A trainee's right to a wage: the Estonian situation with comparative insights from Slovenia, the United States of America and Finland

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I. INTRODUCTION

In 2012 the European Commission conducted a study on traineeship arrangements in the Member States (MS) of the European Union (EU).[1] One of the main concerns identified by the study was the lack of compensation or low pay and the prospect of the exploitation of trainees in the labour market.[2] Using trainees as cheap or free labour is not the exclusive problem of the EU; the growing number of unpaid interns[3] in the United States of America (US) has also generated discussion about an intern's right to remuneration.[4] Additionally, the International Labour Organization (ILO) has expressed its concern about the use of apprenticeships, internships and other work experience schemes as a way of obtaining cheap labour.[5] Traineeships are turning into a new form of precarious work instead of being a learning experience.

The question of a trainee's right to a wage is important not only for the trainee by influencing her or his day-to-day subsistence and social security, but also from the viewpoint of the overall functioning of the labour market. Using unpaid trainees enables employers to reduce or avoid labour costs, and they choose to retain the trainees instead of hiring salaried workers.[6] Paid workers are thereby indirectly replaced or not

1 European Commission, 'Study on a comprehensive overview on traineeship arrangements in Member States', 2012, available at http://ec.europa.eu/social/BlobServlet?docId=7754&langId=en, last accessed 21.10.2015.

2 'Analytical document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Commission, 'Towards a Quality Framework on Traineeships', 2012, available at http://www.adapt.it/englishbulletin/docs/comm_analytical_paper.pdf, last accessed 21.10.2015, 17.

3 In the US, the term 'intern' is used in a similar meaning as a 'trainee' in Europe.

4 See *eg* R. Perlin, *Intern Nation. How to Earn Nothing and Learn Little in the Brave New Economy*. (Verso, Brooklyn, 2012).

5 ILO, 'The Youth Employment Crisis: Time for Action. Resolution and conclusions of the 101st Session of the International Labour Conference', 2012, available at http://pdf-save.rhcloud.com/tag/the-youth-employment-crisis-time-for-action, last accessed 21.10.2015, 7.

6 D.L. Gregory, 'The Problematic Employment Dynamics of Student Internships', (1998) 12 *Notre Dame Journal of Law, Ethics & Public Policy*, 227-264.

hired in the first place.[7] Because of the reduction in employment positions, the number of unemployed people increases and the entrance of young people into the labour market becomes even more difficult.

From a legal point of view the question of a trainee's right to a wage is complicated because of the uncertain labour law status of a trainee. In our previous study we analysed the labour law status of a trainee in Estonia, Finland, France and the US and concluded that usually trainees are subordinated to the employer and should, according to traditional characteristics of a labour relationship, be regarded as employees.[8] However, the legislatures and the courts in the studied states do not always categorise trainees as employees. The main reason for that seems to be the unwillingness to pay a trainee a wage if the traineeship is regarded as a period of studying. Hence, certain traineeships are exempted from the labour law legislation. The result of this practice is that a trainee is not only left without wage, but also without other labour law protection.

The aim of this paper is to answer the question of whether and under which conditions a trainee should be entitled to a wage in Estonia. The preconditions of receiving a wage in a labour relationship are analysed and it is determined whether a trainee's work fits into this setting. The answer to this question and the further analysis of the modes of payment of a wage will enable us to conclude whether one of the most important conditions of a labour relationship – the wage – is incompatible with the essence of a traineeship or whether it can be customised with the special characteristics of a traineeship.

The research question is answered by analysing and comparing the provisions of Estonian, Slovenian, US and Finnish law. Examples are given of the conditions of generally applicable collective agreements in Finland. Additionally, the decisions of national courts, Estonian labour dispute committees (LDC) and the Finnish Labour Advisory Board (TN) are analysed. The ILO regulation concerning wages is also analysed.

For comparison the legal regulation of Slovenia has been chosen as an example of a regulation in which certain traineeships are regulated inside labour law as special types of labour contracts. The legal regulation of the US has been chosen because of the existing extensive court practice dealing with the question of a trainee's right to a wage. Finnish regulation as an example of a highly protective regulation through collective agreements is analysed in order to determine the possibilities of regulating trainees' wages at a collective level.

The article discusses only the legal status of trainees in a strict sense. Apprentices are exempted from the discussion because of their somewhat unique nature. Three types of traineeships are analysed: traineeships forming an optional or compulsory part of academic or vocational curricula; traineeships as part of active labour market policies (ALMP) and traineeships on the open market, generally after completion of studies.

The paper consists of three parts. First, the definition of wage is given for the purposes of opening up the preconditions of receiving a wage and the modes of payment of a wage. Second, the preconditions of receiving a wage are analysed from the viewpoint

7 J.L. Curiale, 'America´s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Need for Urgent Change', (2010) 61 *Hastings Law Journal*, 1531-1560.

8 A. Rosin & M. Muda, 'Labour Law Status of a Trainee: The Estonian Situation with Comparative Insights from Finland, France and the US', (2013) 4 *European Labour Law Journal*, 292-312.

of a trainee. It is discussed whether a trainee performs work during the traineeship, whether she or he is expecting compensation for the work and whether the beneficial outcome of a trainee's work becomes the property of the employer. Third, it is discussed in which mode and which amount a trainee should be paid. The possibility of payment in non-monetary values is analysed and the amount of a trainee's wage in the case of monetary payment is discussed.

II. THE DEFINITION OF WAGE AND MODES OF PAYMENT

The ILO defines wage as remuneration capable of being expressed in monetary terms and fixed by mutual agreement or by national regulations, which are payable in virtue of a contract of employment by an employer to an employee for work done or to be done or for services rendered or to be rendered.[9] National regulations may authorise the partial payment of wages in the form of allowances in kind in industries in which payment in the form of such allowances is customary.[10] According to the ILO's definition, a wage is usually paid in an employment relationship in return for work done and in values that can be expressed in monetary terms.

In Estonian law, wage is defined as the agreed remuneration payable for the work, including remuneration payable for economic performance and transactions.[11] A wage is paid in an employment relationship in return for the work done.[12] Similar is the definition of wage in Slovenia,[13] the US[14] and Finland.[15]

In Estonia wage can be paid only in money.[16] Although the Employment Contracts Act (*TLS*) envisages the parties' right to agree on the granting of other benefits, these benefits are not considered wage.[17] The authors of the act explain this differentiation with the need to protect the employee's right to health and retirement benefits that would be reduced if the wage was paid in other values.[18] The reasoning given for the *TLS* mainly concerns taxation. An employee's health and retirement benefits depend on the amount of social tax paid for her or his wage. If a wage is paid in values other than money, the monetary value of these benefits should be determined and social tax should be paid according to this value. Although the determination of taxable income

9 International Labour Organization Convention concerning the Protection of Wages C95, 1 July 1949, available at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C095, last accessed 21.10.2015, Article 1.

10 *Ibid*, Article 4.

11 *Töölepingu seadus* [Estonian Employment Contracts Act], passed on 17.12.2008, RT I 2009, 5, 35; RT I, 10.02.2012, 1, available at http://www.legaltext.ee/text/en/XXXX060K2.htm, last accessed 21.10.2015, Section 5(1).

12 *Ibid*, Section 1(1).

13 Slovenian Employment Relationships Act, passed on 5.03.2013, available at http://www.mddsz.gov.si/en/legislation/, last accessed 21.10.2015, Section 4(1).

14 26 U.S.C. § 3401(a).

15 *Työsopimuslaki* [Finnish Employment Contracts Act], passed on 26.01.2001, available at http://www.finlex.fi/fi/laki/ajantasa/2001/20010055?search[type]=pika&search[pika]=ty%C3%B6sopimuslaki, last accessed 21.10.2015, Chapter 1, Section 1.

16 *Töölepingu seadus*, Section 29(3).

17 *Töölepingu seadus*, Section 29(4); E. Käärats *et al*, *Töölepingu Seadus. Selgitused Töölepingu Seaduse Juurde* (Juura, Tallinn, 2013), 71.

18 'Töölepingu seaduse seletuskiri', available at http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=353198&u=20140402135422, last accessed 21.10.2015, 31.

would be more complicated, allowing payment in kind would not necessarily reduce an employee's health and retirement benefits. Additionally, the payment of a wage in other values is not unknown in Estonian legal regulation. According to the authentic text of the Wages Act,[19] upon the agreement of employee and employer a wage could also be paid as payment in kind (in product, compensation, bonds or services).[20] With the amendment of the act on 16 May 2001 the right to pay a non-monetary wage was abolished.[21] It was explained that payment in kind was not used in practice and would restrict an employee's right to decide how to use the wage.[22] We believe that the reasoning of the amendment is not convincing.

In the states of comparison, the payment in money only is envisaged in Slovenia.[23] In the US and in Finland other modes of payment can be used. In the US federal law the payment of a wage is regulated in the Fair Labor Standards Act (FLSA).[24] According to the regulation of the US Department of Labor (DOL), the FLSA enables the payment of a wage in cash or negotiable instrument payable at par or in other facilities.[25] 'Other facilities' envisaged must be something like board or lodging.[26] So, in the US a wage can be paid in money or other material goods. In Finland the modes of payment are regulated even more broadly. A wage can be paid in money, goods or benefits that have economic value to the employee.[27] Usually the payment is made in money, but the parties can agree on the payment of a wage in goods or other benefits.[28] Reciprocal work and the obtainment of education can also be regarded as a wage.[29]

Compared to the other analysed states, Estonian law is one of the most restrictive by enabling payment for work in money only. Although the initial idea of restricting the modes of payment was to protect employees, the actual effect may be adverse. Demanding the payment of a wage only in money may lead the employers to the conclusion of other contracts instead of labour contracts if non-monetary modes of payment are used and may result in the deprivation of other labour rights from the worker as well.

III. THE PRECONDITIONS OF A TRAINEE'S RIGHT TO A WAGE

In the studied states three common preconditions of receiving a wage can be defined. First, a wage is paid for the performance of work; second, the work is performed

19 *Palgaseadus* [Estonian Wages Act], passed on 10.02.1994, RT I 1994, 11, 154, available at https://www.riigiteataja.ee/akt/28642, last accessed 21.10.2015, Section 5(1).

20 *Ibid*, Section 6.

21 *Palgaseaduse muutmise seadus* [Amendment Act of the Wages Act], passed on 16.05.2001, RT I 2001, 50, 287, available at http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=010380002, last accessed 21.10.2015.

22 'Seletuskiri palgaseaduse muutmise seaduse eelnõu juurde', available at http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=010380001, last accessed 21.10.2015.

23 Slovenian Employment Relationships Act, Section 126 (1).

24 29 U.S.C. §§ 201-219 (2006).

25 29 C.F.R. § 531.27.

26 29 C.F.R. § 531.32.

27 J. Paanetoja, 'Työsuhteista Työtä vai Työtoimintaa? Tutkimus Vajaakuntoisen Tekemän Työn Oikeudellisesta Luonteesta', University of Helsinki, 2013, 152.

28 M. Kairinen, *Työoikeus perusteineen* (Työelämän Tietopalvelu OY, Masku, 2009), 387.

29 *Ibid*, 76.

with the expectation of compensation; and third, the economic outcome of the work belongs to the employer. Next, it will be analysed whether a trainee fulfils these preconditions in order to receive a wage.

A. Performance of work

As the definitions of wage describe, a wage is paid for the work done by an employee. The payment of a wage is the employer's counter-performance for the employee's services. In order to determine whether a trainee has a right to a wage, it is important to determine whether work is performed.

a. A trainee's work versus an employee's work

In Estonia a traineeship is defined in the Vocational Education Institutions Act (*KutÕS*) as work performed within the framework of the curriculum in the work environment under the supervision of an instructor with specific study objectives;[30] in the Standard of Higher Education as a targeted activity for the attainment of educational aims through the application of attained knowledge and skills in the work environment under the supervision of an instructor in the form determined by the educational institution;[31] and in the Labour Market Services and Benefits Act (*TTTS*) as a labour market service for gaining practical experience provided to unemployed persons by employers with the aim to improve the knowledge and skills needed for the employment of the unemployed persons.[32] According to the definitions, the performance of work is explicitly envisaged in the case of vocational education trainees.

The legislature has avoided using the word 'work' in the case of higher education and ALMP trainees, which raises the question whether in these cases a trainee performs work similar to an employee, which entitles her or him to receive a wage. The same question arises in Slovenia, where the legislature envisages the possibility of secondary school and university students to perform practical education with an employer within the framework of educational programmes.[33] Although Estonian courts have not dealt with this question, we can find some help on the issue from the administrative and court practice of the US.

In the US, the DOL has created a six-part test[34] to determine whether interns can remain unpaid. According to the DOL, *'an intern does not perform the routine work of the business*

30 *Kutseõppeasutuse seadus* [Estonian Vocational Education Institutions Act], passed on 12.06.2013, RT I, 02.07.2013, 1, RT I, 22.12.2013, 2, available at https://www.riigiteataja.ee/en/eli/505022014002/consolide, last accessed 21.10.2015, Section 30(1).

31 Statute of the Government No 178 'Kõrgharidusstandard', passed on 18.12.2008, RT I 2008, 57, 322; RT I, 22.02.2012, 8; Section 5(3).

32 *Tööturuteenuste ja toetuste seadus* [Estonian Labour Market Services and Benefits Act], passed on 28.09.2005, RT I 2005, 54, 430; RT I, 10.02.2012, 8, available at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/528042014001/consolide, last accessed 21.10.2015, Section 15(1).

33 Slovenian Employment Relationships Act, Section 214 (6), (7).

34 According to this test the interns can remain unpaid if the internship satisfies the following requirements: *'the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in an educational environment; the internship experience is for the benefit of the intern; the intern does not displace regular employees, but works under close observation; the employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded; the intern*

on a regular and recurring basis, and the business is not dependent upon the work of the intern.'[35] The DOL does not prohibit work during the internship, but it states that interns should not perform routine work as employees. We can notice the DOL's attempt to offset an intern's right to a wage by claiming that the intern does not work in the same way as an employee. The Supreme Court, though, finds in *Walling* that the trainees do work in the kind of activities covered by the FLSA.[36] To say it another way, the trainees perform work similar to employees. We find the opinion of the Supreme Court to be more realistic compared to the DOL's. It would be difficult to define what routine work is and differentiate between the work performed by employees and the work performed by interns on that basis. Denying a trainee's right to a wage with this reasoning would be artificial and questionable.

In Estonia, also, it would be difficult to claim that the '*targeted activity for the attainment of educational aims through the application of attained knowledge and skills*' in higher education or the '*gaining of practical experience*' as a part of the ALMP would be something different compared to ordinary work performed by an employee. Using a different word to mark the same action should not be a basis for denying a trainee her or his right to a wage. As a conclusion, it can be stated that not only vocational education trainees, but also higher education and ALMP trainees perform work and fulfil the first precondition to receive a wage. In the Estonian labour market a form of open-market traineeship – 'testing days'[37] – is also used. The LDCs have found that Estonian law does not foresee the use of 'testing days' and if the employer permits the employee to work, a labour contract is concluded.[38] So, the LDCs admit that open-market trainees perform the same work as employees.

b. Performance of work and the explicit exemption of trainees from labour laws

Apart from open-market trainees that are entitled to a wage from their first day of working, other trainees in Estonia do not receive a wage. The first and most radical exemption is made in case of ALMP trainees. ALMP trainees in Estonia are exempted from the scope of labour law, which means that regardless of their working, they are not entitled to a wage. This exemption may be reasoned from the administrative point of view – it would be difficult to preserve the status of unemployment if the unemployed are treated as employees during the traineeship carried out in the framework of the ALMP. On the other hand, the legislature has not taken into account the influence of that exemption to labour law. If the existence of a labour relationship is determined on the basis of the performance of work by the employee in subordination to the employer,[39] the possibility to limit the scope of labour law by the act regulating unemployment services is questionable.

is not necessarily entitled to a job at the conclusion of the internship; the employer and the intern understands that the intern is not entitled to wages for the time spent in internship'. See United States Department of Labor – Wage and Hour Division 'Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act', http://www.dol.gov/whd/regs/compliance/whdfs71.htm, last accessed 21.10.2015.

35 *Ibid.*

36 Walling vs Portland Terminal Co., 330 U.S. 148, 152 (1947).

37 A period of work before the conclusion of a labour contract in order to give training and evaluate the suitability of the person to the vacant position.

38 LDC decision of 9 May 2012, No 4.2.-2/734, LDC decision of 28.03.2012, No 4.1.-2/398-2012.

39 *Töölepingu seadus*, Section 1 (1).

A similar exemption of trainees from the scope of labour laws can be detected in Finland and Slovenia. In Finland vocational education trainees are not entitled to a wage despite of their performance of work. The law states that vocational education trainees are not in a labour relationship unless they have agreed otherwise with the employer by concluding a labour contract.[40] Vocational education trainees' employee status and their right to a wage are denied only because they are vocational education students. In Finnish academic literature the explicit exemption of certain work arrangements from the scope of labour law has also been questioned. For example, Paanetoja has studied social working arrangements for disabled people and finds that it is not grounded to explicitly exempt some working relationships from the regulation of labour laws without even assessing whether the conditions of a labour relationship have been fulfilled.[41]

In Slovenia also the courts of the first and the second instance have found that the statuses of an employee and a student are mutually exclusive. The Supreme Court of Slovenia, however, has had a different opinion and has stated that the existence of a labour relationship should be determined according to the characteristics of the labour relationship and that the statuses of a student and an employee are not incompatible.[42] Therefore, students that work on the foundation of a student work referral should be regarded as employees and should be entitled to a wage. In practice, still, student work is treated as a special kind of contract work and the student's right to a wage is regulated differently compared to regular employees. On 1 February 2015 a minimum gross hourly rate of €4.5 for student workers was set.[43] This means that students do receive a wage, but are not fully protected by other labour law provisions. The main reason of treating student workers as non-employees seems to be the will to avoid other labour law protection, not the payment of a wage.

Although the performance of work by trainees cannot be denied, the legislature's attempt to offset their right to a wage by their explicit exemption from the scope of labour laws can be found in Estonia as well as in Finland. This kind of exemption is not, however, grounded from a labour law perspective. The scope of labour law in Estonia as well as in Finland is determined on the basis of the existence of a labour relationship. Other legal acts are not in a position to limit this scope if the existence of a labour relationship cannot be denied.

c. Performance of work and freedom of contract

According to the Estonian Vocational Educational Institutions Act a traineeship agreement is concluded to regulate the relations between the school, the student and the host institution if a traineeship is organised.[44] Although the existence of a labour relationship and a vocational education trainee's right to a wage is not explicitly denied, in practice trainees working under a traineeship agreement are not regarded as employees and are not entitled to a wage. Differently from Slovenia, where the work on

40 *Laki ammatillisesta koulutuksesta* [Finnish Vocational Education Act], passed on 21.08.1998, available at http://www.finlex.fi/fi/laki/ajantasa/1998/19980630, last accessed 21.10.2015, Section 16.

41 J. Paanetoja, 'Työsuhteista Työtä vai Työtoimintaa?', *op cit*, 248.

42 L. Tičar, 'Relationship between State Law, Collective Agreement and Individual Contract – Case of Slovenia', available at http://mta-pte.ajk.pte.hu/downloads/MTA-PTE_Labour_Law_Research-Luka_ABSTRACT.pdf, last accessed 21.10.2015.

43 Slovenia Times, 'New Student Work Provisions Step into Force', 1.02.2015.

44 *Kutseõppeasutuste seadus*, Section 30(3).

the foundation of a student work referral is remunerated, the work in Estonia under a traineeship agreement is not paid.

Here we can ask whether a trainee's signature on a traineeship agreement means that she or he has agreed to work in another relationship than a labour relationship and therefore has given up her or his right to a wage. For example, in Slovenia, the courts of first and the second instance have found that the conclusion of an agreement other than a labour contract between the student and the employer implies that there was not a labour relationship. The courts respected the parties' contractual intention to cooperate on the basis of a student referral, not on the basis of a labour contract.[45] In Estonia there is no court practice that deals with the differentiation between traineeship and labour contracts, but the LDCs and courts have distinguished between civil and labour agreements in the cases concerning bogus self-employment. Similarly compared to Slovenia, LDCs have found that the intention of the parties was to conclude a civil contract if the written document of the agreement was not titled as a labour contract, without analysing the existence of the characteristics of a labour relationship.[46]

However, the Supreme Court of Estonia, similarly to the Supreme Court of Slovenia,[47] has analysed the characteristics of a labour relationship in order to determine the existence of a labour relationship. The Estonian Supreme Court finds that in case the contract has the characteristics of a labour contract and the characteristics of another civil law contract, it is presumed that a labour contract was concluded, unless it is obvious that another civil law contract was concluded or unless the employer proves that a contract other than a labour contract had been concluded.[48] We share the opinion of the Supreme Court and find that the existence of a labour contract cannot be decided only on the basis of the title of the contract, but the characteristics of a labour relationship should be analysed. Otherwise, labour law itself loses its meaning. The main aim of labour law is to protect an employee as the weaker party of the labour relationship. Labour law starts from the presumption that the employee and the employer do not have equal bargaining power and therefore the employee needs more protection. In this context it is not grounded to presume that the employee is in a position to freely choose the type of the contract. Continuing from this conclusion to the issue concerning traineeships, we find that the same arguments apply. Therefore, the conclusion of a traineeship agreement does not exclude the existence of a labour contract if the conditions of a labour relationship are fulfilled. Regardless of the conclusion of a traineeship agreement a trainee should be entitled to a wage on the basis of her or his working in subordination to the employer.

It has now been proven that a trainee performs work in a manner that should entitle her or him to a wage and that the attempts to deny her or his right to a wage by exempting traineeships from the scope of labour laws or by emphasising the freedom to contract do not hold. Still, there are some exemptions to the payment of wage that derive from labour law itself. Labour law exempts from its scope voluntary work and independent provision of services. In order to differentiate paid work from voluntary work or independent provision of services, two conditions are used – the expectation

45 L. Tičar, 'Relationship between State Law, Collective Agreement and Individual Contract – case of Slovenia'.

46 LDC decision of 18.02.2013 No 4.4-1/157.

47 L. Tičar, 'Relationship between State Law, Collective Agreement and Individual Contract – case of Slovenia'.

48 Estonian Supreme Court, *Alexander Sinotov v. Intertakso OÜ*, Decision of 25 Jan. 2010.

of compensation and work for the benefit of the employer. These conditions have been used in the legislation and court practice of the studied states to determine also a trainee's right to a wage.

B. The expectation of compensation

The expectation of compensation is one of the most important conditions that enable the differentiation of paid work from volunteer work or from simple help. It would be unreasonable to force the payment of a wage in situations where the person's will is to work for free. In the case of traineeships, it has been claimed that trainees should not be entitled to a wage, because they are not expecting compensation for their work. In other words, they are working voluntarily.

a. The expectation of compensation determined by factual circumstances

In Estonia, according to the TLS, the existence of a labour contract is presumed if a person performs work which, under the circumstances, can be expected to be performed only for remuneration.[49] The authors of the TLS explain that the aim of this presumption is to help to differentiate a labour contract from other contracts. In the event of disagreement about the essence of the contract, the employer has to prove that the concluded contract was not a labour contract.[50] We propose that the TLS can be interpreted also in a way that the existence of a labour contract is presumed in distinguishing paid work from voluntary work. The TLS determines the condition of the expectation of compensation objectively, which means that if the facts indicate that the work was not done for a wage, the work qualifies as voluntary work and the worker is not entitled to a wage.

This condition is similar to conditions in US and Finnish law. In the US the Supreme Court found in *Alamo Foundation* that the expectation of compensation should be determined on the basis of economic reality. It should be determined whether the person must have expected compensation. The worker's denial of the expectation of compensation does not exclude the application of the FLSA.[51] In Finland the TSL also envisages the presumption of compensation: the TSL is applied even if there is no agreement on a wage if the facts indicate that the work was not intended to be performed without a wage.[52] It is assumed that work for a stranger is performed with the expectation of compensation. In the event of disagreement, it is the obligation of the employer to prove the opposite.[53]

As we already concluded, the work performed by a trainee does not differ from the work performed by an employee, and therefore, there are no objective circumstances that would enable us to presume that the work done by a trainee is meant to be done without receiving a wage. Hence, a trainee cannot be left without a wage because according to objective circumstances she or he was not expecting to be paid.

49 *Töölepingu seadus*, Section 1(2).
50 E. Käärats et al, *Töölepingu Seadus. Selgitused Töölepingu Seaduse Juurde* (Juura, Tallinn, 2013), 15.
51 Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985).
52 *Työsopimuslaki*, Chapter 1, Section 1.
53 S. Koskinen & H.-K. Öhman, 'Työsuhdetta, Korvattavaa Työtä vai Auttamista?', available at http://www.edilex.fi/lakikirjasto/2744.pdf, last accessed 21.10.2015.

b. Subjective expectation of compensation

Although the TLS in Estonia does not envisage the use of a trainee's subjective expectation of compensation as a precondition for her or his right to a wage, the acts regulating education and the provision of unemployment services emphasise that the aim of a traineeship is not to earn a wage, but to obtain skills and knowledge.[54] We will now turn again to the laws and practice of the US and Finland, in order to understand to what extent a trainee's subjective intention to receive a wage is important for her or his right to a wage.

In the US, according to the DOL, interns can remain unpaid if, among other things, the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[55] The DOL does not further explain this condition. The FLSA excludes from the category of employees: individuals who volunteer to perform services for a public agency if no compensation is paid, and the volunteers of private non-profit food banks, who receive the groceries from food banks.[56] Under that exception the DOL allows unpaid internships in the public sector and non-profit charitable organisations if the intern has no expectation of compensation.[57] It could be understood that an intern's right to a wage depends on her or his subjective expectation of compensation. In *Walling*, the Supreme Court found that the purpose of the FLSA was to ensure that the persons who did work in expectation of compensation should not sell their services for less than the minimum wage. The Court stated that the intention of the FLSA was not to cover the relationships where the person worked without a promise or expectation of compensation.[58] The Court emphasised the role of a person's subjective expectation of compensation in determining her or his right to pay.

In Finland the government's proposal for the TSL envisages that the work performed in a labour relationship should be performed with the aim of receiving compensation.[59] The TSL itself does not establish this condition. In the academic literature it has been argued that the criterion of expectation of compensation is subjective and difficult to evaluate. It has been proposed that instead of using this criterion as a separate condition of a labour relationship, the payment of a wage or the intention to pay should be taken into account.[60]

We can see that the use of a worker's subjective aim as a basis for determining her or his right to a wage has been questioned in Finland. In the US the exemption of public sector trainees from the scope of FLSA on this basis has also been criticised.[61] It can be

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54 See *Kutseõppeasutuste seadus*, Section 30(1); *Kõrgharidusstandard*, Section 5(3); *Tööturuteenuste ja –toetuste seadus*, Section 15(1).

55 United States Department of Labor – Wage and Hour Division, 'Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act', *op cit.*

56 29 U.S.C. §§ 203(e)(4); 203(e)(5).

57 United States Department of Labor – Wage and Hour Division, 'Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act', *op cit.*

58 US Supreme Court, Walling vs Portland Terminal Co.

59 'Hallituksen esitys Eduskunnalle työsopimuslaiksi ja eräiksi siihen liittyviksi laeiksi. HE 157/2000', available at http://www.finlex.fi/fi/esitykset/he/2000/20000157?search%5Btype%5D=pika&search%5Bpika%5D=HE%20157%2F2000#id195885, last accessed 21.10.2015.

60 J. Paanetoja, *Työsuhteista Työtä vai Työtoimintaa?*, *op cit.*, 192-193.

61 See *eg* K.A. Edwards & A. Hertel-Fernandez, 'Not-so-equal Protection. Reforming the Regulation of Student Internships', (2010) *Policy Memorandum. Economic Policy Institute*, http://www.epi.org/files/page/-/pdf/epi_pm_160.pdf, last accessed 21.10.2015.

concluded that the use of a worker's subjective aim to receive a wage as a precondition to her or his right to a wage is problematic. In agreeing that the person's subjective aim matters, we have to determine how to evaluate it. Even if a trainee has declared in writing that she or he has no expectation to compensation, we cannot prove that she or he has been free in forming this opinion. If a traineeship is an obligatory precondition of the obtainment of vocational or higher education, receiving unemployment benefits or entering the labour market, a trainee has no choice but to agree with working for free. In this sense, Estonian labour law that does not foresee the use of this criterion can be regarded clearer and more protective than the laws of the US and Finland. As in Estonia a trainee's subjective intention to earn a wage has no influence on her or his right to a wage, and in the US and in Finland using this criterion to distinguish between paid and voluntary work is problematic, it should not be a basis for denying a trainee's right to a wage. However, in this context the issues concerning the traineeships' aim and its influence on a trainee's right to a wage need to be discussed.

c. The expectation of compensation and the aim of traineeships

The definitions of traineeships in the KutÕS, the Standard of Higher Education and the TTTS envisage that the aim of working during traineeships is to attain or improve knowledge and skills.[62] It can be asked whether this different aim compared to a regular labour relationship exempts a trainee from receiving a wage.

This question has been discussed in Finnish TNs. In its decision 1041/78 the TN states that often work performed with the aim of receiving vocational training is regarded as work done in a labour relationship. This practice is customary in the case of apprenticeships and traineeships organised during summer or vacations. In other cases the legal nature of a traineeship should be decided on the basis of the meaning of work results for the employer.[63] Here, the TN does not demand that the aim of work during traineeships should be the receipt of compensation. On the contrary, in its decision 1195/86 the TN concluded that if the aim of the work is to improve young people's labour market position, no labour relationship is created.[64] The same has been the TN's position in its opinion letter 1235/1988.[65] In decision 17/93 the TN found that even if the aim of work is to provide the worker with work experience, it does not exclude the existence of a labour relationship.[66] It can be concluded that although in Finland the subjective expectation of compensation supports a trainee's right to a wage, working with the aim of learning does not exempt a trainee from receiving a wage.

Almost the same, but even more straightforward could be the conclusion in Estonia. As the TLS does not envisage the use of a worker's subjective intention to receive compensation as a precondition for the obtainment of a wage, a trainee's aim to receive skills and knowledge has no relevance in determining her or his right to a wage. If

62 See *Kutseõppeasutuste seadus*, Section 30(1); *Kõrgharidusstandard*, Section 5(3); *Tööturuteenuste ja –toetuste seadus*, Section 15(1).

63 *Työneuvoston päätös työaikalain ja vuosilomalain soveltamisesta autonkuljettaja A:han.* 4.05.1978.

64 *Työneuvoston päätös työturvallisuuslain ja nuorten työntekijäin suojelusta annetun lain soveltamisesta A: n suorittamaan työhön.* 15.09.1986.

65 *Työneuvoston lausunto työturvallisuuslain soveltamisesta työllisyysasetuksen (737/87) 11 ja 12 luvuissa tarkoitettujen henkilöiden suorittamaan työhön.* 24.11.1988.

66 *Työneuvoston päätös vuosilomalain soveltamisesta nuorten työllistämiskampanjan avulla työllistettäviin nuoriin.* 2.06.1993.

the work is performed in the same way as employees, a trainee should be entitled to a wage. Additionally, a trainee can have several purposes for working: she or he can expect to receive skills and knowledge, but the compensation as well. These two aims are not mutually exclusive.

C. Working for the benefit of the employer

According to Estonian law, the precondition of receiving a wage is performing work for the benefit of the employer.[67] In the context of traineeships we need to determine who can be regarded as the employer and which benefits can be taken into account.

a. Benefitting the host organisation or educational institution

In vocational education in Estonia traineeships can be carried out as a form of practical work in or outside an educational institution.[68] Higher education and ALMP trainees perform work only in a host institution. In order to receive a wage, a trainee has to benefit the employer. The determination of the employer is easier if a traineeship is organised outside an educational institution. Then a trainee is subordinated to the host organisation and on this basis, the host organisation can be regarded as the employer.

Problems arise if traineeships are carried out in vocational education institutions. Does the performance of work in subordination, and for the benefit of a vocational education institution entitle a trainee to receive a wage? This question has been dealt with in the US and in Finland. In the US, in *Solis*, the Court regarded students' contribution to the maintenance of the educational institution as a benefit received by the institution. If students are providing services for which the clients are paying the school, the school benefits from the students' work even though the finances are invested back into the school programmes.[69] On the contrary, in Finland the TN has exempted the traineeships that are organised in an educational institution from labour law regulation. The TN states that no labour relationship is created even if the educational institution benefits from the productive work of the trainee.[70]

In the context of Estonian labour law the US approach is more appropriate. The precondition of receiving a wage is the performance of work for the benefit of the employer. An employer can be either a natural or a legal person who obtains the employer status by receiving the benefits from the subordinate work of a natural person. The TLS does not foresee the exemption of certain legal bodies from the status of the employer. Therefore, there is no basis in Estonian labour law to offset a trainee's right to a wage because of her or his performance of work for the benefit of an educational institution.

b. Benefits received by the employer

The TLS does not specify which benefits the employer must receive in order to give a worker ground to claim a wage. In the context of traineeships it has been discussed

67 *Töölepingu seadus*, Section 1(1), 1(2).
68 *Kutseõppeasutuste seadus*, Section 30(2).
69 Solis v. Laurelbrook Sanitarium and School Inc., 642 F.3d 518 (6th Circuit 2011).
70 *Työneuvoston päätös työaikalain ja vuosilomalain soveltamisesta autonkuljettaja A:han*. 4.05.1978.

whether the employer must receive direct benefits from the work of a trainee or whether the indirect benefits also count.

In the US the DOL allows unpaid internships if, among other things, the employer derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded.[71] So, the precondition for an intern to receive a wage is that the employer receives the immediate economic benefit arising from the work performed during an internship. In the academic literature, however, it has been found that not only immediate advantage should be taken into account when determining an intern's right to a wage, but also the long-term advantage for the employer. It has been argued that even though an intern may not provide an immediate advantage to the employer, she or he can improve the employer's goodwill with clients, the community and universities, as a consequence of which the employer may receive economic benefit by a bigger client base. Also the use of unpaid interns helps the employer to avoid training costs for the employees.[72]

In Finland, only direct benefits received from the work of a trainee matter. The TN has found in its decision 1168/84 that if trainees have participated in the ordinary production process, they have done work for the benefit of the employer.[73] In decision 1041/78 the TN has distinguished between work performed for the benefit of the employer according to the curriculum and work performed in addition to this work. The TN admitted that the trainee worked for the benefit of the employer in both cases. However, it found that the work done according to the curriculum should not be regarded as work done in a labour relationship, but as compensation to the employer for the skills and knowledge received by the trainee. The additional work is done in a labour relationship.[74]

As according to Estonian labour law a wage is a counter-performance of a trainee's work, only direct benefits received from the work of a trainee matter. Although the existence of the above-mentioned indirect benefits cannot be denied, the employer should not pay a wage to the trainee if no immediate economic benefit from the trainee's work is received. Also, Estonian labour law makes no difference between benefits received by the employer from the trainee's work performed according to a curriculum and outside the curriculum. If the employer receives benefit from a trainee's work, a trainee should be entitled to a wage even if the work was performed according to an educational curriculum.

IV. CONDITIONS OF THE PAYMENT OF WAGE

After having determined that trainees fulfil the preconditions for receiving a wage and should be entitled to pay, we will continue discussing in which mode and which amount a trainee should be paid.

71 Ibid.

72 C. Durrant, 'To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships', (2013) 162 *University of Pennsylvania Law Review*, 169-202.

73 *Työneuvoston päätös vuosilomalain soveltamisesta vaatesuunnitteluopiskelijoihin A:han ja B:hen.*, 27.09.1984.

74 *Työneuvoston päätös työaikalain ja vuosilomalain soveltamisesta autonkuljettaja A:han.*, 4.05.1978.

A. Payment in non-monetary values

As discussed above, according to the ILO, a wage can be paid in values that can be expressed in terms of money. In the US the mode of payment of a wage is limited to money or material goods and in Estonia and in Slovenia only to money.

Finnish law, on the other hand, more widely interprets the meaning of wage and enables pay by reciprocal work or education. Regarding the acquisition of education as a wage is based on a Finnish Supreme Court decision of 17 December 1953. In this decision the Court regarded the trainee as an employee because he was working in subordination to the host company and was paid a wage in the form of practical skills and knowledge.[75] The Court did not specify further which skills and knowledge have to be obtained in order to offset a trainee's right to monetary compensation. Some help on this question can be found in the Finnish TN decisions about the benefits received by a trainee.

In its decision 1041-78, the TN found that a possibility to gain work experience benefits a trainee by enabling her or him to become familiarised with her or his future profession even if she or he performs very simple tasks and does not receive sufficient guidance.[76] On the contrary, in its decision 1168-84, the TN decided that gaining work experience alone is not sufficient to deny a trainee her or his right to a wage.[77] In report 1294/93, the TN states that organising traineeship in the framework of an educational programme does not exclude the existence of a labour relationship.[78] The TN's practice on what forms the benefit received by a trainee is inconsistent. Its opinion of whether the benefit received by a trainee should be gaining work experience or the obtaining of skills and knowledge seems to depend on the aim and type of the traineeship.

As generally work during a traineeship does not differ from work in a labour relationship, and a trainee fulfils the preconditions for receiving a wage, there is no logic for denying her or his right to a wage. Still, the courts, legislatures and administrators in the studied states seem to have a common opinion that a trainee's possibility to benefit from a traineeship by obtaining skills, knowledge and work experience should offset her or his right to a monetary wage. In Finnish law the legal preconditions exist to consider the acquisition of skills and knowledge as a wage. This precondition enables the retention of a labour relationship in the event of a traineeship with a trainee's right to other benefits evolving from the labour relationship, but without her or his right to a wage.

However, if skills and knowledge can be regarded as a wage, it should be possible to determine the value of the obtained skills and knowledge. As the payment of a wage is a counter-performance to the work performed by a trainee, a trainee's right to a monetary wage should be offset only if she or he receives benefits that are at least equal to the benefits of the employer received from the trainee's work. It is difficult to specify further the evaluation of the benefits received by a trainee and the employer. These should be evaluated and weighed on an *ad hoc* basis by a competent administra-

75 Finnish Supreme Court, Decision of 17.12.1953, KKO 1952 II 7.

76 *Työneuvoston päätös työaikalain ja vuosilomalain soveltamisesta autonkuljettaja A:han.*, 4.05.1978.

77 *Työneuvoston päätös vuosilomalain soveltamisesta vaatesuunnitteluopiskelijoihin A:han ja B:hen.*, 27.09.1984.

78 *Työneuvoston päätös vuosilomalain soveltamisesta nuorten työllistämiskampanjan avulla työllistettäviin nuoriin.* 2.06.1993.

tive organ before the traineeship (*eg* on the basis of a training programme that would specify the trainee's working tasks and the skills and knowledge that a trainee is entitled to receive) and by courts after the traineeship if a dispute arises. Yet, we note that regarding skills and knowledge as a wage should be well grounded and we should be precautious introducing this practice in order not to create a group of workers that can legally remain unpaid.

Broadening the modes of payment similar to those in Finland may be a solution to the legal difficulties concerning a trainee's right to a wage in Estonia. There is no established practice in Estonia concerning a trainee's right to a wage, and the modes of payment are regulated very strictly. The outcome of the existing strict wage regulation is that trainees are not paid at all and, because of the unwillingness to pay, they are not considered as employees, leaving them without other employee protection. Therefore, in Estonia the broadening of the modes of payment of a wage should be considered.[79]

B. Payment in money

If a wage is not paid or cannot be paid in non-monetary values, a trainee is entitled to a monetary wage. According to Estonian law, the amount of a wage is agreed upon in a labour contract. If no agreement can be defined, the wage rate specified in a collective agreement or the wage customarily paid for similar work under similar circumstances is paid. In any case the employer has to pay at least the minimum wage stipulated by the government (€2.34 per hour, €390 per month; effective since 1 January 2015).[80]

Differently from the regulation of Slovenia, the US and Finland, Estonian law does not provide for any possibilities to pay trainees less than a customary wage; and neither can a subminimum wage be paid. In Slovenia an open-market trainee is entitled to a wage that forms 70% of the customary wage; at least the minimum wage envisaged by the law must be paid.[81] In the US the FLSA enables the payment of a subminimum wage to learners, apprentices, messengers and full-time students under special certificates issued by the Secretary of Labor.[82] A learner is a worker who is being trained for an occupation for which skill, dexterity and judgement must be learned and who, when initially employed, produces little or nothing of value. A student-learner means a student who is receiving instruction in an accredited school, college or university and who is employed by an establishment on a part-time basis, pursuant to a bona fide vocational training programme.[83] Learners can be paid 95% and student-learners 75% of the minimum wage.[84] In Finland it is common to agree in collective agreements about the subminimum wages of trainees. For example, according to the technology industry's collective agreement, vocational education trainees under 18 years old are paid 86% of the employee's minimum wage.[85] In the trade sector's collective agree-

79 The authors of the paper understand that the payment of a wage in skills and knowledge can cause problems concerning the calculation of the average wage and holiday pay.

80 *Töölepingu seadus*, Section 29; Statute of the government No166, *Töötasu alammäära kehtestamine*, passed on 28.11.2013, RT I, 03.12.2013, 4.

81 Slovenian Employment Relationships Act, Section 140.

82 29 U.S.C. § 214.

83 29 C.F.R. § 520.300.

84 Ibid. §§ 520.408; 520.506.

85 'Teknologiateollisuus RYn ja Metallityöväen Liitto RYn välinen työehtosopimus 1.11.2013-31.10.2016', available at http://www.finlex.fi/data/tes/stes862-TT47Metalli1311.pdf, last

ment, new workers are defined as trainees and earn 85% of the minimum wage during their first year of work. Primary, high or vocational school pupils or students can earn 70% of the minimum wage.[86]

Two reasons for the use of lower wage rates in the case of traineeships can be detected. First, a trainee's need to obtain skills, knowledge and work experience; second, a trainee's smaller productivity compared to experienced workers. In this sense, the payment of a lower wage to trainees seems logical. Here, again, Estonian regulation is the strictest compared to the states of comparison by enabling the payment of a customary rate of wage only. It is questionable whether so strict regulation is justified. Understandably employers are not willing to pay trainees the same level of wage as they do regular employees. If there are no legal possibilities to pay a lower wage, the employers do not pay the trainees and claim that trainees are not employees or do not host trainees. In order to avoid these outcomes, the possibility to pay a lower wage than a customary rate to trainees should be stipulated in Estonian law. This provision would inform employers that trainees should be paid, and it would enable them to obtain cheaper workforce and motivate them to host trainees.

Still, when introducing this practice we should keep in mind the experiences of other states. In the US the payment of a subminimum wage to trainees is possible and allowed but very strictly regulated (learners can be paid a subminimum wage only if there are no available workforce and abnormal labour conditions, and their maximum hours of work are limited;[87] in the case of student-learners a bona fide vocational training programme and the need for special skills must exist, and also certain conditions to avoid the abuse of trainees must be fulfilled).[88] As a result, the employers cannot often fulfil the conditions for the payment of a subminimum wage and therefore they choose to use unpaid interns. According to Curiale, typical internships do not fit into the category of learners.[89]

In an Estonian context we need to avoid the mistakes made in the US by introducing the payment of a lower wage to trainees compared to a customary wage rate, but setting out too strict conditions for the use of that exemption. In our opinion, similarly to Slovenian regulation, the abuse of trainees as cheap labour could be avoided by limiting the duration of a traineeship and by the employer's obligation to provide a training programme, mentoring and evaluation to a trainee.[90] The payment of less than a customary rate of wage should not be dependent on the type of the traineeship.

V. CONCLUSION

The aim of this paper was to answer the question whether and under which conditions a trainee should be entitled to a wage according to Estonian law. In addition to the existence of a subordinate relationship between the employer and employee several prerequisites have to be fulfilled for receipt of a wage. The most important of these

accessed 21.10.2015, 55, 58 and 59.

86 'Kaupan työehtosopimus ja palkkaliite. 1.4.2012-30.4.2014', available at http://www.finlex.fi/data/tes/stes4864-PT50Kaupan1204.pdf, last accessed 21.10.2015, 35, 36, 40, 42 and 43.

87 29 C.F.R.§ 520.408.

88 29 C.F.R.§ 520.503.

89 J.L. Curiale, (2010) 61 *Hastings Law Journal*, 1552-1553.

90 Slovenian Employment Relationships Act, Section 121, 122.

conditions are the performance of work, the expectation of compensation and work for the benefit of the employer.

Trainees are usually regarded as subordinate to the employer. Still, the common practice is that trainees are not paid for their work. This contradiction raises a question of whether a trainee fulfils the other preconditions for receiving a wage. After analysing Estonian legal regulations and comparing these with the laws of Slovenia, the US and Finland, it can be concluded that trainees fulfil the conditions for receiving a wage. Although the legislatures, courts and governmental organisations in the studied states have tried to deny a trainee's right to a wage on several grounds, these grounds are not compatible with the existing labour law. Trainees usually perform productive work; we cannot deny their expectation to compensation even if they simultaneously expect to obtain skills and knowledge, and their work benefits the employer.

As the preconditions for receiving a wage are fulfilled, trainees should be eligible for a wage. Still, the argumentation of the courts, labour dispute committees and governmental organisations in the studied states reflects the understanding that the benefits received by a trainee in the form of skills and knowledge and the absence of working experience should somehow offset a trainee's right to a wage or reduce its amount. If there are no possibilities to solve this contradiction in the framework of labour law, the employee status of trainees is denied and trainees are left also without other labour law protection.

In the case of Estonia the broadening of the modes of payment of a wage similar to those in Finland may be a resolution to the legal difficulties concerning a trainee's right to a wage. A wage could be paid not only in monetary values or material goods, but also through education. Regarding the acquisition of skills and knowledge as a wage would enable traineeships to be regarded as labour relationships with a trainee's right to other benefits evolving from a labour relationship, but without her or his right to a monetary wage. To determine the value of obtained skills and knowledge, the already existing courts' and labour dispute committees' opinions concerning the benefit received by a trainee can be used. The benefit received by the trainee and by the employer should be evaluated and weighed on an *ad hoc* basis by a competent administrative organ before the traineeship (*eg* on the basis of a training programme that would specify a trainee's working tasks and skills and the knowledge that a trainee is entitled to receive) and/or by courts after the traineeship if a dispute arises. Yet, regarding skills and knowledge as a wage should be well grounded and introducing this practice should be precautious in order to avoid the creation of a group of workers that can legally remain unpaid.

Another possibility to solve the conflict between law in books and law in action would be the introduction of the payment of a lower rate of wage compared to a customary wage rate to trainees. This would first inform employers that trainees should be paid, and second, motivate them to host trainees. The conditions of the payment of lower wage to trainees should be sufficiently flexible to enable employers to use this possibility. The flexibilisation of wage regulation is a resolution to problems concerning a trainee's right to a wage in Estonia.