

THE ROLE OF CONTRACTUAL PRINCIPLES IN CONTEMPORARY EMPLOYMENT RELATIONSHIPS IN GERMANY: IS THERE A LESSON TO LEARN FOR SOUTH AFRICA? PART 2*

Marlize Ingrid van Jaarsveld
Blur LLB LLM LLD
Professor of Law
University of South Africa (UNISA)

SUMMARY

An employment contract is preceded by the conclusion of a valid contract between an employee and an employer. Prior to the commencement of an employment relationship the parties must be in agreement as regards the terms of their contract.

It was traditionally accepted that the parties entered into a contract in the hope of securing reciprocal advantages for themselves, and that the parties accordingly should be able to contract on the terms they desired. This argument lost momentum seeing that the employment relationship became even more curtailed by various statutory provisions.

Likewise, the contractual freedom of employers and employees alike to determine the terms of their contractual relationship has been limited in Germany by various enactments. The role and impact of traditional contractual principles as they present in contemporary employment relationships in Germany are explored in this article, ultimately to determine whether these principles remain significant at all.

It is established that these traditional contractual principles, emanating from an employment relationship, not only remain essential, but moreover continue to feature in contemporary employment relationships in Germany in a distinctive and unique way. Furthermore the ongoing interaction between these contractual principles and the provisions of statute is regarded as valuable for employment relationships in South Africa.

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1 CONTRACTUAL DUTIES OF AN EMPLOYER

1 1 Introduction

An employer's main contractual duty is to remunerate an employee.¹ A number of additional duties (*Nebenpflichten*) are imposed by German civil law, either due to the existence of a contract, or through the provisions of various statutes. Since an employment relationship is based on the existence of an obligatory relationship, two reciprocal duties, namely the duty of care and the duty to prevent harm, are applicable.² These contractual duties of an employer, emanating from the conclusion of a valid employment contract,³ are explored next.

1 2 Acceptance into employment and tasks

After the conclusion of an employment contract, an employee has a duty to work pursuant to the terms of the employment agreement. Some authors have noted that an employee must be provided with tasks because employment is viewed as representative of amusement, social interaction, promotion and self-validation of the employee.⁴ Other authors are of the opinion that the provision of tasks is compulsory based on the fundamental rights guaranteeing human dignity and the free development of one's personality.⁵

¹ S 611(1) of the *Bürgerliche Gesetzbuch (BGB) in der Fassung der Bekanntmachung vom 2. Januar 2002*; "the German Civil Code", refers to remuneration as *vereinbarten Vergütung*. The duty to pay remuneration has been referred to as "the main duty to pay comparable remuneration" (*Hauptpflicht der Zahlung der vereinbarten Vergütung*). See Hueck and Nipperdey *Lehrbuch des Arbeitsrechts Band I* 7. Auflage (1963) 262; Richardi "Begriff des Arbeitsrechts" in Beck-Texte *Arbeitsgesetze* 64. Auflage (2004) xx; and Steinmeyer and Waltermann *Casebook Zum Arbeitsrecht 2. überarbeitete Auflage* (2000) 51. Another view simply states that the core duty in an employment relationship amounts to work in exchange for remuneration. See Gotthardt *Arbeitsrecht nach der Schuldrechtsreform* (2002) par 8. The duty to employ the employee after the conclusion of the employment contract and the duty to pay remuneration are noted as main duties by some academics. See Hanau and Adomeit *Arbeitsrecht* 13. Auflage (2005) par 593; and Burgess *Contracts and Terms and Conditions of Employment Incomes Data Services* (1995) 140. Remuneration paid to an employee is sometimes referred to as *Arbeitsentgelts* which simply means remuneration is paid in exchange for performance. See Zöllner and Loritz *Arbeitsrecht Ein Studienbuch* 5. Neubearbeitete Auflage (2005) 185.

² When either one of the contractual parties in this contractual employment relationship, characterised by reciprocal obligations, disappoint the other's legal expectations, he is compelled to mend the consequential damages based on the contractual principle of *culpa in contrahendo*. This latter principle applies when one contractual party failed to comply with one of the legal duties that derived from the legal relationship existing between the contractual parties. See Hromadka and Maschmann *Arbeitsrecht Band 1 Individualarbeitsrecht* (1998) 103.

³ See Part 1 of this article where the requirements for the establishment of a valid contractual employment relationship are discussed.

⁴ Hanau and Adomeit par 722. This duty is referred to as a duty to employ and to work as agreed to (*Beschäftigungspflicht*).

⁵ Articles 1-2 of the *Grundgesetz für die Bundesrepublik Deutschland 23 Mai 1949*; "the German Constitution". Accordingly, an employer may not simply release an employee from work by continuing to pay remuneration because this conduct is viewed as non-compatible

Nonetheless, based on the general provision of the German Civil Code, it is generally accepted that as long as the employee is remunerated he could sit around idly without being provided with any work.⁶ There is an exception to this principle of the German Civil Code. When it is the interest of an employee to perform certain tasks, the employee obtains a legal right to insist on tasks based on an implied agreement to this effect.⁷ Should it be impossible for the employer to accept the offer of performance, the employee retains his entitlement to remuneration.⁸ An employer must exercise his contractual right to direct the tasks of his employee in a fair manner.⁹

with the right to human dignity, and the free development of the employee's personality. In the German context, the latter right includes the right to self-fulfilment of one's personality by working, which is in turn viewed as an essential element of the freedom to develop one's personality. See Gres and Jung *Handbook of the German Employment Law* (1983) 59; and Weiss "Fundamental Rights and Labour Law in Germany" in Blanpain (ed) *Labour Law, Human Rights and Social Justice* (2001) 193.

⁶ S 615 sentence 1 of the German Civil Code reads that when an employer delays the acceptance of the employee's work (ability to work) the employee is entitled to request the agreed remuneration.

⁷ The duty to provide the employee with tasks in certain employment situations is based on the notion that an employer has the duty to advance the employee and to look out for his interests in the workplace. In German Law this aspect is referred to as *Förderungspflichten*. See Zöllner and Loritz 206. Examples where employers are compelled by the very nature of the agreement to provide their employees with tasks include employees working as actors, either in television or theatre productions, editors, teachers-in-training, appointees in economic or invention-type employment, representatives or marketers for whom meetings with clients are important, and apprentices. See Hueck and Nipperdey 383.

⁸ The reason for the impossibility of acceptance of performance determines whether the employee keeps his right to remuneration. Generally, based on the principle of economic risk (*Wirtschaftsrisiko*) an employer must ensure that the performance ability of his employee is used in an economic and sensible manner. When the employee offers to perform and the employer refuses to accept this offer by not employing him despite an agreement to do so, or by refusing to provide him with the materials he needs in order to perform the employer is in default (*Verzug*); s 293; s 294 of the German Civil Code. The employer bears the risk when he is unable to use this ability, and he remains liable for remuneration (s 323 of the German Civil Code). See Otto *Arbeitsrecht 3. Auflage* (2003) par 335; Zöllner and Loritz 236-237.

⁹ S 315(1) of the German Civil Code stipulates that when the agreement between parties involves the performance of specific tasks, the tasks must be directed through fair discretion (*Bestimmung nach billiger Ermessen*). In one case of the Federal Labour Court the claimant was appointed as a commercial clerk at a bank. He was later placed in a position where he had to advise clients. After a disagreement with an assigned client, his employer ordered that he was not to be involved in clientele service anymore. The claimant alleged that his employer overstepped his right to give direction by changing his tasks through a prohibition. The court referred to the content of an employer's right to direct performance and noted that the direction must be exercised in a reasonable manner in particular with reference to time, place, and manner of the employee's performance. This nature and limits of this right may be confined by legislation, collective agreements as well as through an individual agreement. The court referred to the position of the claimant and held that nothing really changed. His position as a commercial clerk might have involved him also advising clients. Although he was removed from the latter task, his basic position stayed the same in so far as it concerned his remuneration and his workspace in the client-advice office. Held, his employer, exercised his right to direct fairly. See Dreyer "Arbeitsrechtliche Entscheidung BAG 1980-2 -10 2AZR 506/78" 1980 *Der Betrieb* 1603.

1 3 Duty to remunerate

1 3 1 General observations

Members of the European Union (the EU) are compelled to accept directives of the European Council. Germany as one of the members of the EU has accepted the provisions of the directive providing for equal pay for male and female employees.¹⁰ The principle of equal-pay-for-equal-work or work of equal value must be applied to both male and female employees.¹¹ Remuneration is payable either after the tasks have been completed, or if so agreed at the end of a specific period.¹² Note however, that there is no statutory provision for the payment of a minimum wage in Germany.¹³ Yet, if the provisions of a collective agreement are applicable to a specific employment relationship, the terms of the employment contract may not allow for a minimum wage less beneficial than the terms of the collective agreement.¹⁴

Remuneration is deemed to be tacitly agreed upon if the work is usually expected to be undertaken for remuneration, which is definitive for a valid employment contract. When the amount is not specified, the official rate for the type of work determines the remuneration. In the absence of an official rate the usual remuneration for the work suffices.¹⁵

¹⁰ Formerly known as art 119, replaced by art 141(1) of the Treaty Establishing the European Community (*Vertrag zur Gründung der Europäischen Gemeinschaft*) *EG Vertrag* of 25 March (General Legal Gazette I 766 as amended 2 October 1997 (General Legal Gazette I 416). The text of this treaty is included in Lingemann, Von Steinau-Steinrück and Mengel *Employment & Labor Law in Germany* (2003) 205.

¹¹ *Einschliesslich des Arbeitsentgelts* or equal pay. It is also possible to compare the equality of the parties in respect of age, specific qualifications or training. See Preis, Peters-Lange, Rolfs, Stoffels and Klaus *Der Arbeitsvertrag Handbuch Der Vertragpraxis und – Gestaltung 2. Auflage* (2005) 317 par 13.

¹² S 614 of the German Civil Code. There are two kinds of remuneration agreements, namely *Zeitlohnvertrag* and *Akkordvertrag*. The former refers to the situation where the employee's remuneration is based on a time schedule. The employee is then paid per month, per week, or per hour. The latter agreement refers to the situation where the employee is only paid after the work is completed, for instance the remuneration of a sales person after a number of sales were effected. See Hueck and Nipperdey 137.

¹³ There are, however, exceptions, for example the wages of employees working in the construction-industry are determined by a Posted Workers Directive, which does set a minimum wage although not a specific minimum amount. The amount is determined by collective agreements. See Lingemann *et al* 16.

¹⁴ The parties of collective agreements may fix a minimum wage and the parties of an employment contract may not contract for less remuneration than this fixed wage. See Weiss "Labor Law" in Zekoll and Reimann (eds) *Introduction to German Law Second Edition* (2005) 328.

¹⁵ S 612(1)-(2) of the German Civil Code. Note that the meaning of remuneration is rather wide. The concept "remuneration" includes the agreed wages may be paid in either money (*Geldlohn*) or by the providing certain material things such as housing, heating, or any other material article of value. See Zöllner and Loritz 185.

1 3 2 Remuneration but unable to work

The German Civil Code stipulates that the duty to remunerate is applicable after the services have been rendered.¹⁶ Therefore the basic rule is remuneration in exchange for performance, although certain exceptions do exist.¹⁷ Generally an employee must be remunerated when he offers his services but is unable to work, for example, when there are not any tasks for him to perform.¹⁸ This rule exists even though the employer might be unable to accept the employee's offer to work due to reasons beyond his control.¹⁹ There are three exceptions to this general duty of remuneration.²⁰

In a case of the Federal Labour Court, a claim for remuneration when the employee was unable to arrive at work due to transport problems was refused.²¹ The court held that it is an employee's responsibility to get to work, and when he is unable to do so he loses his right to remuneration.²² When an employer is faced with a collective dispute, for example strike action by some of the employees, the employer should have the authority to shut down the whole business, and to suspend the employment relationship

¹⁶ S 614 sentence 1 of the German Civil Code.

¹⁷ See Richardi xx; Hanau and Adomeit par 793. The principle is referred to as "no work no pay" (*Ohne Arbeit kein Lohn*).

¹⁸ S 615 sentence 1 of the German Civil Code; and Hueck and Nipperdey 217.

¹⁹ Weiss and Schmidt *Federal Republic of Germany* (2000) par 202. This is based on the theory of employer's risk (*Betriebsrisikolehre*) as stipulated in s 615 of the German Civil Code. According to this theory, an interruption in the business of the employer has caused an inability to work but that it is not blamed on the employee, for example interruptions in electricity, problems due to material used by the undertaking, such as raw products or coal, health hazards in the workplace, absence of co-employees, and public mourning due to death of a leader. Consequently the employer usually must remunerate the employee. See s 615 of the German Civil Code; Hueck and Nipperdey 348; Zöllner and Loritz 239-241; and Hanau and Adomeit par 817.

²⁰ There are three exceptions to this theory, of which the second one is regarded as only a theoretical exception. The first one is based on the rules of the payment of remuneration during strike action by employees. Based on the second theory, an employee does not have to be paid when the payment of his remuneration would have endangered the existence of the undertaking. The third exception is applicable when an employee wants to perform in terms of his contract but is unable to due to a temporary hindrance relating to personal reasons through no fault of his own. This inability to work must be for a short period of time, and the employee must deduct this portion of his remuneration from his health and accident insurance which he had taken out due to statutory obligation. See s 616 of the German Civil Code; Weiss and Schmidt par 203; and Hueck and Nipperdey 329-333.

²¹ BAG 8-12-1982 4AZR 134/80 in Sigloch and Houseisen "Arbeitsrechtliche Entscheidung" 1983 *Der Betrieb* 395. In *casu*, the employee was unable to work because the bus that used to transport him to work did not show up due to ice on the roads.

²² The court distinguished between problems of performance based on business reasons and personal reasons. Transport problems are viewed as personal problems of an employee within the ambit of s 616 of the German Civil Code. S 616 sentence 1 stipulates that an employee is not entitled to remuneration when he is unable to perform due to personal reasons (*Verhinderung durch ein Personliegender Grund*). However, although he will not be entitled to remuneration, he will at least not be liable to pay damages to his employer when the impossibility was not his or his employer's fault. See s 323 of the German Civil Code; Zöllner and Loritz 230.

with the non-striking employees without having to be concerned that the latter will be unable to perform in terms of their employment contracts.²³

1 3 3 *Payment during periods of leave*

An entitlement to remuneration without counter-performance is based on the duty of an employer to protect and to ensure the employee's health and performance abilities through the provision of paid leave.²⁴ Here the contractual rule of no-work-no-pay is limited through legislation. Therefore different periods of leave are regulated by the provisions of various legislative instruments. An employee is entitled to certain periods of leave as well as to the remuneration during these periods in spite of the fact that performance will not have taken place. These periods of paid leave include the following: (i) sick leave,²⁵ (ii) vacation leave²⁶ which provides a minimum amount of paid vacation leave per year,²⁷ (iii) maternity leave,²⁸ and (iv) parental leave.²⁹

1 4 **Duty of care**

1 4 1 *General remarks*

An employment relationship is, among other things, a common-law relationship encompassing a personal relationship (*personenrechtliches*

²³ This aspect is referred to as an impossibility to employ due to an interruption of performance. An employer is generally liable to pay the remuneration to employees who tender performance during strike action and whose performance he accepts. However, when the employer is unable to accept their offers to perform because of a shutdown of the business during strike action, his duty to pay remuneration falls away, based on the principle of labour dispute risk (*Arbeitskampfrisikolehre*). See Zöllner and Loritz 244-245.

²⁴ Zöllner and Loritz 210. A claim for remuneration during periods of leave is subjected to certain conditions.

²⁵ To an amount of one hundred percent of an employee's salary for a limited period of the first six weeks of the illness. See s 3(1) sentence 1 of the *Gesetz über die Zahlung des Arbeitsentgelts an Feiertagen und im Krankheitsfall (Entgeltfortzahlungsgesetz) vom 26. Mai 1994*, referred to as "the Continuation of Remuneration Act".

²⁶ *Mindeurlaubsgesetz für Arbeitnehmer (Bundesurlaubgesetz) vom 8 Januar 1963*, referred to as "the Minimum Vacation for Employees Act". Provision is made for at least twenty-four working days vacation per year.

²⁷ Working days are days which are not Sundays or public holidays (s 3 (1) and (2) of the Minimum Vacation Act for Employees Act). Only employees who have worked at least six months are entitled to the full vacation days (s 4). Other aspects regulated by this Act are: a possible carryover of vacation (only for compelling operations reasons or personal reasons of the employee (s 7 (3)), compensation in lieu of vacation (s 7(4)), and illness during vacation (s 9). Vacation pay is determined by the average earnings received by the employee during the last thirteen weeks prior to the vacation (s 11(1)).

²⁸ *Gesetz zum Schutze der erwerbstätigen Mutter (Mutterschutzgesetz – MuSchG) In der Fassung der Bekanntmachung vom 20. Juni 2002*, referred to as "the Mothers Protection Act". Protection is further regulated by the *Verordnung zum Schutze der Mutter am Arbeitsplatz vom 15 April 1997*.

²⁹ *Gesetz zum Erziehungsgeld und zur Elternzeit (Bundeserziehungsgeldgesetz – BerzGG) in der Fassung der Bekanntmachung vom 7. Dezember 2001*, referred to as "the Parents Resonsibility Act".

Gemeinschaftsverhältnis) based on reciprocal trust. Reciprocal trust implies that an employer is obliged to take care of the interests of his employee, and it permeates all aspects of this legal relationship within the framework of the contractual employment milieu.³⁰ This duty of trust is referred to as an employer's duty of care, which has a rather wide content. An employer's duty of care entails both a duty to protect as well as a duty to prevent harm to the interests of the employee.³¹ The German Civil Code contains a general reference to the duty of care on the side of an employer.³²

1 4 2 Safe working environment

An employer is contractually obliged to guarantee his employee's health and safety at work.³³ The German Civil Code clearly states an employer has a duty to take precautions in order to ensure that the safety and health of an employee is protected during the performance of his duties.³⁴ Various pieces of legislation were enacted to comply with and to curtail this duty. The most important act for these purposes is the Act on Occupational Health and Safety, whose provisions compel an employer to take a number of preventative measures to ensure a safe working environment with healthy working conditions.³⁵ Another feature of the safety obligation is the duty of

³⁰ Hueck and Nipperdey 390. The general duty of care is referred to as a duty to prevent harm (*Fürsorgepflicht*). More specific obligations have developed from this general concept of the duty of care, such as (i) to prevent harm to health and property of the employee at work, and (ii) to safeguard confidential information with regard to the confidential information of an employee when such information has come to the knowledge of the employer in a confidential manner. See Gres and Jung 59.

³¹ See Hueck and Nipperdey 390. The duty of care does not only consist of a *Fürsorgepflicht* but also includes a duty of trust (*Treuepflicht*). The duty of care is further viewed as the duty of an employer to protect his employee based on the fact that the employee finds himself in a full-time relationship with his employer where he uses this ability to perform to the benefit of the employer. This ability of an employee to perform is also his way of earning a living and without it he is usually unable to take care of himself in the event of illness, aging or emergencies. It is here where the employer has a duty to ensure that the ability of an employee to look after himself financially is protected during the period that the employee uses this ability to perform for benefit of his employer. See Zöllner and Loritz 202-203.

³² See s 242 of the German Civil Code where it is stated that the debtor (*Schuldner*) must ensure that his performance in terms of the agreement conforms to the requirements of trust and care (*Treue und Glauben*) which are generally accepted in that type of commercial relationship.

³³ Referred to as *Leben und Gesundheit* while the employee is at work. See Hanau and Adomeit par 594. The duty of safety and health is regarded as a component of an employer's duty of care (*Fürsorgepflicht*). See Otto par 382-385. This duty is a contractual duty ensuing after the conclusion of a valid employment contract. See Weiss and Schmidt par 159; and Steinmeyer and Waltermann 58. Although the duty of care has also been referred to as the duty to have consideration (*Rücksichtspflicht*), this latter term is considered too vague. The duty to have consideration is accepted to incorporate a special level of consideration pertaining to an employment relationship and as such is explicitly referred to as a duty of care (*Fürsorgepflicht*). See Hanau and Adomeit par 593.

³⁴ Referred to as *Pflicht zu Schutzmaßnahmen*. See s 618(1) of the German Civil Code. An employer who fails to comply with this duty is liable for damages based on the principles of delict based on s 618(3) of the German Civil Code.

³⁵ *Gesetz über die Durchführung von Massnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigten bei der Arbeit vom 7. August 1996 (Arbeitsschutzgesetz)*; referred to as "the Occupational Health and Safety Act". The

an employer to ensure a pleasant working environment.³⁶ An unpleasant working environment may *inter alia* be created by mobbing and by sexual harassment.³⁷ An employer is required to act in an appropriate manner by either preventing these types of conduct, or stopping them when they do occur. An employer may within reason limit other rights of employees in order to comply with his duty of safety.³⁸

2 CONTRACTUAL DUTIES OF AN EMPLOYEE

2.1 General observations

The main duty of an employee in terms of the employment contract is to perform in accordance of the employment contract.³⁹ Various other duties, referred to in German law as additional duties (*Nebenpflichten*), similar to an employer's main contractual duty, accompany this main duty.⁴⁰ These contractual duties of an employee are explored next.

provisions of this Act are regarded as clear and uniform rules covering health and safety aspects at work. Employers and employees alike have safety and health duties to comply with. Labour inspectors may visit business to investigate whether the protective provisions of the Act are complied with. See Whitfield "Vorsprung durch Arbeitsschutz" 1998 *Health and Safety Bulletin* 15 16.

³⁶ Otto par 385.

³⁷ See Hanau and Adomeit par 596; Otto par 385. S 253(2) of the German Civil Code states that a contractual party is in certain cases entitled to compensation (*Schmerzensgeld*) based on damages to his immaterial property. *Mobbing* refers to incidents of bullying at the workplace by co-workers or supervisors. *Mobbing* is defined as negative, conflict-orientated communication or conduct by a co-worker(s) against another co-worker that takes place in a systematic manner for a significant period of time with the purpose to direct or indirectly exclude the victim from the employment relationship. It may also be based on unfair discrimination. See Grünwald and Hille *Mobbing im Betrieb* (2003) 26.

³⁸ Eg, an employee's freedom of conduct (*Handlungsfreiheit*), guaranteed by s 2(1) of the German Constitution, as opposed to the duty to ensure health at the workplace. In a decision of the Federal Labour Court in Schmidt and Spiegelhalter "Rechtsprechung BAG 19-1-1999-1 AZR 499/98" 1999 *Neue Zeitschrift Arbeitsrecht* 546, the question was whether a prohibition to smoke in work offices, even offices of which the doors could be closed, was an infringement of the right of freedom of movement. The court referred to the right of an employer to announce measures for the sake of ensuring reasonable inter-relations in the workplace. It was observed that non-smoking employees had the right to be protected against passive smoking, but that it is also important to ensure order and peaceful relationships in the workplace. The court decided in a reasonable effort to maintain reasonable working relations between the parties that the employee could be assisted by utilising an available office where smokers could smoke without harming the non-smokers. See Schmidt and Spiegelhalter 1999 *Neue Zeitschrift Arbeitsrecht* 546.

³⁹ S 320(1) of the German Civil Code states that a person involved in a reciprocal agreement is compelled to perform as agreed. When one party fails to perform materially as agreed, the other party is entitled to hold his performance back. See Hromadka and Maschmann 161.

⁴⁰ *Nebenpflichten* mean duties that do not exist equally compared to the main duty of an employee to perform in terms of s 320 of the German Civil Code. These duties mostly derive from the principle of good faith (*Treu und Glauben*), or from other principles associated with the type of agreement. These duties may further be divided into duties where the employee is compelled to refrain from acting in a certain manner, and duties where the employee is compelled to act in a certain manner. See Zöllner and Loritz 170-171.

2.2 Provision of services

An employee's main duty in terms of the employment contract is to provide his personal services as agreed.⁴¹ The terms of the employment contract determine the place where performance should take place as well as the exact nature of the work. An employer's right to direct the performance of his employee further supplements the nature and place of performance.⁴² Two other factors may also influence the performance of an employee's duties, namely the duration of the employee's working time,⁴³ and the tempo of his performance.⁴⁴ The Working Hours Act⁴⁵ regulates *inter alia* the working hours of employees,⁴⁶ and the contractual freedom of an employer to

⁴¹ Referred to as *Hauptpflicht der Arbeitsleistung*. See s 613(1) of the German Civil Code; Weiss and Schmidt par 150; and Hueck and Nipperdey 198. The personal character of an employment relationship has *inter alia* the effect that legal consideration is given to the employee as an "individual" human being within the framework of this legal agreement. This legal consideration has in turn the effect that protective statutory provisions, such as paid holiday leave, paid sick-leave, and so forth exist for the benefit of the employee. Hereby the value of an employee as an individual is expressed through legislation, and an employee is thus not merely valued in terms of the commercial value of his ability to work. See Zöllner and Loritz 155 and 163; and Burgess 140.

⁴² See s 315(1) of the German Civil Code which states that when the performance of one party may be directed by the other party, the latter has the right to expect that the performance takes place within bounds of the reasonable discretion of the party; s 315(2) of the German Civil Code which states that direction takes place through instructions of the one party to the other party. See also Hueck and Nipperdey 205; Araki "Accommodating Terms and Conditions of Employment to Changing Circumstances: A Comparative Analysis of Quantitative and Qualitative Flexibility in the United States, Germany and Japan" in Engels and Weiss (eds) *Labour Law and Industrial Relations at the Turn of the Century Liber Amicorum in Honour of Roger Blanpain* (1998) 517.

⁴³ The duration of working time is usually established by the terms of the employment contract or through collective agreements. The influence of protective legislation should also be kept in mind. Working time presents a problem when it is not fixed but rather determined by other criteria, for example the needs of the business and the availability of funds. It is here where the principle of *KAPOVAZ* is applied. *KAPOVAZ* refers to *Kapazitätsorientierte variable Arbeitszeit* or capacity-orientated changeable time in employment. Based on this principle, a number of different forms of variable employment are available which are characterised by easy determinable working hours and fixed remuneration scales. An employee working *KAPOVAZ* is compelled to complete a balanced amount of working hours within a certain period of time. This aspect is based on various fixed-rates of remuneration, individual accounts of working time, and balanced working periods within the framework of the agreement. The average hours worked by the employee within a determinable time are then determined. Usually these types of working arrangements are monitored with the assistance of computer-programmes guaranteeing more flexible working options without doing away with an employee's protective measures. See Zöllner and Loritz 166; and Hromadka and Maschmann 187.

⁴⁴ The tempo of an employee's performance comes to mind during the performance of factory workers who work at production-lines. An employee is compelled to perform as agreed in accordance with his abilities and within the designated circumstances. Based on a particular remuneration agreement, the parties may agree that the employee will be remunerated provided that he completes a minimum amount of work per day. See Zöllner and Loritz 167.

⁴⁵ *Arbeitszeitgesetz (ArbZG) vom 6 Juni 1994*, referred to as "the Working Hours Act". The Working Hours Act aims to: (i) ensure the safety of employees, (ii) protect the health of employees by establishing certain working hours, (iii) improve the general conditions for creating flexible working hours, and (iv) preserve Sundays and other legal holidays as days of rest.

⁴⁶ *Eg*, maximum working hours per day are eight hours but these may be extended to ten hours subject to certain conditions (s 3). A shortening of the rest period is allowed for

determine the working hours of his employees is accordingly limited. The provisions of this Act do not apply to all employees.⁴⁷ Different provisions of other legislation are also applicable in the cases of employees working as sea crew officers, aviation and inland-navigation.⁴⁸

2 3 The following of orders

The duty of an employee to follow the orders of his employer is not an independent duty but is viewed as part of the duty to perform.⁴⁹ An employee must follow the instructions of his employer based on the right of an employer to specify the contractual obligations of the employee.⁵⁰ According to some authors, certain duties do not derive purely from the conclusion of the employment contract, but may be expected from the employee as long as they do not interfere unjustifiably with his right to one of his constitutional rights.⁵¹

hospital staff. Where there are provisions of the European Community permitting shorter rest periods for truck drivers, the provisions of s 1 do not apply. The Working Hours Act also regulates night shifts and rotating shifts (s 6), work on Sundays and public holidays as well as aspects pertaining to compensation on those days (ss 9-11).

⁴⁷ Eg, managerial employees, chiefs of medical staffs, heads of government services and employees who make independent decisions regarding personnel matters in the public service, persons who manage care facilities, and liturgical realms of churches. See s 18(1) of the Working Hours Act. Other statutory provisions regulate the working hours of employees who are younger than 18 years.

⁴⁸ See s 18(3), s 20, and s 21 of the Working Hours Act.

⁴⁹ Hueck and Nipperdey 238. The duty to follow orders entails that the employer has the right to direct how, when and where the employee should perform his duties. The employer must ensure that he treats all employees equally.

⁵⁰ Weiss and Schmidt par 151. An employee is in breach of his duty to follow the instructions of the employer when he either refrains from performing at all (*Nichtleistung*), or when he does perform but not properly (*Schlechtleistung*). An employee is liable for damages if he fails to perform (s 286 of the German Civil Code). The employer may further refuse to remunerate the employee (s 320 of the German Civil Code), and he may also dismiss an employee without notice due to his default in performance (s 326 of the German Civil Code). Whether an employee may be held liable for damages in the event of failing to perform properly depends on whether this lack of adequate performance is the employee's fault. If not, the employee will not have to pay damages and he is entitled to his full remuneration. An exception to this general rule is found when a remuneration agreement exists in terms of which the employee is only paid for faultless performance. An employee is then liable for damages based on his inadequate performance. See Hueck and Nipperdey 223-229.

⁵¹ Weiss and Schmidt par 153 and 155. These duties may involve specific rules pertaining to an employer's dress-code, or an employee's respect for gate control. An employee's interests should be weighed against the interests of the employer. An employer may not impose these duties without the consent of the works council if there is such a council active in the undertaking. See s 75(1) of the Works Constitution Act stating an employer and the works council must ensure that all employees are treated in accordance with the principles of justice and fairness in relation to, for eg, religion, gender, sexual identity, and so forth; s 75(2) of the Works Constitution Act stating an employer and a works council must promote and protect the free development of the personality of an employee, his independence and his initiatives. The works council's right to co-determination concerning social matters prohibits unilateral actions by the employer on these matters. See Araki 517.

In one case before the Federal German Court,⁵² an employee who worked as a printer refused to print brochures in which the efforts of German pilots during the Second World War were praised, and which were to be used to promote books on the history of the Third German Reich. The employee refused to obey this order based on his beliefs, and he was dismissed.⁵³ The matter was referred to the court as an alleged unfair dismissal. Firstly, the court acknowledged that two seemingly opposing rights were involved in this matter, namely the right of an employer to give orders, and the constitutional right of an employee to act in accordance with his beliefs.⁵⁴ Secondly, the court observed that the conflicting interests of both parties must be considered in order to establish which interest is more important.⁵⁵ The court held that the employer had exercised his right to direct the employee's performance unfairly.

The services of an employee may be terminated when he either does not perform in terms of his employment contract based on his beliefs, or if the interests of an employer are unreasonably influenced by the religious practices of the former and it is impossible to address these types of problems without expensive measures.⁵⁶

2 4 Impossibility to perform

An employee's duty to perform may be influenced by an agreement or by certain statutory provisions.⁵⁷ The duty to perform in terms of an agreement

⁵² Schmidt and Spiegelhalter "Rechtsprechung BAG 20-12-1984 2AZR 436/83" 1986 *Neue Zeitschrift Arbeitsrecht* 21.

⁵³ The employee was a pacifist and a member of an organisation opposed to wars in general, and the former Nazi regime in particular. It was against his beliefs to print material with positive statements about German pilots.

⁵⁴ S 4 of the German Constitution guarantees the right of every person to act in accordance with his beliefs or conscience. An employee must perform in accordance with the terms of his employment contract which in turn implies that he should follow the orders of his employer as part of the right of his employer to direct his work (s 613; 315(1) and (2) of the German Civil Code).

⁵⁵ Balancing of interests takes place. First, it must be determined whether the employee considered at the conclusion of the employment contract that he might be expected to perform a duty against his beliefs. This means that an employee who contracts with an employer who is involved in the provision of war material might not later be able to blame his refusal to perform on his beliefs. Secondly, it ought to be established whether this type of conflict is a once-off situation, or whether it might happen again later during the employment.

⁵⁶ Adam "Religionfreiheit im Arbeitsrecht" 2003 *Neue Zeitschrift Arbeitsrecht* 1375 1380. The refusal of an employee to perform a specific task based on his beliefs may further amount to an impossibility to perform based on beliefs. The employee may then obtain a right to refuse performance (*Leistungsverweigerungsrecht*) based on s 275(3) of the German Civil Code which makes provision for impossibility of performance. However, in such an event an employer is not required to remunerate the employee because the latter loses his contractual right to claim remuneration based on these circumstances (*Verlust des Lohnanspruchs*). See Henssler "Arbeitsrecht und Schuldrechtreform" 2002 3 *Recht der Arbeit* 129 139.

⁵⁷ Parties may agree to suspend performance when an employee requests an additional vacation day for some reason. This additional vacation day may be granted without remuneration. Also, an employee may be suspended from work during an investigation into his conduct. However, since such a suspension usually takes place without any evidence of

may cease to exist due to impossibility.⁵⁸ The general rule is that where the reason for the impossibility was not the fault of either the employee or the employer, the former may lose his right to remuneration.⁵⁹ When the employee has caused the impossibility he still does not have to perform but he will be liable in damages.⁶⁰

Although it is not easy to determine which situations are viewed as 'impossibilities' to perform certain situations have been identified which are accepted as rendering performance impossible.⁶¹ In one case before the Federal Labour Court⁶² the question was whether an employer was liable for remuneration after heavy snow caused part of his business's roof to collapse with the effect that the employees could not work during that day. The court held that an employer bears the risks when performance is impossible due to circumstances associated with the business, and that the employees had to be remunerated although they did not work.⁶³

wrongdoing on the side of the employee, it should be granted with remuneration. The parties may also agree that an employee is freed from his duty to perform during the notice-period following a dismissal. Various statutes free employees from their duties of performance during certain circumstances regardless of the fact that they are paid, for example during statutory holiday leave or child-bearing leave. See Zöllner and Loritz 169-171.

⁵⁸ S 275(1) of the German Civil Code refers to impossibility to perform in terms of a contractual agreement as "*unmöglichkeit der Leistungspflicht*".

⁵⁹ S 323 of the German Civil Code; and Hueck and Nipperdey 220. When the employer has created the impossibility, the employee keeps his right to remuneration but he has a duty to declare any benefits he had received due to this impossibility, for example, other wages earned because he had offered his ability to work elsewhere during the period of the impossibility. See s 324 of the German Civil Code.

⁶⁰ S 280(1) of the German Civil Code. However, an employee is only liable for damages when he had caused the impossibility. An employee does not have to perform when: (i) the performance leads to a disproportion between the performance in terms of the agreement and the principles of good faith, or (ii) the obstacles in the way of his performance outweigh the interests that the creditor (employer) might have in his performance (s 280(2) of the German Civil Code). An employer is usually able to claim damages except where the obstacles were not caused by the employee (s 283 read with s 280(1) of the German Civil Code). According to s 326(1) of the German Civil Code the reciprocal duty of the employer lapses when the employee does not perform, and the employer is able to rescind from the agreement.

⁶¹ These situations actually create more important duties that an employee must take care of which in turn have the effect that an employee is unable to perform as required by his employment contract. Examples of such duties may include a court appearance following a subpoena, participation in war, religious duties, death or serious illness in the family, and an employee's own wedding. See Hueck and Nipperdey 221.

⁶² Harms and Küting "Arbeitsrechtliche Entscheidung BAG 9-3-1983 4 AZR 301/80" 1983 *Der Betrieb* 1496.

⁶³ With reference to the principles of business risk (*Betriebsrisikolehre*), the court held that it must be determined whether the employees' impossibility to perform and the duty of an employer to reciprocate were caused by reasons associated with the business. Reasons associated with the business may include technical problems like heating or faulty machinery, or acts of God like earthquakes, fires and floods. When any one of these reasons causes an impossibility of performance, an employer is usually liable for remuneration. Exceptions to this general rule are: (i) when the conduct of an employee caused the business-associated reasons; (ii) where these types of situations are regulated by other individual or collective agreements, and (iii) when paying full remuneration owed during these circumstances endangers further existence of the business. However, when the reason that caused the impossibility is not associated with the business, the employer's responsibility to pay remuneration falls away. See Steinmeyer and Waltermann 70.

2 5 Duty of care

2 5 1 Definition

The duty of care (*Treue und Fürsorge*) is an additional duty of an employee which is present in all legal relationships that are also personal legal relationships.⁶⁴ Some of the aspects regarding the duty of care are not only influenced by legislation, but also regulated by various enactments.⁶⁵ The duty of care has five distinct features, namely: (i) an employee must refrain from any conduct that is harmful to the employer and his business, (ii) the scope of this duty may differ depending on the nature of employment relationship,⁶⁶ (iii) this duty incorporates active and passive conduct by the employee,⁶⁷ (iv) it places a prohibition on accepting bribes,⁶⁸ and (v) it includes a duty to remain silent about certain aspects of a business that are deemed confidential.⁶⁹ Therefore, an employee must always act with the interests of his employer and co-workers in mind.

⁶⁴ Referred to as *Nebenpflichten in personenrechtliches Gemeinschaftsverhältnis*. See Hueck and Nipperdey 241. Traditionally, the duty of care was regarded as a duty of trust or good faith (*Treuepflicht*). However, on its own a “duty of trust” was viewed as a too narrow depiction of an employee’s duty of care with the result that the duty of care of an employee embraces various features relating to the interests of his employer (*Rücksichtspflichten*). See Hanau and Adomeit par 593 and 598.

⁶⁵ S 242 of the German Civil Code stipulates that a debtor (also an employee) must perform in terms of his contract in a manner consistent with the principles of good faith whilst taking into consideration general accepted practices. The duty of care further incorporates other legal aspects which correlate with the notion that parties who are involved in an agreement may bargain within the framework of their agreement. So the duty of good faith is based on an ideology and may be rather wide. See Zöllner and Loritz 178.

⁶⁶ The duty of care is, for example, stricter and wider for employees working in small businesses than for employees employed in a larger undertaking. It is also wider for better qualified or supervising employees, or even managers as opposed to less qualified employees or sales personnel. See Hueck and Nipperdey 242.

⁶⁷ Passive duties (*Unterlassungspflichten*) refer to certain things an employee must refrain from doing. Passive duties may include a duty to refrain from enticing co-employees to act contrary to their duties or not to conspire with third parties to the detriment of the business or its clients. Active duties (*positiven Handeln*) refer to certain things an employee is required to do, for example disclosing possible problems that may hinder the business of his employer, *eg*, the presence of dangerous materials, defective machinery, or even other damaging conduct by co-employees. See Hueck and Nipperdey 242; and Zöllner and Loritz 172-173.

⁶⁸ “*Schmiergeldverbot*”. An employee may not accept any gifts or benefits during the course of business with the purpose to either conclude a corrupt relationship with another, or to provide a competitor with an unfair advancement. However, not all gifts are prohibited. Only those gifts given with a purpose contrary to the duty to act in an employer’s best interests are prohibited. See Hueck and Nipperdey 247.

⁶⁹ Referred to as *Schweigepflicht*. See s 17 of the Gesetz gegen unlauteren Wettbewerb “UWG” vom 3. Juli 2004. An employee is prohibited to divulge secret information that harms the business of an employer or trade secrets that may lead to unfair competition and damages to the commercial business of an employer. Any negligent disclosures to third parties that are detrimental to a business are prohibited. See Hueck and Nipperdey 244-245; and Hanau and Adomeit par 600.

2 5 2 The exercise of skill

An employee must ensure that he performs his duties with the necessary skill and without any negligence.⁷⁰ The liability of an employee for damages based on performing his tasks negligently depends on the degree of negligence.⁷¹ An employee is only liable for a part of the damages in cases of medium negligence but in cases of severe negligence or damages caused by intentional conduct, an employee is liable for all damages.⁷² In one decision the court noted that the extent of an employee's liability for an incident precipitated by gross negligence should be determined by consideration of all the circumstances of the matter.⁷³ Even in cases of severe negligence, an employee may be entitled to relief from liability for damages depending upon the circumstances of the matter.⁷⁴

⁷⁰ S 276(1)-(3) of the German Civil Code stipulates that a debtor (an employee) is responsible for negligent (*Fahrlässigkeit*) or wilful conduct (*Vorsatz*) that ensues from his performance. Negligence takes place when the duty to take care is disregarded (s 276(2) of the German Civil Code). Based on these provisions, an employee may even be liable for the slightest act of negligence that occurs during the performance of his duties. However, human inadequacy dictates that negligence may sometimes occur. So an employee might be unfairly burdened if any kind of negligence renders an employee liable for damages. See Dütz *Grundrisse des Rechts Arbeitsrecht 6. Auflage* (2001) par 198; and Zöllner and Loritz 253. Nevertheless, this duty is regarded by some academics as a duty to prevent harm and as a duty to protect the interests of the employer (*Schutzpflichten*). See Zöllner and Loritz 176.

⁷¹ Damages caused by negligence are equally divided between an employee and his employer in those situations where the employment situation is of such a nature that negligence is often an occurrence during the performance of that particular type of work. It was held in a decision of the Federal Labour Court that the liability of an employee in cases of negligence is determined by the degree of the negligence. See Henkel "Arbeitsrechtliche Entscheidung BAG 12-6-1992-GS 1/89 (decision of the Grosser Senat)" 1993 *Der Betrieb* 939.

⁷² See Wiess and Schmidt par 211; and Steinmeyer and Waltermann 80. An employee is usually not held liable for minor negligence. See Zöllner and Loritz 253.

⁷³ Schmidt and Spiegelhalter "Rechtsprechung BAG 23-1-1997-8 AZR 893/95" 1998 *Neue Zeitschrift Arbeitsrecht* 140. *In casu*, an employee who worked shifts in the low-maintenance section of an airport, consumed too many beers the night before he had to work an early morning shift. During the morning shift he was requested to move a light airplane via the runway, and shortly thereafter fell asleep in the cockpit. The airplane left the runway, struck a light pole before bursting through a fence. In an action for damages his former employer claimed 150 000 DM. The court found that the employee had breached of his duty of care (*Sorgfaltspflicht*) greatly without having any consideration for the consequences, and that he was held liable for damages.

⁷⁴ These factors are the following: (i) the degree of negligence; (ii) the presence and nature of danger in the work; (iii) the extent of the damages; (iv) the position of the employee in the business, and (v) the insurance contribution that the employee made in situations where risk-payments are required. The court observed that when an employer places expensive machinery in the care of an employee, the employer must ensure that the employee carries part of the risk within the framework of their employment relationship. Since the employee *in casu* was severely negligent by consuming alcohol and accepting the task irrespective of his state if intoxication, the court held it fair that the employee be held responsible for some of the damages. However, the court accepted the employee was not supposed to undertake that kind of a task during his career, and damages owed to the employer were limited to an amount of 20 000 DM.

2 6 The promotion of business and loyalty

2 6 1 General observations

Certain contractual duties, namely the prohibition of competition by an employee with his employer and the duty of loyalty, are regarded as ancillary or additional duties to the main duty of the employee to work. Some authors view the legal foundation of these duties as problematic due the nature of the employment relationship.⁷⁵

An employment relationship may be regarded as “something more” than just a contractual relationship, or a relationship where the personal element should be decisive.⁷⁶ If the personal element is still decisive, the duty of loyalty would determine a number of other ancillary duties. Whether or not an employee acted contrary to his duty of loyalty depends then on the nature of the interests involved.⁷⁷

In one case a medical doctor, who was employed at a hospital that belonged to the Catholic church, was dismissed after a letter written by him was published, in which he strongly objected to the negative attitudes of co-workers regarding abortions on request following unplanned pregnancies.⁷⁸ He claimed that his dismissal was unfair since it infringed on his right to a free opinion.⁷⁹ After consideration of the opposing rights, the dismissal was found to be unfair because the employee’s conduct, although regarded as unacceptable and disloyal to the interests of his employer, did not justify the penalty.⁸⁰

Although an employee should always promote the interests of his employer and refrain from disloyal conduct, this duty may be reduced when the employer harms the legal interests of his employee by, for example, not

⁷⁵ Weiss and Schmidt par 154.

⁷⁶ Steinmeyer and Waltermann 90.

⁷⁷ *Ibid.*

⁷⁸ Flemming “Entscheidung Arbeitsgericht BAG 21-10-1982-2 AZR 591/80” 1984 *Neue Zeitschrift Arbeitsrecht* 826. The doctor was employed at a Catholic hospital. In his employment contract it was clearly indicated that he was expected to perform his duties in accordance with the principles of the Christian faith.

⁷⁹ See s 5 of the German Constitution which guarantees the right to freedom of opinion (*Meinungsfreiheit*). A right of freedom of opinion may be limited after when a contract of employment is concluded based on the additional duty of an employee to refrain from acting in a manner that harms the interests of his employer. This limitation does not have to be evidenced by the written terms of the contract. When an employee harms the peace or order in a business and annoys his co-workers through the expression of his opinion in one way or another, his right to do so may fairly be limited. See also Zöllner and Loritz 175.

⁸⁰ Firstly, the Federal Labour Court noted that an employee has a duty of loyalty which includes that he must have consideration for the interests of his employer. On this aspect, it was held that the employee was in breach since the respect for human life by opposing abortions was one of the interests of his employer. He had a duty not to oppose this interest publicly. Secondly, with regard to the claimant’s constitutional right, the court held that the right to self-autonomy of the church outweighed the right of the employee. Lastly, it was held that although the employee was in breach, this breach of loyalty did not justify the severance of the employment relationship between the parties.

adhering to stipulated safety measures.⁸¹ An employee who testifies against his employer in court is not regarded as acting in conflict with his duty of loyalty, provided that he merely performs his duty as a citizen, and that he does not intentionally give untrue information.⁸² The duty of loyalty does not act as a justification for all the other ancillary duties of an employee. It must be proved that the existence of the employment contract is only possible when other additional duties are involved. Every additional duty in turn must be justified by the circumstances of the specific employment relationship.⁸³

2 6 2 Competition

2 6 2 1 Restraint clauses

Restraint clauses are regulated by legislation.⁸⁴ These clauses restrict the freedom of an employee⁸⁵ to trade but are valid provided certain requirements are met. First, the clause is binding if the employer is obliged to pay compensation to the employee equal to at least one half of the most recent compensation received by the employee for each year of the prohibition.⁸⁶ Secondly, the clause must be in writing and the conditions of the clause must be furnished to the employee.⁸⁷ A restraint clause is not

⁸¹ The duties of an employee to promote the interests of an employer and to refrain from acting in a disloyal manner are viewed as dynamic aspects of modern employment relationships, and depend on various external factors that should be balanced. See Müller "Whistleblowing – Einkündigungsgrund" 2002 *Neue Zeitschrift Arbeitsrecht* 424 435.

⁸² Decision of BVerfG on 2 July 2001, referred to by Schmidt and Spiegelhalter "Rechtsprechung" 2001 *Neue Zeitschrift Arbeitsrecht* 888. In this case, an employee was dismissed after he testified in a criminal case against his employer following allegations of irregularities pertaining to the procurement of contracts that involved city planning and traffic regulation. The court referred to the concept of "whistleblowing" and held that an employee may not be penalised when he acts as a whistleblower, provided that his testimony against his employer complies with certain requirements.

⁸³ See Weiss and Schmidt par 154.

⁸⁴ Ss 60, 61 and 74 of the Commercial Code. These clauses are sometimes referred to as "*verträgliches Wettbewerbsverbot*" or "covenants of non-competition". See Weiss and Schmidt par 261. A restraint clause differs from other prohibitions of competition existing between an employer and employee in the sense that the clause usually applies after the employment has been terminated, and it is included to ensure that a former employee does not compete with his former employer by utilising the clients and experience that he obtained during his previous employment in an undesired manner. See Steinmeyer and Waltermann 47. A restraint clause represents a feature of the duty of an employee to refrain from acting in a specific manner as agreed to earlier by the parties. In this context, it is referred to as the duty to refrain from competition (*Pflicht zur Unterlassung von Wettbewerb*). See Zöllner and Loritz 173.

⁸⁵ The Commercial Code refers to restraint clauses in the sense that these clauses influence "commercial employees". "Commercial employees" are regarded in German law as "employee-like" but are only covered by certain labour legislation. See further Weiss and Schmidt par 83-85.

⁸⁶ When remuneration is made up from commission or other variable payments, the compensation is determined by either calculating the average of the remuneration received through commission over the last three years of employment, or by calculating the average of contractual remuneration paid to the employee during the period that the provision applied, excluding any other payments the employee may have been entitled to (s 74(1)-(3) of the Commercial Code).

⁸⁷ S 74(1) of the Commercial Code.

binding when a legitimate interest of the principal is not protected,⁸⁸ where the particulars of the restriction clause, for example, are time terminated, the place and subject, unreasonably interfere with the employee's career, and the maximum time limit of the restraint, namely two years after the employment relationship has been terminated, has been exceeded.⁸⁹

A restraint clause may be void altogether due to a core aspect of the agreement.⁹⁰ A restraint clause is invalid when the employee terminates the employment relationship based on breach of contract by the principal.⁹¹ An employee is not entitled to any compensation when he is in breach of contract.⁹²

2 6 2 2 Confidential information and inventions

The duty not to divulge confidential information (*Betriebsgeheimnisse*) about the employer's business is part of the duty of an employee to remain silent on issues that may harm the interests of his employer.⁹³ When an employee has invented a product in a technical field that may lead to a patent or a registered design, his product is subject to the stipulations of the Act on

⁸⁸ S 74a(1) sentence 1 of the Commercial Code. The Commercial Code refers to a protectable interest as a "*berechtigten geschäftlichen Interesse*". An employer's protectable interest may include recipes, business secrets, client lists, the buying habits of clients, and their specific preferences pertaining to the products. See Schmidt and Spiegelhalter "Rechtsprechung BAG 15-12-1987-3 AZR 474/86" 1988 *Neue Zeitschrift Arbeitsrecht* 502, where the court had to decide whether a former employee of the claimant, a wine seller, was in breach of a restraint clause when after termination of his employment he (the former employee) had established his own wine business and had sold wine to eighteen of his former employers' clients. The former employee stated that in terms of the clause he was only prohibited to disclose anything that related to the secret affairs of the business. The court explained the meaning of "protectable" interests, and held that the heading and content of the restraint clause clearly defined it as representing a "duty not to disclose" business secrets to third parties. In *casu* the duty not to disclose did not go further. It did not include a duty not to solicit clients. Therefore, the claim for damages was unsuccessful.

⁸⁹ S 74a(1) sentence 3 of the Commercial Code.

⁹⁰ This is the case in two possible scenarios. First, when the employee is a minor and the agreement is invalid, and secondly when a third party in the place of the commercial employee assumes the obligation that the commercial employee will restrict his activities after termination of the employment relationship (s 74a(2) of the Commercial Code). See also ss 138(1) and (2) of the German Civil Code where it is stipulated any legal transaction that is contrary to public policy, or a legal transaction where another person's predicament, inexperience, or lack of sound judgement is compromised, or where another person is granted a pecuniary advantage for a performance which is disproportionate to the performance, is invalid.

⁹¹ S 75(1) of the Commercial Code. An employee is compelled to declare in writing within one month after his termination of the relationship that he does not consider himself bound by the clause. A restraint clause is further invalid when an employer terminates the employment relationship except when the termination takes place due to significant reasons relating to the employee, or when the employer indicates that he is willing to pay the full contractual remuneration last earned by the employee for the duration of the restraint clause (s 75(1) and (2) of the Commercial Code).

⁹² S 75(3) of the Commercial Code. Also note that the provisions of the ss 74 to 75 are mandatory according to s 75d of the Commercial Code.

⁹³ The duty of an employee to remain silent on certain confidential matters of his employer is referred to as "*Verschwiegenheitspflicht*". See Zöllner and Loritz 172.

Employee Inventions.⁹⁴ This Act distinguishes between two types of inventions,⁹⁵ of which only one type is relevant for purpose of the discussion at hand, namely service inventions. Service inventions are inventions made during the course of the individual labour contract, and which lead to certain additional duties of the employee.⁹⁶ A service invention may be used by the employer but the employee is entitled to claim financial compensation for this invention.⁹⁷

3 CONCLUSION

The role of contractual principles in individual employment relationships in Germany is without a doubt significant. Notwithstanding the existence of the various forms of legislation that limit the contractual freedom of an employer throughout various stages of the employment relationship, the preservation and continued use of typical contractual principles through the provisions of the German Civil Code are evident of the pivotal impact of these contractual principles. Conversely, although the continued importance of the individual employment contract in Germany is acknowledged, it has been observed that employment contracts will increasingly be overshadowed by work agreements.⁹⁸ However, given the comprehensive application of the provisions of the German Civil Code and by implication typical contractual principles throughout the employment relationship, it is difficult to envisage the disappearance of contractual principles into the background of insignificance in the near future. Another point deserves mentioning.

The highly organised and unique way in which these contractual principles continue to interact with statutory provisions is also of value for South African employment relationships. Although various contractual principles⁹⁹

⁹⁴ S 1 of the Gesetz über Arbeitnehmererfindungen, 25 Juli 1957 (the Invention Act); see also Preis *et al* 1528 par 28.

⁹⁵ S 4(2) of the Invention Act. These two types of inventions are (i) free inventions, and (ii) proposals on improvements. Free inventions are inventions made during the period of employment but not in connection with the work of the employee, or through his knowledge and experience connected with his particular job. When the invention is related to either the products or the services of the business, the employee must inform his employer of this invention. The employer may then allege that the invention is not a "free invention" but part of a service rendered by the employee. "Proposals on improvements" are inventions that will not lead to a patent or a registered design. An employer may use this proposal when he pays the employee financial compensation. See Weiss and Schmidt par 263; Preis *et al* 1528 par 28.

⁹⁶ Ss 5-6 of the Invention Act. The employee must keep the invention a secret, the employee is not allowed to exploit the invention, and the employee must inform his employer of this invention.

⁹⁷ S 10(1) of the Invention Act.

⁹⁸ Weiss "The Future of the Individual Employment Contract in Germany" in Betten (ed) *The Employment Contract in Transforming Labour Relations* (1995) 42. The main reason for this observation is that the work agreement is more flexible compared to the individual employment contract. Only in those undertakings where work councils, and by implication work agreements, do not exist, the individual employment contract may apparently continue to portray a pivotal role.

⁹⁹ This aspect is evident especially in the following instances: (i) during the conclusion of an employment contract; (ii) as regards implied contractual duties of the parties; (iii) interpretation of an employment contract, and (iv) in the event of breach of contract. See

continue to permeate individual employment relationships in South Africa, the interface between these principles and statutory provisions are not always so obvious. Therefore, the unique interaction between typical contractual principles and statutory provisions in German employment relationships holds an important lesson for South Africa, namely that the continuing role of contractual principles should not be mentioned as an afterthought. Rather, it should be acknowledged as an integrated and pivotal part of individual employment relationships whose interaction with statute is not set in stone, but rather flexible as the industrial society's specific needs continue to evolve.

also, eg the following discussions and references to recent case law concerning the ongoing role of typical contractual principles in South African employment relationships: Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 *ILJ* 28; Le Roux "Contracts of Employment and Unfair Dismissal: An Update" June 2004 *Contemporary Labour Law* 109; Mischke "Contractually Bound: Fairness, Dismissal and Contractual Terms" April 2004 *Contemporary Labour Law* 81; Mischke "Acting in Good Faith: Courts Focus on Employee's Fiduciary Duty to an Employer" August 2004 *Contemporary Labour Law* 1; Grogan "Of Offers and Acceptance Second Thoughts over VSP's" 2003 June *EL* 15; Schooling "Misrepresentation" 2003 *Contemporary Labour Law* January 5; Landman "The Coach who wouldn't Coach: Santos Professional Football Club (Pty) Ltd v Gordon George Ingesund & Another (Case no A786/2002)" December 2002 *Contemporary Labour Law* 48; Mischke "Return of the employment Contract" January 2002 *Contemporary Labour Law* 58.