of OSH. Therefore, it is the employer who has the task to ensure safe work environment and carry out the surveillance.

Article 6 of the directive 89/391 formulates general obligations of the employer. The employer must take all necessary measures to ensure the protection of workers OSH. In addition, the employer must prevent occupational risks, provide information and training and ensure the necessary arrangements and corresponding tools. In order to improve the situation an employer must take into account the constantly changing circumstances. In point 2 of the same article there are preventive principles, under which the employer must take measures to ensure the safety and protection of workers health: avoiding risks, analysing inevitable risks, crowding the risks at the source, adapting work to the individual and according to the technical progress, replacing dangerous factors with safe ones, developing coherent prevention policy, preferring collective protective measures and giving appropriate instructions to the workers. According to point 3 of the same article, the employer must account the risk to workers OSH, taking into consideration the nature and the activities of the enterprise. Accordingly to the resolution of European Court, the employer must assess all the risks associated with employees OSH.¹⁹

It is essential to define the legal status of a person engaged in work, which helps to implement the laws that regulate work.²⁰ Article 3 of directive 89/391 lays down the definition of an employee, according to which the employee is a person employed by an employer, including trainees. According to article 13(1) of directive 89/391, every employee is obliged to take care of their own and other workers OSH in accordance with their training and instructions given by the employer. This idea is a part of proactive policy, involving employees in order to develop a real culture of risk prevention.²¹

Article 13(2) of the directive 89/391 formulates workers' general obligations as three main tasks. First, employees must make proper use of personal protective equipment, tools, dangerous substances and other means of production. Second, the employee is obliged to inform the employer about other employees, who have a special responsibility for the OSH of workers, of any work situations they have a reasonable ground for believing that they pose a serious and immediate danger to OSH and also of any shortcomings in the protection systems.²²

19 *Ibid*, p. 12.

20 HALJASMÄE, Reelika. Majanduslikult sõltuva töötajaja õiguslik kaitse. *Juridica* 2007 nr 4, pp. 274–280, p. 274.

21 BARNARD, Catherine. *EC Employment Law*. Oxford: Oxford University Press Inc. 2006, p. 561.

22 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, ELT L 183/1, 29.06.1989, art 13, lg 2, p (d).

Third, employees must cooperate with the employer in order to perform duties assigned by the competent authority to protect the OSH at work²³ and to make sure that the working environment and working conditions are safe.²⁴

Despite the fact that according to the article 4 of the directive 89/391 Member States must take all necessary measures to ensure that employers, employees and employers' representatives follow necessary provisions to implement the directive, the Member States have the final responsibility and they have to ensure adequate control and supervision.²⁵ Therefore, the governmental supervision over the questions concerning OSH is crucial.

Based on the foregoing, the authors of this paper are on the opinion that the employer is the one who is mainly responsible for all aspects of the workplace, but the employee must not use it maliciously. As much as the employer has a duty to ensure the safety of employees at work, the employees have also the obligation to comply with the safety rules. Since the employer has a great responsibility, it is reasonable for him to learn the requirements related to OSH or to hire a person responsible for the work environment. Ignorance does not release from liability.

In order to understand the application of the directive, it is important to realize the overall scope of its application, it applies to both, public and private sectors in all activities, but in minor exceptions. According to the article 2(2) the directive does not apply in cases where certain public service activities, such as the armed forces, the police or the civil protection services activity may conflict with it.

Here may be a misunderstanding whether the everyday work of certain public services, such as the armed forces and the police, belong to the scope of the directive or not. This issue is explained by many resolutions of European Court of Justice. According to point 53 of the case C-397/01 – C-403/01²⁶, the article 2(2) of directive precludes from the scope of the directive not the civil protection services, but certain specific activities of those services, which due to its characteristics get into variance with rules laid down in the directive. The exception in the directive is intended for only providing essential effective services and in large-scale accidents, which is characterized by the fact that in this case it is impossible to plan the amount of the activities provided by public services²⁷. Court decides that rescue services do not fall within the scope of the exception in article 2(2) of directive 89/391 and the directive generally applies to the provision of such services. The authors of this article find that the essence of the public service is similar to other traditional works, which belong to the scope of the

23 *Ibid*, art 13, lg 2, p (e).

24 *Ibid*, art 13, lg 2, p (f).

25 BARNARD, Catherine. *EC Employment Law*. Oxford: Oxford University Press Inc. 2006, p. 562.

26 ECJ 5.10.2004, connected cases C-397/01 – C-403/01, p. 47–61.

27 *Ibid*, p. 55.

directive and it would be unthinkable that the public service workers' health and safety would not be taken into account on a daily basis.

4 Conformity of the Estonian OSH regulation to the convention no 81 and some problems

After Estonian independence the first occupational and health safety act (OHSA) was enforced in 1999 and was based mainly on a directive 89/391²⁸. Since then 19 EU directives have been adopted related to the occupational health and safety²⁹. Characterising the adoption of EU rules one can note that as a big amount of directives were taken over in a short time period then unfortunately the regulations were remained often too formal because there was not left enough time to adopt them. Since 1999 the OHSA has been changed more than 20 times. Considering that there are also a number of decrees applying the OHSA the regulation of OSH in Estonia is considered as a complicated legal act to apply in practice.

Also the ILO conventions have been taken over quite well, still, based on the analyse of OHSA in 2011 there are some serious deficiencies.³⁰

In Estonia the labour inspection is performed by the Labour Inspectorate following the rules provided by the OHSA. Labour Inspectorate is a government agency operating within the area of government³¹ of the Ministry of Social Affairs, hence performs the obligation of cooperation between the government agencies and other institutions. However, the cooperation provided by the art 5 of the convention no 81 could be better. Similarly to other countries³² the cooperation should be based on certain written agreements providing includingly the procedure of the joint operation, otherwise the obligation provided by the convention is declarative as nobody knows what exactly should be done and in practice is not followed at all.

Article 3(2) of the convention no 81 provides that any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with

28 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

29 *Töötervishoiu ja tööohutuse strateegia 2010–2013* (The policy of occupational and health safety), p. 7. [online] Available at: <www.sm.ee/sites/default/files/content-editors/ees-margid_ja_tegevused/Too/Tookeskkond/tto_strateegia_2010-2013.pdf>.

30 KWANTES, Jan, Harmes, et al. *Töötervishoiu ja tööohutuse seaduse õiguslik analüüs. TNO aruanne*. (Legal analyse of occupational and health safety act. Report of TNO). 2011, p. 37.

31 Article 4 of the Convention 81 provides that supervision over the conditions of the work must be placed under the supervision and control of a central authority.

32 KWANTES, Jan, Harmes, et al. *Töötervishoiu ja tööohutuse seaduse õiguslik analüüs. TNO aruanne*. (Legal analyse of occupational and health safety act. Report of TNO). 2011, p. 28.

employers and workers. Such provision has not been adopted to Estonian legal system directly but a question has been raised in Estonian practice. The Ministry of Social Affairs has confirmed that some labour inspectors have acted as trainers.

Article 10 of the convention no 81 provides that the number of labour inspectors must be sufficient to secure the effective discharge of the duties of the inspectorate. Based on an overview of the working environment 2014 in Estonia³³ there can conclude that the number of controlled entities is increasing. ILO has provided the rules for the number of inspectors: one inspector for 10 000 employees in a state with developed market economy, 1 inspector for 20 000 employees in a state with transfer economy and 1 inspector for 40 000 employees in less developed state.³⁴ In Estonia the situation is quite good: there is 1 inspectorate approximately for 15 000 employees. Based on the data of Labour Inspectorate there are 55 inspectors but this number includes also 17 inspector-lawyers. Amount of the tasks labour inspectors have to fulfill is increased by the number of inspectors has been remained unchangeable.

Even for such a small state like Estonia the number of inspectors is not enough for sufficient supervision. This has raised even a question of conflict of interests as some inspectors acted as trainers in the companies. The situation is problematic because additional tasks can obstacle the performance of the main tasks. Though it seems to be welcomed that competent officials deliver their knowledge, then the contribution to his/her main labour tasks can be diminished. Includingly, "selling" the knowledge collected from the position in a public service to the private companies can cause the conflict of interests. Situation reflected the deficit in a labour market: insufficient number of competent trainers. Certainly a person who is experienced in supervision can better turn attention to the mistakes in the field. But, in such cases there should be specific officials whose main task is training and additional task supervision. Still, a question remains whether such inspector is wholly dedicated to the supervision? Those inspectors who are seriously interested in schooling should be relocated to work as a labour inspector but as a training provider and then they are not inspectors any more. As a solution, in 2014 was started a workplace consulting services which meant that an enterpreuner could invite into its entity a consultant of Labour Inspectorate and consultant will advice the questions of working conditions. In 2014 61 enterpreuners used the service. According to the Labour Inspectorate 2395 working places became safer by this new tool.³⁵

33 Tööinspektsioon. *Töökeskkonna ülevaade 2014* (Review of the surveillance of the occupational health and safety), pp. 10–11. [Online]. Available at: <www.ti.ee/fileadmin/user_upload/failid/dokumendid/Meedia_ja_statistika/Toeokeskkonna_uelevaad/2014/2014_toeokeskkonna_uelevaade_A4_web_13042015.pdf>.

34 ILO calls for strengthening labour inspection worldwide. [Online]. Available at: <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_077633/lang-en/index.htm>.

35 Tööinspektsioon. *Töökeskkonna ülevaade 2014* (Review of the surveillance of the occu-

Art 12 of the convention allows labour inspector to enter the controlled entity in a day-time and in the night with no previous warning. According to Estonian law labour inspector can visit entities only at the working time or with an attendance of the owner of the entity. Also, Estonian labour inspectors can demand the application of the appropriate measures to rectify the deficiencies which can danger the OSH of the employees. Art 16 of the convention provides that the entities should be controlled as often and properly as useful to ensure the following of the legal norms. Estonian law does not regulate how often entities should be inspected. Labour inspectorate has its own working plan for this.

Art 17 of the convention gives an inspector the right to decide whether to turn to the court with the case. In Estonia it is a rare practice that labour inspector decides to turn to the court. Also, based on the review of the working conditions³⁶ the percentage of the follow-up control has been falled year by year because the employer fulfills the obligations provided by the inspectors better and better. However, there are some obligations employers cannot manage with: organisation of health control³⁷ and internal control³⁸. State works upon the problem, but again the problem is on the one hand insufficient human resource in Labour Inspectorate: employers need teaching because the rules they have to follow are in so many different legal acts and quite complicated to understand. Estonian labour market can be desribed as a lot of small entities acting as employers and they are not financially capable to hire well-qualified OSH experts. The fact is that the deficiencies in organisation of health control and internal control exist not because of the negligence or even intent but the lack of knowledge.

5 Exceptional labour relations and occupational health and safety control

As mentioned above the fast development of technology has brought along new labour relations. This means that aside traditional labour relations exist also exceptional work formats. Most common is distance work and domestic work. Cho states that non-traditional work formats are one of the main problems in labour law because they cause instability and inequality and allow an employer to avoid the obligations derived from the law.³⁹ Supervision over exceptional work formats is different from the traditional work and certainly more complicated as in the supervision process one must consider specific aspects, e.g. inviolability of the home, constantly changing working place etc.

pational health and safety), pp. 10–11. [Online]. Available at: <www.ti.ee/fileadmin/user_upload/failid/dokumendid/Meedia_ja_statistika/Toeokeskkonna_uelevaat-ed/2014/2014_toeokeskkonna_uelevaade_A4_web_13042015.pdf>.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 CHO, Kyungbae. Legal Problems and Assignments of Non-Standard Workers. *Journal of Korean Law*, 2002, 2 (2), pp. 111–134, p. 111.

Distance work has many definitions. In general distance work can be described as a work made in a place which is far away from the undertaking and with the result that an employee has no direct contact with colleagues, but still has an opportunity to contact them via internet or else.⁴⁰ Estonian Employment Contract Act⁴¹ defines distance work as a work done by the employment contract but outside the undertaking of the employer (§ 6 lg 4). In Estonian law distance work is not related only to the use of IT tools which means that distance work can cover also the work just made outside the undertaking. The idea of the regulation is to ensure the same working conditions for those employees who work in different places. However, regulation does not give clear rules for labour inspector nor employer, also does not provide the rights and obligations of employer related to working environment, working conditions, and responsibility.⁴² Also, ILO conventions and EU council directives do not provide specific rules for non-traditional labour conditions.

Legal literature distinguishes distance work from home workers. Home workers are those who make traditional handwork, who lack of special skills and their salary is poor and depends often from the amount and quality they do while distance workers are employees who have special skills and use IT in their every day work. However, such distinguishing has caused problems, especially in ensuring the equal treatment for distance workers and home workers.⁴³ Employees, despite their skills, working place or way of working should be treated the same. Some types of work e.g. moving work is more complicated to match OSH requirements and it is not easy to supervise them but it is important not to forget that all employees should be treated equally. Every type of work has specific requirements to be followed by the employer and employee. Some requirements are less strict than the others but all in all it is important to follow them. However, the main principle is that it must be possible to control the welfare and health of the employee.

Supervision is not always easy to perform. For example, when an employee makes distance work at home. According to the Estonian Constitution⁴⁴ the home is inviolable: no one's dwelling or other premises lawfully occupied by him or her, or his or her workplace may not be forcibly entered or searched, except in the cases and pursuant to the procedure provided by the law to protect public order, public health or the rights and freedoms of others, to prevent a criminal

40 DI MARTINO, Vittorio, WIRTH, Linda. Telework: A New Way of Working and Living. *International Labour Review* 1990, 129 (5), pp. 529–554, p. 530.

41 Estonian Employment Contract Act RT I 12.07.2014, 146.

42 KÜNNAPAS, Kaido. Kaugtöö aktuaalseid probleeme. *Juridica* 2014(4), pp. 279–290.

43 NEVENS, Koen. Home Work, Telework and the Regulation of Working Time: A Tale of (Partially) Similar Regulatory Needs, in Spite of Historically Rooted Conceptual Divergence. *International Journal of Comparative Labour Law and Industrial Relations*, 2010, 26 (2), pp. 193–216, p. 200.

44 Estonian Constitution RT I 15.05.2015, 2, § 33.

offence, to apprehend the offender, or to ascertain the truth in a criminal case. On the other hand employer is required to suspend an employee from work if he or she is under the influence of alcohol, narcotics or toxic or psychotropic substances.⁴⁵ Also, according to the paragraph 12 (1) of OSHA an employer must ensure the following of the occupational and health safety requirements in every situation provided by the law.

In a labour relation an employee is subordinated to the employer and employer is the one who performs the direct control over the employee. Labour inspectorate has the right to control the trim of the tools and the following of the working requirements provided by the law.⁴⁶

Now there is a situation where on the one hand control over the working place is required but on the other hand it is excluded. This shifts the control over the working conditions in the background because of the inviolability of the home. How to solve a situation? One solution can be the exchange of the information: an employer informs employee about the requirements of OSH and the risks derived from them, and an employee organises his/her working environment according to the requirements. In other words, an employer delegates the responsibility to the employee. However, though it is understandable that in a such situation an employer cannot be responsible because he/she cannot control whether the instructions are followed by the employee, and employer does not know all the risks employee can have at home. But in a civil law countries where disputes are solved strictly based on a written norm, it would not be sure that an employer would be released from the responsibility when an accident happens with an employee even when it is proved that an employer has informed employee but employee did not match the working conditions according to the law. As long as the mutual responsibility of OSH concerned the distance work is not clear, the main principle that an employer is responsible, applies. But it is strongly disputable in exceptional labour relations.

In some states, e.g. France and Italy, law provides that it is an employer's responsibility to control whether working conditions of distance workers conform to the OSH requirements. In Hungary the OSH requirements are applicable for distance work only when an employee uses the tools of employer.⁴⁷ Both solution provide who is responsible but do not specify how to perform supervision.

According to Estonian law employer has an obligation to give the employee the tools to work – not only IT tools but also a working desk, chair, lamp etc. In distance work it is disputable whether an employer has to buy and set these tools

45 Estonian Occupational and Health Safety Act. RT I 10.11.2015, § 13(1.15).

46 TAVITS, Gabriel. Kaugtöö ja töösuhete reguleerimine. *Juridica*, 2000(2), pp. 93–99, p. 97.

47 RAMOS MARTIN, Nuria., VISSER, Jelle. A More 'Autonomous' European Social Dialogue: The Implementation of the Framework Agreement on Telework. *International Journal of Comparative Labour Law and Industrial Relations*, 2008, 24 (4), pp. 511–548, p. 540.

especially considering other requirements like light and heat etc. in employee's home. When in general in Estonia employer's responsibility is to design and furnish a workplace such that it is possible to avoid occupational accidents and damage to health and to maintain an employee's work-ability and well-being,⁴⁸ then it would be complicated to accomplish this at employee's home.

In distance work an employee designs and furnishes a workplace him/her-self. In case of not following the requirements it is not easy to determine who is responsible – an employer or employee? Another option is that in distance work the requirements should not be applied at all. When thinking as an example about a mother having a baby and working at home, then toys on a floor should not be considered as a danger, it should be employee's responsibility how secure is the workplace. But when the wire of the IT tool given by the employer is broken and can cause a fire then there is another situation. An employee should immediately inform the employer and employer must fix the problem as soon as possible because it is employer's responsibility to control the equipments given for a distance worker to use, regularly. However, when a working place the distance work is made, is hundreds of kilometers away, it could be an additional burden and maybe even unreasonable expense for the employer to fix the problem.

Another problem is domestic work. Domestic work means that an employee works in someone else's household.⁴⁹ Domestic helpers are often left outside the protection of labour law because they do not make traditional work. As a result they suffer of poor working conditions.⁵⁰ Not the persons who hire them nor the workers themselves do not take their work as an employment contract and hence do not know their mutual rights and obligations.⁵¹

To protect domestic workers ILO has enforced in 2013 a convention concerning decent work for domestic workers⁵² providing working requirements for domestic workers. According to the art 1 of the convention a domestic worker is any person engaged in domestic work within an employment relationship. Estonia has not ratified this convention but domestic work is widely spread. As in Estonia there is a trend to use other than labour contracts for such works the

48 Estonian Occupational and Health Safety Act. RT I 10.11.2015, § 4 (2).

49 ILO. *Domestic workers across the world: global and regional statistics and the extent of legal protection*. Geneva, ILO 2013, p. 7. [Online]. Available at: < www.ilo.org/wcmsp5/groups/public/-/-dgreports/-/-dcomm/-/-publ/documents/publication/wcms_173363.pdf >.

50 TOMEI, Manuela., BELSER, Patrick. New ILO Standards on Decent Work for Domestic Workers: A Summary of the Issues and Discussions. *International Labour Review*, 2011, 450 (3–4), pp. 235–264, p. 431.

51 OELZ, Martin. The ILO's Domestic Workers Convention and Recommendation: A Window of Opportunity for Social Justice. *International Labour Review*, 2014, 153 (1), pp. 143–173, p. 145.

52 *Domestic Workers Convention*, 2011 (No. 189) (Convention concerning Decent Work for Domestic Workers). [Online]. Available at: < www.ilo.org/dyn/normlex/en/f?p=NORML_EXPUB:12100:0::NO::P12100_ILO_CODE:C189 >.

OSH requirements are not obliged to follow. However, in case of dispute too often such contracts are considered as labour contracts. As disputes arise mainly when an injury has already occurred it is not possible to prevent the situation by the rights and obligations of the employer and employee derived from the labour contract. It is so because such contract has not been made and the rules derived from the law for labour contract are not followed. Even when an employee works through the cleaning company and has a labour contract it is complicated to follow the employer's obligation to ensure the OSH requirements for the employee. Also, the right of labour inspectorate to enter into the working places to control is disputable.

It is often forgotten that working in someone's own home can become in one moment a working relationship. In principle Estonian labour law provides that working in one's household is not considered as labour contract meaning common everyday work in household and for the benefit of the family. But when the household is mixed with entrepreneurship, e.g. a farm and children or spouses work there to bring income for the parent or spouse, then such working relationship has become a labour relationship and all the requirements of OSH should be applied. Certainly it is rather complicated to draw a line between working in a household for a family and for income, as it has been considered as private matter and hence it is also complicated to supervise the relations.⁵³

OHSA obligates an employer to perform systematic internal control over working conditions by organising and supervising whether the OHR follows the rules provided by the law. Internal control means cooperation between employees and bases on a risk analyze.⁵⁴ Sieger defines internal control as a systematic activity designed to ensure the planning of all the performances of the company: organisation, administration and control based on a regulation of OHS.⁵⁵ In Estonia the results of internal control are presented to the Environment Council who's duty is to give a feedback to the internal control. Environment Council has also an authority to demand the elimination of shortcomings.

As a tool internal control and risk analyse should avoid the lawbreaking and facilitate by this the inspection. Unfortunately, risk analyses and internal control have been made often too superficially. So the idea that profound risk analyse gives a review of the risks and an opportunity to improve the situation without the intervention of the labour inspectors, has not been carried out. Includingly, risk analyse should facilitate the task of labour inspectors as they get a set of information about the problems of the entity.

53 See RODRIGUEZ, Ricardo. Study on Child Labour and Protection of Young Workers in the European Union – final report, p. 21. [Online]. Available at: <www.ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=209>.

54 TTOS RT I, 10.11.2015, § 13(1.1).

55 SIEGER, Argo. *Töökeskonna ohutegurid ja riskianalüüs*. Tallinn, Teabekirjanduse OÜ 2006, p. 126.

However, insufficient risk analyses do not meet the objective. It is complicated to assume whether the reason of insufficiency comes from the conscious infringement or inability. When the last one should be improved by teaching and informing then the first one leads to the need of punishment.

It appears that the implementation of occupational and health safety rules provided by a state are not easy to follow in exceptional labour relations. The reason is not unintentionance of an employer to ensure an employee with provided conditions but the insufficient regulation as it is not clear what are the exact rights and obligations of both parties – an employer and employee. Even more, it is not clear what are the rights of the labour inspector to enter the home of the employee.

6 Conclusion

Conventions no 81 and 129 provide the rights and prohibitions for labour inspectors and demands a Member State to ensure sufficient high quality system to support inspectors but also employees and employers in connection with OSH. Also, European Council directives regulate OSH. Most important of them is OSH Framework Directive 89/391/EEC providing the minimum requirement for OSH mainly through the responsibilities of employer and employee.

This article analysed whether the reason for the increase of the number of occupational accidents derive from the non-following the rules and principles provided by the convention no 81 and 129.

Though in principle Estonian OSH law conforms the conventions and European Council directives there are some deficiencies discussed in an article. Discussions show that cooperation between the agencies should be based on certain written agreements to provide clarity. Insufficient number of advisers on OSH lead to the situation where labour inspectors acted as trainers in the entities which they inspected. This caused the conflict of interests. However, the situation was solved by introducing the instrument of consultant of Labour Inspectorate. Similarly to other states also in Estonia there is a shortage of labour inspectors and advisers on OSH. Though the regulations and obligations do exist there is a lack of persons with certain knowledge to understand them or teach them to the others. One reason for this is too big amount of the rules apart in different legal acts. The result is weak internal control and risk analyse in the entities. As the development of labour relations have created exceptional labour relations then the existing rules for OSH needs adoption to those new relations. As an example, article discussed briefly two exceptional labour relations – distance work and domestic work. Analyse showed that based on a legal regulation it is not evident who should be responsible for OSH and in what extent in such non-traditional relations – an employer or employee. Also, the rights an inspector has can collide with the rights employer or employee has impeding the inspection.

To conclude, though the area of OSH improves, it needs a continuous development considering more seriously the development of labour relations.