

THE ROLE OF CONTRACTUAL PRINCIPLES IN CONTEMPORARY EMPLOYMENT RELATIONSHIPS IN GERMANY: IS THERE A LESSON TO LEARN FOR SOUTH AFRICA? PART 1*

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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 on-going 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 INTRODUCTION

An employment relationship commences after a valid contract of employment has been concluded by an employer and an employee. In Germany, the employment contract does not enjoy statutory definition but rather developed from the definition of a contract for services.¹ Perhaps it is appropriate to emphasize three aspects of importance at the outset. First, it is generally accepted in Germany that an individual employment relationship is based on the existence of a contractual relationship between an employer and an individual employee.² Secondly, although the employment contract is viewed as the primary source of the terms of this employment relationship,³ reality dictates that this contractual employment relationship⁴ is influenced in various degrees by a myriad of statutes.⁵ Thirdly, although the principle of freedom of contract is recognised in Germany its role in contemporary employment relationships, if any at all, remains rather illusive bearing in mind the regulatory role of statutes.⁶ In this article I shall discuss the role and the influence of contractual principles in contemporary German employment relationships against the background of mandatory legislation. The article is divided into two parts. In the first part of the article I shall analyse the role of contractual principles which ensue during the initial stage of the employment relationship with reference to the freedom of an employer to contract and the limitations imposed by legislation. Aspects bearing on the conclusion of a valid employment contract are addressed here. In the second part of the

¹ The contract of services is the basic form from which the contract to sell services, referred to as an employment contract, has developed. Two key elements are found in the explanation of the meaning of an employment contract. First, the element of personal subordination is evident, which refers to the duty of an employee to follow his employer's directions. Secondly, a private contract is established, which in turn means that the individual has voluntarily agreed to become part of the employment relationship. See Weiss "The Future of the Individual Employment Contract in Germany" in Betten (ed) *The Employment Contract in Transforming Labour Relations* (1995) 29 31.

² See Lingemann, Von Steinau-Steinrück and Mengel *Employment & Labour Law in Germany* (2003) 1. Nipperdey simply views an employment relationship as a legal relationship between an employer and an employee on the basis that the employee works for the employer. See Hueck and Nipperdey *Lehrbuch des Arbeitsrechts Band 1 7. Auflage* (1963) 114.

³ Lingemann *et al* 4. An employment contract (*Arbeitsvertrag*) is regarded as the foundation of an employment relationship. See Preis, Peters-Lnge, Rolfs, Stoffels and Wagner *Der Arbeitsvertrag 2. Auflage* (2005) 8 par 15.

⁴ Employment law is not codified in Germany. See Lingemann *et al* 4.

⁵ The regulating aspect of the various statutes (*Bundesgesetze*) is referred to as *eine Vielfalt von Einzelgesetzen*. See Hanau and Adomeit *Arbeitsrecht 13. neu bearbeitete Auflage* (2005) par 145; Steinmeyer and Waltermann *Casebook Arbeitsrecht 2. Auflage* (2000) 7. German employment law is not codified because of the difficulty it entails to codify all the different rules influencing its stipulations including rules pertaining to private law, political interests and other diverse legal fields. The German Constitution stipulates the practice of an occupation may be regulated by legislation. See s 12(1) sent 2 of the Grundgesetz für die Bundesrepublik Deutschland 23 Mai 1949 (the German Constitution) that guarantees freedom of occupation (*Berufsfreiheit*).

⁶ See Otto *Arbeitsrecht 3. Auflage* (2003) par 40. Other authors noted a number of years ago that the contractual agreement between an employer and an employee may simply be a recital of the fact that employment existed with *inter alia* reference to the employment position, trial period, and pay; thus leaving the other details of the relationship to be controlled by statutory law. See Gres and Jung *Handbook of German Employment Law* (1983) 23.

article, I shall consider the contractual duties of the parties, with a specific emphasis on the impact of legislation against the background of applicable court decisions. The article is concluded with an evaluation of the impact of contractual principles and their interaction with legislation as evident in modern German employment relationships. The value of this interesting interaction between contractual principles and statutory law in German employment law for South African individual employment relationships is also considered.

2 CONTRACTUAL AUTONOMY AND LEGISLATION

2.1 The German Civil Code

Three aspects are of importance when considering the important interaction between conventional contract law and contemporary legislation in the individual employment relationship, namely: (i) the meaning of the parties' private autonomy, (ii) the use of the principles of the general civil law in particular with reference to the German Civil Code, and (iii) the method of finding the applicable legal principles.⁷ With regard to the first aspect, Otto notes that the meaning of private autonomy refers to the determination of the protection an individual employee needs in light of the contemporary employment conditions.⁸ The second aspect entails that the principles of the German Civil Code are applicable to the employment relationship as far as other principles have not been created by the legislator, custom, or by means of those exceptions further created by the Federal Labour Court.⁹ The last aspect implies that by using the guidance of the civil law (*Bürgerlichen Recht*) it also implies applying its structures, including the meaning of German civil law, its system, and dogmatic theories and, whilst realising that these structures are very important, a midway should be sought between these structures, legal rigidity and legal creation.¹⁰

So, it is not surprising that one of the most important forms of legislation pertaining to, and impacting on, the contractual employment relationship between an employer and an employee, is the German Civil Code, which is referred to in Germany as the "BGB".¹¹ Specific provisions of the German Civil Code apply to the individual employment relationship but only to the extent that they are not superseded by other special statutory provisions.¹² All contracts, including employment contracts, are required to comply with the principles of equity and good faith.¹³

⁷ Otto (2003) par 41-44.

⁸ Otto (2003) par 42.

⁹ Otto (2003) par 43.

¹⁰ Otto (2003) par 44.

¹¹ Bürgerliches Gesetzbuch (*BGB*) in der Fassung der Bekanntmachung vom 2. Januar 2002 (the German Civil Code).

¹² Foster *German Legal System & Laws* 2ed (1996) 359.

¹³ S 242 of the German Civil Code; Weiss "Fundamental Rights and Labour Law in Germany" in Blanpain (ed) *Labour Law, Human Rights and Social Justice* (2001) 187-196. Weiss explains that this general clause opens a door for the value system as represented by the

Another general albeit important aspect pertains to the illusion of contractual freedom. Based on the fact that the individual employment contract is accepted as being characterised by unilaterally pre-formulated terms, standardisation and uniformity, the courts have laid down a set of limitations on contractual freedom based on the list of fundamental rights contained in the German Constitution.¹⁴

2 2 Sources influencing modern employment contracts

Many conditions of employment are influenced by legislation¹⁵ and work agreements¹⁶ with the effect that the function of the individual employment contract is regarded mainly to improve most of those conditions already provided for by other sources.¹⁷ German courts, of which the Federal Labour Court (*BAG*) is the most important court, may review the content of an employment agreement with regard to its fairness.¹⁸ Standard employment contracts are used for most employees but are often amended if necessary for higher-level employees.¹⁹ Other important legal sources which determine the obligations and rights of employees and employers alike are directives of employers,²⁰ principles relating to equal treatment and equal protection of all employees,²¹ the German Constitution,²² European law,²³ numerous

fundamental rights of the German Constitution. This means that these fundamental rights become the decisive criteria for monitoring the content of an employment contract.

¹⁴ See Weiss in Betten (ed) 37; and further below for a discussion of the relevant sections of the German Constitution.

¹⁵ Legislation sets minimum standards but deviation is possible in terms of the favourability-principle (*eine günstigere Vereinbarung*). Based on this principle, the parties in an employment relationship may agree to better terms than the basic terms stipulated by legislation provided the deviation is to the advantage of the employee. See Otto (2003) par 137.

¹⁶ Work agreements are special contracts concluded between an employer and a work council in order to determine employment conditions. See Lingemann *et al* 4.

¹⁷ See Weiss and Schmidt *Federal Republic of Germany* (2000) par 77.

¹⁸ S 315 of the German Civil Code; and see also Lingemann *et al* 4. Court decisions fill in the gaps left open by the legislator. The Federal Labour Court is just as important as the legislator because it has the power to solely develop the existing law ever further. See Weiss and Schmidt par 72.

¹⁹ “*Leitende Angestellte*”, referring to an employee who in fact “steps into the shoes of an employer”. Thus, this phrase refers to an employee who has managing and supervising duties. See Otto (2003) par 82; s 305 of the German Civil Code; and Weiss and Schmidt par 72.

²⁰ S 315 of the German Civil Code.

²¹ The principle of equal treatment often forms the basis for employees’ remuneration claims. See s 611a of the German Civil Code; s 612 sent 3 of the German Civil Code; s 4 of Gesetz über Teilarbeit und befristete Arbeitsverträge (Teilzeit – und Befristungsgesetz – TzBfG) vom 21 Dezember 2000 (the Part Time and Limited Term Act). The right to equal rights (*Gleichheit vor dem Gesetz*) is guaranteed by s 3(1) of German Constitution that stipulates that men and women shall have equal rights. See Weiss and Schmidt par 132.

²² Although the rights conferred by the German Constitution do not directly apply between citizens, the objective order of the ethnical values derived from the basic constitutional rights affect the relationship between employee and employer in various ways. Some of the fundamental rights do not only affect the relationship between citizens and the government but also affect the relationship of the citizens with one another as legal associates. See Kempff *Grundrechte im Arbeitsverhältnis Zum Grundrechtsverständnis des Bundesarbeitsgerichts* (1988) 25. Examples of sections of the German Constitution which

directives which were adopted by the European Union in order to harmonize national legislation,²⁴ conventions and charters of the International Labour Organisation that became part of national law through a process of ratification and case law.²⁵ Based on the existence of various legal sources influencing German employment law a hierarchy exists for purposes of determining an order of precedence, listed from the most important to least important: European law, constitutional law, statutes, collective bargaining agreements, work agreements, terms of an employment contract, work practice, and the directives of an employer.²⁶

are of particular importance for the individual employment relationship include the following: s 2(1): every person has the right to develop his/her or its own personality (*freie Entfaltung der Persönlichkeit*); s 4(1): right of freedom of religion (*Glaubens-Gewissen- und Bekenntnisfreiheit*); s 12(1): the freedom to practice an occupation (*Berufsfreiheit*); and s 5(1): the right of freedom of choice (*Meinungsfreiheit*). This latter guarantee is interpreted to include a justification for the freedom of contract as well as the right to decide whether and with whom a party is prepared to contract; see Weiss and Schmidt par 94-95. Although the legislature has to provide a legal regime for the regulation of labour relations, this regulatory process must bear the principles of the German Civil law that regulate the individual labour contract in mind. See Foster 358.

²³ Only a few of the articles in European treaties have an effect on German law as regards the employment contract, including Art 141 (the former Art 119) of the European Treaty on Equal Remuneration between Men and Women. See Art 141: Gleiches Entgelt für Männer und Frauen of Vertrag zur Gründung der Europäischen Gemeinschaft vom 25. März 1957, and Art 3 of the Outline of the European Council on Further Development of the Equal Treatment for Men and Women particularly regarding Access to Employment, Career Advancement and Promotion in cases of Labour Stipulations; Richtlinie 76/207/EWG des Rates zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zum Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in bezug auf die Arbeitsbedingungen vom 9. Februar 1976.

²⁴ Various directives of the European Union have been adopted and eventually implemented by German legislation. The provisions of these directives are applicable to the contractual employment relationship between an employer and an employee. See Lingemann *et al* 6. Examples of some the more important directives for purposes of the individual employment relationship include: (i) Equal remuneration for men and women, 75/177 of 10-2-1975 *Abl 1975 no L 45, S 19* implemented in s 611a; s 612(3) of the German Civil Code; (ii) Equal Treatment of Men and Women in relation to Access of Equal Employment, Career Advancement and Promotion 76/202/EWG of 9-2-1976 *Abl 1976 No L 39 S 40*, implemented in s 611a; 611b of the German Civil Code; (iii) Protection (*Wahrung*) of Claims of Employees in the event of Transfer of Undertakings and Businesses, 77/187 of 14-2-1977 *Abl 1977 No L 61 S 26*, implemented through s 613a of the German Civil Code; the Protection of Mothers, 92/85/EWG of 19-10-1992 *Abl 1992 No L 348 S 1*, implemented in the Protection of Mothers Act (see full reference below); and the Framework for Protection of Employment, 89/391 of 12-6-1989 *Abl 1989 No L 183 S 1*, implemented in the Employment Protection Act. See Hromadka and Maschmann *Arbeitsrecht Band 1 Individualarbeitsrecht* (1998) 25.

²⁵ Case law is important because as German labour and employment law are not codified these fill in the gaps in statutory law. See Lingemann *et al* 7. Although case law is not recognised as a formal source of German law, it is generally regarded in the area of labour law as binding law. See Foster 359.

²⁶ Lingemann *et al* 7. A work practice (*Betriebübung*) is rather problematic because it implies that an employee is granted or not granted certain benefits based on earlier practices of the employer. The problem usually arises where the practice is not beneficial to the employee because the latter did not *per se* agree to it at the time of the conclusion of the contract. Usually few problems are experienced by those work practices that are not subordinate to the terms of the employment agreement. However, when a work practice is incorporated in an employment agreement but on different terms, its modification is only possible by either changing the employment agreement, or by classifying it as equal to the terms of the agreement based on the principles of good faith. See Zöllner and Loritz *Arbeitsrecht 5. Auflage* (1998) 73.

As was mentioned earlier, the freedom of the parties in an employment relationship to determine the terms of their employment agreement is guaranteed only if their contractual terms are not contrary to other statutory provisions.²⁷ This distinct limitation of the parties' freedom to contract is based on an ongoing effect to overcome and prevent imbalances that are inherent in an employment relationship.²⁸

3 CONCLUSION OF AN EMPLOYMENT CONTRACT

3.1 General

An employment relationship refers to the totality of the legal relationships created through an employment contract between an employer and an employee.²⁹ Moreover, an employment relationship encompasses an obligatory agreement founded on the concept of a contract with private law features.³⁰ As a special obligatory relationship, the employment relationship is characterised by trust because of its duration.³¹ In Germany the German Civil Code regulates all legal obligatory relationships.³² Therefore, the

²⁷ The freedom of the parties to decide which terms they should like to incorporate in their employment agreement is subject to the provisions of compulsory legislation. Parties may agree to better terms than those terms provided by basic statutory provisions. See Preis *et al* 26 par 67 and 27 par 72; s 105 der Gewerbeordnung i.d.f of 24.8.2002 (the Commercial Order of 2002); and also Otto (2003) par 186.

²⁸ Most of the limitations concern restraints pertaining to the conclusion, contents and termination of the employment contract. See Weiss "Labour Law" in Zekoll and Reimann (eds) *Introduction to German Law* 2ed (2005) 299-328. Despite many limitations to contractual freedom, Weiss observes that this concept remains one of the central principles of labour law because there remains much space for contractual freedom. Although an employer is usually viewed to be in a stronger bargaining position than an employee, the court intervenes when requested. See Weiss in Blanpain (ed) 196.

²⁹ Zöllner and Loritz 40.

³⁰ This is based on the idea that an employer has a duty to pay the employee for the work he has personally undertaken. However, since there is also a personal relationship between an employer and an employee, the employment relationship may not be regarded as a strict relationship of obligations. Other obligation-related relationships are based on the existence of financial duties, whilst having a financial character is merely one of the characteristics of the employment relationship. See Hueck and Nipperdey 132; Richardi "Einführung: Begriff des Arbeitsrechts" in Beck-Texte *Arbeitsgesetze* 64. Auflage (2004) xiii; Steinmeyer and Waltermann 7; and Zöllner and Loritz 40.

³¹ "Duration" refers to the fact that an employment contract is concluded for either an indefinite period of time, or for a specific period of time (*Dauerschuldverhältnis*). Trust permeates the employment relationship, and the private autonomy of the parties within their relationship is consequently restricted thereby. See Otto *Der Wegfall des Vertrauens in den Arbeitnehmer als wichtiger Grund zur Kündigung des Arbeitsverhältnis* (2000) 78-80.

³² The German Civil Code incorporates all the rules applicable to the civil law (*Bürgerlichen Rechts*). This means that the German Civil Code forms part of private law, and as such incorporates all the applicable private law rules that citizens must adhere to. The German Civil Code also deals with specific private law relationships as well as other civil law relationships. The German Civil Code incorporates and distinguishes between various legal relationships, for example, obligations, things, family and succession, and might correctly be viewed as a codification (*Gesamtkodifikation*) of the civil law, but its provisions may be added to by other legislation. Since an employment relationship is a relationship embracing reciprocal obligations of both an employer and an employee, specific provisions of the German Civil Code apply to this contractual relationship. See Bassenge, Diederichsen, Edenhofer, Heinrichs, Heldrich, Putzo, Sprau and Thomas *Palandt Bürgerliches Gesetzbuch* 57. neubearbeitete Auflage (1998) 1-3 and 656.

general provisions of the German Civil Code are not only applicable to the employment relationship but they are also of great importance.³³ Two points deserve mentioning.

First, notwithstanding criticism that the German Civil Code derives from 1889, its provisions are viewed as both practical and not contrary to modern development.³⁴

Secondly, since the relationship between an employer and an employee is a legal relationship with features of the law of persons, it is not surprising that other specialised forms of legislation have been promulgated to ensure social and other protection.³⁵ Although various amendments have influenced the law of obligations during 2002, the provisions of the German Civil Code, especially sections 611 to 630, are regarded as the foundation of individual employment law with the effect that these provisions are applicable to all contractual employment relationships.³⁶

National legislation has been promulgated to implement the directives of the European Union regarding to the prohibition of discrimination in employment.³⁷ However, discriminatory appointments are allowed for purposes of adhering to legislation allowing for the advancement of certain groups of employees. Moreover, private and public employers are compelled to employ a percentage of disabled persons.³⁸

In addition, affirmative action measures aimed at improving the representivity of women in employment are applied in Germany's public service sector.³⁹ These positive measures are incorporated in German law in

³³ The basic principles of the law of obligations as regulated by the German Civil Code are applicable to an employment relationship because the latter is regarded as an obligatory relationship. See Hueck and Nipperdey 131-134.

³⁴ See Dütz *Grundrisse des Rechts: Arbeitsrecht 6. Auflage* (2001) 5.

³⁵ Dütz 5.

³⁶ See Hromadka and Maschmann 33; Hanau and Adomeit par 146. An employment agreement is viewed as a business transaction with legal consequences incorporating both reciprocal rights and obligations. Therefore the general provisions of the German Civil Code pertaining to business transactions and contracts are also applicable to the employment agreement. See further Gres and Jung 53; Zöllner and Loritz 150; and Foster 363.

³⁷ Various recent directives of the European Union prohibit discrimination in employment, for example: (i) Directive on the Prohibition of Discrimination based on Ethnical Origin, Religion, Disability and Age 2000/43; (ii) Sexual Orientation 2000/78, and (iii) Equal Treatment of Men and Women in Employment 2002/73. The provisions of these directives must be applied in the national law of Member Countries. These directives have two dimensions in national law. The first dimension relates to the protection of all persons against discrimination. Secondly, to change perceptions at workplaces in order to ensure that discrimination does not take place in the first place. See Wendeling-Schröder "Grund und Grenzen gemeinschaftlicher Diskriminierungsverbote im Zivil- und Arbeitsrecht" 2004 *Neue Zeitschrift Arbeitsrecht* 1320.

³⁸ See s 71(1) of the Sozialgesetzbuch (SGB IX) Neuntes Buch (IX) Rehabilitation und Teilhabe behinderter Menschen, vom 19. Juni 2001. When an employer advertises at least twenty jobs, five percent of those positions must be filled by disabled employees. An employer who does not comply with this requirement must pay a fine to the agency promoting the position of the disabled in employment. Since the fine is regarded a small amount many employers rather pay the fine instead of employing disabled employees. See Richardi "Begriff des Arbeitsrechts" in Beck-Texte *Arbeitsgesetze 64. Auflage* (2004) xxxiv; Hanau and Adomeit par 630; and Weiss and Schmidt par 120.

³⁹ Referred to as "positive measures" in Germany. Priority in employment is given to women who are equally qualified and under-represented. Germany passed specific acts to further

compliance with the directives of the European Union which were issued to advance the employment opportunities of female employees in Europe. In a well-known decision of the European Court of Justice, *Kalanke/Freie Hansestadt Bremen*,⁴⁰ the court held that the appointment of a female applicant instead of a male applicant for the purpose of positive measures must still comply with the requirements laid down for the fair advancement of women in the workplace.⁴¹

Nonetheless, the European directive regarding equal treatment in employment and career advancement, and which prohibits discrimination, apparently leaves the national legislator with enough room to provide for situations where party-autonomy is important based on the type of appointment.⁴²

3 2 Recruitment through advertising

It has been suggested that, based on one of the fundamental rights in the German Constitution, an employer does not have the right to decide whether or not he wishes to provide a specific applicant with an opportunity to apply for a position.⁴³ It follows then that an employment position may generally not be advertised as only being available to persons of a particular gender, except where gender is an "indispensable prerequisite" for the duties of the employee.⁴⁴

make employment more accessible to female employees. See generally Weiss and Schmidt par 130-134.

⁴⁰ *Eckhard Kalanke/Freie Hansestadt Bremen; EuGH, decision of v 17 October 1995*, referred to by Hamm "Europarechtswirigkeit der Frauenquotenregelung im Bremer Gleichstellungsgesetz" 1995 *Neue Juristische Wochenschrift* 3109. A female applicant was appointed instead of Kalanke, who also applied for the same position and who had a better qualification. Since female workers were not well represented in Bremen's landscaping division priority was given to the application of the female applicant through the implementation of positive measures regardless of the fact that on the merits, Kalanke was the better applicant. He was of the view the appointment was contrary to the principle of equal treatment of all workers. The city of Bremen countered by stating that it made the appointment based on the implementation of positive measures in German public workplaces.

⁴¹ The basic requirement for correct implementation of positive measures is that when on the merits a female applicant's application is similar to the application of a male applicant, priority should be given to the female applicant, especially with regard to those positions where female workers are not well represented. The court noted that women were only supposed to be given priority in cases of where male and female applicants had similar qualifications. In this case, Kalanke was the better applicant. The appointment of a female instead of him was contrary to the equal treatment principles. The court noted that national law is too wide when priority is always given to female workers without limitations in respect of merits.

⁴² Directive 2000/87 EU on Equal Treatment in Employment and Career Advancement. This type of situation may arise when appointments are made on behalf of a church, and a conflict arises between the freedom of religion and the autonomy of the church because the latter only appoints persons of a particular faith. See Belling "Umsetzung der Antidiskriminierungsricht Lini im Hinblick auf das Kirchliche Arbeitsrecht" 2004 *Neue Zeitschrift Arbeitsrecht* 885.

⁴³ See s 20 of the German Constitution which provides for welfare improvement, and is considered to be the source for a right to work. It suggests that any person should be provided with an opportunity to obtain work. See Weiss and Schmidt par 96.

⁴⁴ S 611b read with s 611(a)1 sent 2 of the German Civil Code.

A further limitation to the autonomy of an employer is the prerequisite that a work council may require an employer to advertise a vacancy first before the position is filled.⁴⁵ A prohibition on discrimination applies when an employer advertises a job position, and when a decision is taken regarding the appointment of a person.⁴⁶ However, should an applicant not be employed based on gender, it must first be determined whether he would have been seriously considered for the position was it not for his gender.⁴⁷ The only exception that allows for unequal treatment is when the reason for the discrimination is based on an indispensable prerequisite for the position.⁴⁸

Therefore, applicants may be treated differently when gender is an indispensable prerequisite in either the type of work that will be undertaken, or the manner in which the work will be performed.⁴⁹

3 3 Interview

During an interview an employee may only be asked questions which are in the employer's rightful and legal interest in order to establish an employment relationship.⁵⁰ Whether or not a legal interest exists depends on the type of

⁴⁵ S 93 of the *Betriebsverfassungsgesetz* (BetrVG) in der Fassung der Bekanntmachung vom 25 September 2001 (the Works Constitution Act).

⁴⁶ S 611a of the German Civil Code prohibits discrimination based on gender during the various stages of employment, *eg* appointment, promotion, and termination of employment.

⁴⁷ In one case a male applied for a job in the public service (*Gleichstellungsbeauftragte*) only to be informed that the position must be filled by a woman, thus rendering his application unsuccessful. The applicant alleged discrimination based on gender, and claimed damages. The court referred to s 611a (2) and held that the section stipulates an applicant may not be penalised due to his gender. Penalisation in this context depends on whether he was serious about his application, subjectively considered, and whether his application stood a chance if viewed objectively. It seemed that the complainant applied for the position by submitting a handwritten application without including his prior work experience or any references. The court held that the applicant was not serious about the possible success of his application and only lodged the claim to solicit money. In addition, based on the merits of his application, he was unsuitable for the position. See Schmidt and Spiegelhalter "Rechtsprechung – BAG 12-11-1998 8 AZR 365/97" 1999 *Neue Zeitschrift Arbeitsrecht* 371.

⁴⁸ S 611a(1) and (2) of the German Civil Code; and Lingemann *et al* 8.

⁴⁹ Thüsing "Zulässige Ungleichbehandlung weiblicher und männlicher Arbeitnehmer - Zur Unverzichtbarkeit des 611a Abs 1 Satz 2 BGB" 2001 *Recht der Arbeit* 319 325; and s 611a(1) sent 2 of the German Civil Code. An applicant, who has been unfairly discriminated against at the pre-employment stage, is entitled to reasonable monetary compensation but it is not required that the applicant must be employed. When an applicant was led to believe he would be appointed and he was not appointed due to a non-discriminative reason, for example, the employment relationship never commenced for some reason, the employer is liable for compensation to a maximum of three months' remuneration simply because an agreement existed that employment will take place. See s 611a(3) sent 1 of the German Civil Code.

⁵⁰ Referred to as *zulässige Frage*. Whether or not a question is admissible is determined by the following requirement, namely an employer may only ask questions whose answers are in the interest of the type of work applied for. See Otto (2003) par 198 and 200; and Weiss and Schmidt par 142. The limitation is based on the Constitutional right to respect of one's personality (s 2 of the German Constitution). Later, this general right was developed in order to include a more specific right, namely the right of self-determination in reference to an individual's personal data. The other side of the coin is that an employer has a right to obtain information from an employee during an interview. This right derives from other constitutional rights, namely an employer's right to freedom of profession, the right to protection of private ownership, and the right to develop one's personality, which is

employment. A fine example of this aspect is a decision of the Federal Labour Court where it was held that a medical doctor with a general practice did not have a legal interest which would have entitled him to cancel an employment contract based on fraud with a transsexual, whom he had thought was a female and who later turned out to be a male-in-the-process-of becoming-a-female.⁵¹

Further, an applicant may not be asked if she is pregnant⁵² but questions may be asked about a possible criminal record, provided it is relevant to the type of work.⁵³ An employer may only ask questions relating to the health of an applicant when the question complies with certain requirements.⁵⁴

Whether or not an applicant must reveal his HIV/AIDS status during an interview depends on the nature of the work the applicant is applying for. Two interests must be balanced in this situation. Firstly, the interest of an employer to comply with his contractual duty to ensure a safe working environment for his employees must be considered.⁵⁵ Secondly, the interest

considered to be the foundation of the right to choose one's own contractual partners. Conflicting rights are thus found. The solution dictates that a fair balance must be found between these different rights. Only questions which are in the employer's justified and approveable interest may be asked and need to be answered. See Weiss in Blanpain (ed) 192; and Henssler, Willemsen and Kalb *Arbeitsrecht Kommentar* 2004 1299 par 7.

⁵¹ See Schmidt and Spiegelhalter "Rechtsprechung - BAG 21-2-1991-2 AZR 449/90" 1991 *Neue Zeitschrift Arbeitsrecht* 719. In this case the applicant applied for a position as a doctor's assistant. She was not asked during the interview about her gender nor was she informed that the doctor preferred a female assistant (which would not have made a difference in *casu*). Later the doctor found out that his assistant, Micaela, was actually Michael who was undergoing gender-changing treatment. The doctor cancelled the contract based on fraud. The court noted that an employer is generally entitled to cancel an employment contract based on mis-statements, provided the latter are material. If applicable, the contract may be cancelled based on fraud when the mis-statements were intentional, or it may be cancelled based on error in the event of negligent mis-statement. Fraud was not applicable in *casu* because the applicant was not asked about her gender. The contract might rather have been subject to cancellation due to error, provided having a specific gender was a material requirement of the employment position. In *casu* the court found that the doctor had a general practice with both male and female patients and the gender of his assistant was not a material element of the contract. The termination of the employment contract based on fraud was held to be unfair.

⁵² Based on a decision of the European Court of Justice in the case of *Dekker in Weber* "Rechtsprechung - Dekker/ VJV Centrum EUGH Urt v 8-11-1990-RSC-177/88" 1991 *Neue Juristische Wochenschrift* 628. The employer in *casu* refused to appoint the applicant because her pregnancy would have meant that she would have been entitled to maternity leave, which would in turn had financial implications for his business. The court held that a refusal to appoint a woman because of the financial reasons her pregnancy would have entailed was unjustified and amounted to unfair discrimination based on sex.

⁵³ Lingemann *et al* 10.

⁵⁴ An applicant is only required to inform an employer of a health condition or disability that materially influences the performance of his duties. A "material influence" is determined when: (i) the employee will often or periodically be absent from work, or will be unable to perform due to illness; (ii) the illness is infectious and may endanger future colleagues or clients; and (iii) at a determinable time in the future, *eg* when employment begins, the applicant will be unable to work because, due to the nature of the illness, it has deteriorated into an acute illness. See Otto (2003) par 205; and Hanau and Adomeit par 624.

⁵⁵ S 618(1) of the German Civil Code stipulates that the necessary measures must be taken in order to protect the safety and health of all workers at the place where performance takes place. This duty in respect of the presence of employees with HIV/AIDS means that the employer must ensure that the workplace is hygienic and that the chances of infection by other employees or third parties are limited. An employer must also protect his business interests by ensuring the safety of his personnel. See Lichtenberg "Stand der

of an applicant to protect those intimate and private details of his personal life, guaranteed by the German Constitution, must be acknowledged.⁵⁶ Therefore an employer may only ask an applicant about his HIV/AIDS status when the employer has a legal, fair and protectable interest to know the status of the applicant. A protectable interest is established when the danger exists that either co-workers, or third parties may come into direct contact with the blood or other body fluids of the applicant when he performs his duties as an employee.⁵⁷

An employer is allowed to ask questions about an applicant's disability but only within the framework of the business's interests relevant to the applicant's possible employment and accommodation within the business, and to the employer's interest in order to comply with his statutory duties in respect of employing the disabled.⁵⁸

When an employee lies about permissible questions the employer may contest the relationship based on fraudulent misrepresentation. Both an employer and an employee may rescind from the employment contract when any one of them has concluded the contract based on fraud or threats from the other party.⁵⁹ When an employer is in error (*Irrtum*) regarding the characteristics of an employee pertaining to skills needed for the position, the employer may in some circumstances be allowed to rescind the employment contract.⁶⁰ Employers may only use questionnaires with the

Arbeitrechtlichen Diskussion zur HIV-Infektion und AIDS-Erkrankung" 1990 *Neue Zeitschrift Arbeitsrecht* 41.

⁵⁶ S 21 of the German Constitution which provides that every person has the right to privacy.

⁵⁷ This may be the case during interviews with kitchen personnel and nursing staff. See Lichtenberg 1990 *Neue Zeitschrift Arbeitsrecht* 44; and Henssler *et al* 1303 par 23.

⁵⁸ Schmidt and Spiegelhalter "Rechtsprechung - BAG 1-8-1985-2 AZR 101/83" 1986 *Neue Zeitschrift Arbeitsrecht* 635. Two interests must be balanced, namely the contractual autonomy of an employer to exercise a free choice to choose his employees and the right to privacy of the applicant. Although an applicant may not be discriminated against based on his disability, it is also acknowledged that an employer has an established protectable interest to ask questions about the disability when the disability may influence the employment relationship, for example when the employee is unable to perform in terms of the agreement due to his disability. See Jousen "Si tacuisses-Der Aktuelle Stand zum Fragerecht des Arbeitsgebers nach einer Schwerbehinderung" 2003 *Neue Juristische Wochenschrift* 2857 2858.

⁵⁹ S 123(1) of the German Civil Code; and see Lingemann *et al* 10 and 15. In a case of the Federal Labour Court an applicant applied for a position at an old-age home which entailed that she had to work night-shifts between 20H00-6H00. Owing to a prohibition of the applicable occupation authority, pregnant women were not allowed to work night-shifts. The applicant ensured the employer that she was not pregnant. It later proved that she was, and she was dismissed. A claim of unfair dismissal based on pregnancy was lodged. The court held that the employee had a duty to disclose her pregnancy because it was under these circumstances a quality that would have made it impossible for her to comply with her duties in terms of the contract with the effect that the employment agreement was not concluded. However, it was noted that the agreement would have existed when at the time of the conclusion the applicant was unaware of her pregnancy. The rules of impossibility of performance may then have applied. See Schmidt and Spiegelhalter "Rechtsprechung - BAG 8-9-1988-2 AZR 102/88" 1989 *Neue Zeitschrift Arbeitsrecht* 178.

⁶⁰ S 119(1) of the German Civil Code. When the error pertaining to the characteristics of the person or things is regarded in the business as being essential, the error is also deemed as an error of the content of the intention to conclude an agreement; see s 119(2) of the German Civil Code. However, an employer may not rescind an agreement because of an error regarding the degree of suitability or characteristics of the employee. Only when the error is of such a nature that its absence makes the employee unsuitable for that specific

permission of the work council (*Betriebsrat*).⁶¹ An employment contract will be valid even though the employer appointed an employee without the consent of the work council, but the employee may not be provided with work, ultimately leading to the employer's termination of the contract within the first six months.⁶²

3 4 Conclusion of the contract

3 4 1 Offer and acceptance of employment

A valid employment agreement consists of an offer of employment and an acceptance of the terms of the offer.⁶³ Owing to the personal nature of the employment relationship, an employment contract is only established once the employee has agreed out of his own free will to undertake earlier agreed upon tasks in exchange for remuneration.⁶⁴ A large number of employment contracts are concluded for an indefinite period of time.⁶⁵ Generally there are no formal requirements for the format of an employment contract.⁶⁶ Within

employment, the employer will be able to rescind. See Hueck and Nipperdey 193. In one case of the Federal Labour Court it was held that although any one of the parties may rescind from an employment contract based on a breach of good faith following statements that were made in error, that later proved to be false, the length of the employment relationship may indicate that the contract is not voidable because of the principles of good faith. See Dahs "Bundesarbeitsgericht - BAG 12-2-1970-2 AAZR 184/69" 1970 *Neue Juristische Wochenschrift* 1565.

⁶¹ Companies with more than twenty employees must obtain the permission of the works council before any new employees are appointed, and all the personal data of the employees must be provided to the works council. See s 99(1) sent 1 of the Works Constitution Act. The works council may withhold its permission in some cases, listed in s 99(2) of the Works Constitution Act, for example, when the hiring will lead to the failure to consider an equally suitable fixed-term employee. See Preis *et al* 28 par 75.

⁶² Lingemann *et al* 10. Regardless of the above-mentioned role of the works council, its legal influence with regard to the essential terms of the employment agreement is limited. In the absence of a collective agreement that regulates certain employment conditions, the individual agreement concerning working conditions is not subject to the control of the works council. See Preis *et al* 28 par 75.

⁶³ Lingemann *et al* 10.

⁶⁴ This aspect is referred to as the uttering of his intention to be bounded by the contractual provisions as agreed upon (*Willenseinigung*). See Zöllner and Loritz 41. An employment contract is concluded when the parties are in agreement with regard to the main duties of the employment relationship, namely the employee's duty of performance and the employer's duty of remuneration. See Preis *et al* 8 par 15. However, working for remuneration after a contract was concluded does not *per se* imply that an employment contract was concluded. German law identifies three categories of independent workers who work under different types of contracts for remuneration, for example entrepreneurs who either work under a business contract (*Werkvertrag*), or under a free contract for services (*freier Dienstvertrag*), and quasi-employees who work under free contract for services or under a business contract but who are in both cases financially dependent of a main principal. See Supiot, Casas, De Munck, Hanau, Johansson, Meadows, Mingione, Salais and Van Heijden *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2001) 7.

⁶⁵ Burgess *Contract and Terms and Conditions of Employment Incomes Data Services* (1995) 143.

⁶⁶ There are exceptions to this general rule where an employment contract must be in writing, namely: (i) where an employment contract is concluded with a commercial apprentice, and (ii) in cases of forestry and farming employment agreements for longer than six months where the remuneration-rate is not prescribed. See Hueck and Nipperdey 169. The material or essential contractual terms (*wesentlichen Vertragsbedingungen*) of an employment

one month after an employment agreement is concluded, an employer must provide an employee with the essential contractual terms⁶⁷ and with other information in writing.⁶⁸

3 4 2 Capacity to contract and invalid agreements

Two main statutory restrictions exist that limit the freedom of an employer to conclude an employment contract with a party of his choice.⁶⁹

The first restriction concerns the employment of minors.⁷⁰ The employment of minors is strictly regulated by the Young Persons' Protection in Employment Act.⁷¹ A number of statutory requirements must be met before a minor may be employed, including the following: (i) only minors older than thirteen years may, with assistance, conclude an employment contract, (ii) the permission of their parents is required, (iii) a child may work for a maximum of two hours per day, (iv) the work must be suitable for a child, and (v) the health and development of the child may not be jeopardised by the work.⁷² An employment agreement is void if it is concluded with a minor without the required assistance.⁷³

agreement are the particulars of the parties, the exact date of the commencement of the employment relationship, the period of the employment (when applicable, for example in the case of a fixed-term contract), the place of employment, a description of the employee's tasks, the remuneration, the working hours, the duration of the annual holiday, the notice period in the event of termination of the employment, and the collective agreements, if any that are applicable to the employment agreement. See Preis *et al* 13-17 par 35-44.

⁶⁷ Hanau and Adomeit 184 par 620.

⁶⁸ The purpose of this requirement is to ensure legal security and legal clarity pertaining to the material terms of the employment contract. See Preis *et al* 12 par 29. The information includes the following: the particulars of the parties, the date of the commencement of the agreement, the duration when term-related, the location of the workplace, a description of the duties of the employee, particulars regarding the remuneration, the working hours, length of vacation, notice period when employment relationship is terminated, and references pertaining to collective agreements, or other agreements applicable to the employment relationship. See s 2(1) of Gesetz über den Nachweis der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen (Nachweissgesetz – NachwG) vom 20 Juli 1995; and also Lingemann *et al* 14.

⁶⁹ Certain persons do not have any capacity to conclude an employment agreement at all on their own, namely minors under seven years, and mentally ill persons. A curator may conclude an employment contract on behalf of such a person. See Hueck and Nipperdey 172-173. Minors older than seven years, persons under the influence of alcohol, prodigals (squanderers), or people suffering from certain mental problems may conclude an employment contract with the assistance or permission of a curator.

⁷⁰ A "young" employee is any one between 15 and 18 years. A person older than 13 but younger than 15 years is regarded as a "child". Employment of children older than 13 years is allowed, provided permission is given by persons with parental custody, and the employment is easy and suitable for children. The employment of children under fifteen years but older than 13 years is regulated by a governmental decree, namely the Verordnung über den Kinderarbeiterschutz (Kinderarbeitsschutzverordnung – KindArbSchV) vom 23. Juni 1998. See also Weiss and Schmidt par 118.

⁷¹ S 2(1) and (2) of Gesetz zum Schutze der arbeitenden Jugend (Jugendarbeitsschutzgesetz – JArbSchG) vom 12. April 1976 (the Young Employees Act).

⁷² Ss 5(3) and (4); and s 15 of the Young Employees Act.

⁷³ S 108 sent 1 and 2 of the German Civil Code. The contract may become valid, provided that the parents give permission. See Bassenge *et al* 75; and Hanau and Adomeit 184 par 621.

The second restriction concerns the employment of non-German citizens. Only workers with valid residence permits and valid work permits may be employed.⁷⁴

Furthermore an employment contract is usually invalid when the duties of the parties in terms of the contract are illegal. In a case before the Federal Labour Court, the claimant worked for three months as a strip-dancer.⁷⁵ Following a disagreement regarding outstanding wages she approached the court for an order that the wages be paid to her. Her employer alleged that the applicant did not have a claim for remuneration since the employment agreement between them was against public morals and thus invalid. The court held that it would be contrary to good faith in light of the particular circumstances of the case to allow the employer to use the illegality of the type of work in order not to pay his contractually owed remuneration.⁷⁶

⁷⁴ Ss 1, 3, 4 and 8 of Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz – AuslG) Auszug v 9 Juli 1990; and s 284 of the Sozialgesetzbuch (SGB) Drittes Buch (III) Arbeitsförderung vom 24 März 1997. See further Lingemann *et al* 14. EU nationals do not need a work permit.

⁷⁵ 1971 BAG AP Nr 18 zu § 611 BAG in Steinmeyer and Waltermann 37. Note that the conclusion of an employment contract to work as a prostitute has been valid since 2001 but it is subjected to various requirements, specifically pertaining to the way the services are advertised and the place where performance takes place. See s 1 of the Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG) vom 20. Dezember 2001. The agreement is legal provided that the parties beforehand agree on specific remuneration for sexual services for a specific period of time.

⁷⁶ The court took into consideration that the employee worked for a long time for the employer, and the employer, whilst knowing that the agreement was invalid, never claimed invalidity (*Nichtigkeit*) of the agreement. The court ruled that the principle of factual employment relationship (*faktisches Arbeitsverhältnis*) applies. Invalidity had the result that the employment relationship had no retrospective effects. By viewing the invalid employment agreement as factual the employee will be entitled to claim what was owed to her as if the relationship were valid. The legal consequences following the affirmation of this relationship are (i) the right to claim remuneration, (ii) both parties may agree to terminate the relationship in the future, and (iii) compliance with all rights and duties by both parties during the period of execution of the agreement. See in this regard Otto (2003) par 233.