Beyond the standard labour contract

by Wolfgang Däubler, Professor at the University of Bremen

I. Overview

The development of labour law was concentrated on the standard employment relationship: Full-time work for an indefinite period within a plant where a representation of workers´ interests is at least possible. The salary will normally be sufficient for a decent life of the worker and his family.

This kind of labour relationship gives not only social protection to the worker. In most cases, it serves also the interest of the employer: The productivity of employees increases the longer they stay with the enterprise. They tend to identify themselves with their tasks. This is considered to be the best condition for innovative initiatives.

This standard labour relationship has still the dominating position in all western countries, but its importance has decreased during the last twenty years. “Atypical” labour relationships have grown considerably and comprise one third of the whole workforce – in Great Britain even more. In the following, we shall describe the main features of these “new” forms of employment. Five different patterns seem to be the most important ones.

- Part-time contracts. The weekly working hours agreed upon are inferior to the hours worked normally in the branch;

- Fixed-term contracts. Unlike Chinese law, this form comprises employment contracts which expire at a certain date as well as those which end after a task has been fulfilled;

.

- Temporary agency work. The employer is an agency sending its employees to different firms on their request;

- Work in small enterprises where numerous labour law rules do not apply und where joining a union is difficult;

- Self-employed workers depending on one major customer.

II. Part-time work

Normally part-time workers range from 10 to 20 hours weekly, but there is no exact time limit as in Chinese law. An EC-Directive prohibits any discrimination in comparison to full-time workers. Part-timers shall earn the same amount of money per hour, they must have the same protection against dismissal. An exception can only be made for a "sound reason". In Europe, part-timers are mostly women so that one has to examine in addition whether there is an indirect discrimination for reason of sex which can be justified only under very special conditions. This kind of protection cannot avoid, however, that part-time workers normally cannot earn their living based on their salary. You may call this phenomenon an "inherent" (and undisputed) discrimination by the very nature of their employment relationship.

In Germany, the legislator has established special rules for those part-timers who do not earn more than 400 Euros a month. They are normally people working up to 10 or 12 hours weekly. They are only partially integrated into the social security system and nearly exempt from taxes. This is the case even if the 400-Euro-contract is just a second job the main employment giving a sufficient income. The State subsidizes this kind of employment even where it is not necessary.

The range of subsidizing becomes clear if we take the social security contributions into account which are normally to be paid in the standard employment relationship. The general rule is, that one half is paid by the employer and the other one is paid by the employee. The total amount is considerable going to more than 40 percent of the wage costs. If the monthly salary is 3000 Euros, the employer will have to pay more than 600 Euros in addition and another 600 Euros are deducted from the 3000 Euros and transferred to the social security system. The employee has to pay taxes depending on the family situation which can easily go to another 600 Euros.

In the case of the 400-Euro-contracts only 28 % have to be paid to the social security system and 2 % taxes as a whole. That makes this kind of jobs much less expensive. The details of the rules are quite complicated and cannot be explained here. The concept is criticized for creating a low-wage-sector deferring actual problems to the future: If this kind of workers grows older they will have no sufficient pension and will be forced to rely on social aid.

Part-time workers often have to face special problems of flexible working time. This is the case for the so-called work on call: The employee has to work for instance for ten hours a week but the exact time is scheduled by the employer: He may choose Monday afternoon, Wednesday morning and Saturday evening, but also six hours on Tuesday and two times two hours on Thursday and on Friday. This makes a second part-time job impossible und creates big problems of coordination with private life. The legislator has intervened in Germany restricting only extreme forms of flexibility. The minimum weekly working time has to be fixed in the labour contract; if this has not been done, ten hours are automatically considered to be part of the agreement. A working period must not be inferior to three hours and has to be communicated to the worker at least four days in advance. This does not help very much because part-timers on call are normally low qualified people without any bargaining power; they will never go to court to invoke their (modest) rights. In establishments where a works council exists the situation may be better because the works council has a right of codetermination on the beginning and ending of working time and can therefore look for a reasonable timetable. But only about 50 % of German employees are represented by a works council.

III. Fixed-term contracts

According to an EC-Directive, fixed-term contracts are admissible only under certain circumstances which can, however, easily be fulfilled.

To take German law as an example, there are two categories of conditions.
Fixed-term contracts need – first group of rules - a “sound reason”. There is a non-exhaustive catalogue in the law reaching from the replacement of an absent worker to a “project” taking only a definite time. An explicit desire of the worker which must not be influenced by the employer will be sufficient, too.

The second group of rules does not require a sound reason, but only a limit in time. Fixed-term contracts are legal if they do not exceed two years. In newly founded enterprises, this time goes up to four years. If an employer recruits an employee older than 52 years, the fixed-term contract can last up to five years. In all three cases, a shorter time is possible. In the first alternative, the shorter employment relationship can be followed immediately by three other short time contracts if the total duration does not exceed two years. In the two other cases, there is no limit for the number of the following contracts, but their sum must not be longer than four respectively five years.

Workers with a fixed-term contract have the same rights as workers with a standard employment relationship. As a general rule, any discrimination is forbidden but an exception is made if there is a justifying "sound" reason. The principle of equal treatment is, however, restricted to the time of existence of the fixed-term contract. The fact that it expires after the period agreed upon is part of its nature and never regarded as a problem of discrimination. This point is the fundamental disadvantage of that kind of employment bringing important consequences with it: As employees are normally in danger of getting unemployed after the end of the contract they do not dare to exercise their labour law rights in order not to destroy the (sometimes very small) chance to stay for a longer time at the actual workplace. Legal rules are even less implemented because the German system relies on workers invoking their rights at the courts; the labour inspection has no competence to control whether rules outside health protection have been observed or not.

IV. Temporary agency workers

Private agencies sending their workers to specific enterprises were legalized only in 1972 because the German Constitutional Court had decided that this kind of activity can be part of the freedom to exercise a profession, guaranteed by Art. 12 of the Constitution. The legislator restricted agency work to cases of temporary demand not exceeding three months. This rule wanted to prevent that agency workers were put at the place of workers with stable labour relationships. This was always considered a real danger because agency workers normally earn 40 % less than comparable employees working on the basis of a standard employment relationship with the firm. After 1982, the longest legal time of working in another firm was put to 6 months, afterwards to 9 months and to one year. In 2001, the delay was extended to two years but during the second year the agency worker

was entitled to invoke equal pay and equal treatment compared to those working on the basis of a standard employment relationship within the respective firms. In 2003 and 2004, the agency work was "liberalized"; there was no time limit any more. Other protective rules were abolished, too. The only "compensation" was the equal pay and equal treatment principle starting from the first day. In practice, equal pay and equal treatment had no importance because the law provided, that collective agreements could fix other conditions. The employers side managed to find a small union being ready to conclude a collective agreement; the big unions followed because the employers threatened to conclude only labour contracts referring to that (modest) collective agreement. By this way, temporary agency workers remained on a level of 60 % compared to employees working on the basis of a standard employment relationship.

The number of temporary agency workers increased considerably after 2003. In the middle of 2008 it reached about 800 000 people, whereas in 2001 only 150 000 were working on the basis of such a kind of employment. The expansion of agency work was an important contribution to reduce wage costs in Germany. The price the workers concerned had to pay was quite high, however; they had to take the burden of lower labour costs whereas other kinds of employees could reach (modest) wage increases. During the actual crisis, the number of temporary agency workers fell from 800 000 to 500 000 until March 2009; the risk to lose the job is obviously much higher for this kind of workers. Some people call them second-class-employees.

V. Work in small enterprises

A traditional group of underprivileged workers are those working with a small enterprise up to 20 employees. They suffer disadvantages on the legal as well as on the factual level.

In many legal orders the protection against unfair dismissal requires a certain minimum size of the establishment or the enterprise. In Germany, the "general rule" that a dismissal has to be "socially justified" applies only to establishments employing more than ten workers. Part-timer working up to 20 hours weekly, count for ½, part-timers up to 30 hours weekly count for ¾. The election of a works council requires at least five employees; in other countries the threshold for such a representation of the workers is often much higher.

In practice, difficulties to exercise existing rights seem to be even more important. If the salary is not paid, the worker would have difficulties to go to court. In most cases, this would be considered to be an "unfair" behaviour motivating the employer to take all kinds of measures, taking into account even a dismissal. A comparable situation would arise, if a worker would inform the labour inspection that a health protection rule was not observed. Workers, thus, depend on the good will of their employer. As a rule their only means of pressure is the possibility to go to another employer which is a very modest threat in times of mass unemployment.

Unions normally have their members in bigger enterprises. This is mainly due to the fact that even a union membership would not be well accepted by the employer. The consequence is not only that the individual worker cannot rely on trade union support. Even in the unions themselves there is less interest to develop concepts in order to improve the situation of this group of employees. In union publications you will only rarely find ideas how to solve the problem, how one could e.g. establish a common representation for workers of different enterprises. One of the few positive examples is the French "conseil de site" which represents all employees working in a certain limited area like a small technology park.

VI. Self-employed workers

Labour law rules do not apply to self-employed workers. An architect, a lawyer and a plumber are no "employees" of their customers. The situation changes if such an independent worker has only one main customer who cannot be replaced in due time by another one. A journalist is working regularly for the only radio station in the region, a teacher of Vietnamese language can only offer his or her services at an certain private institution. The possibility to treat these people as "employees" is in most cases excluded. An employee is normally defined as a person unable to organize his work by its own being obliged to follow the directives of another person, i.e. the employer. The journalist or the teacher keep the right to organize their work, their "autonomy" is not questioned by the fact that they are economically dependant. Their real situation is, however, very similar to that of an employee. If they lose their "job", they are "unemployed" like other

people, if they fall ill they need social benefits, if a female worker becomes pregnant, the same problems arise.

Some legal orders do not pay any attention to that specific situation. If there is a general insurance against illness and unemployment for everybody, the situation is quite acceptable, but most European countries are very far from it. Some countries have developed the notion of an "employee-like person" ("Arbeitnehmerähnliche Person" in Germany, "lavoratore parasubordinato" in Italy) to whom some of the labour law rules apply. In Germany rules on health protection, annual leave, prohibition of discrimination, additional pension schemes and leave to look after severely ill family members apply to employee-like persons. Collective agreements are possible for this group, too. They can go to the labour courts whereas the ordinary courts are competent if other independent workers sue their customers. Important parts of labour law, however, do not apply: this group is still excluded from most of the rules concerning protection against unfair dismissal, and they are not integrated in the legal representation of workers´ interests – they have no right to participate in the election of the works councils, the elected bodies cannot speak in their name or pursue their interests.

The major problem is, however, the participation in the social security system. As independent workers are generally not included in the social security system, the labour costs for the employer are 40 percent lower. This is a high incentive to hire independent instead of salaried workers. There are of course limits which lie in the kind of work and in the political framework, but it cannot be excluded that a lorry-driver is "employed" as a "distribution manager". In France and Austria this kind of incentive does not exist because the social security system comprises all kinds of workers and all sorts of income. In Germany and in Holland, where the problem arises in a very clear manner, there are very few ideas how to improve the situation. One could imagine to establish a principle of non-discrimination in this field, which would, however, be difficult to handle: The fact that the self-employed person has to pay contributions to a private insurance system should enter into the comparison between the two groups but it is not easy to quantify it.

If an employer treats an individual as a self-employed person, who in reality is an employee, the sanctions are considerable: If the social security authorities find out that it is a salaried person, the employer has to pay the social security contributions back until

the beginning of the work (but not more than four years) and has to pay not only his half but also the half of the employee. In order to prevent such a risk the “employer” can formally ask the authorities to qualify the relationship. Misuse is so prevented. The most important problem remains, however: Real self-employed persons stay outside many labour law rights and the social security system; their economic situation is nearly not regarded. Thus, they risk to be among the low-wage people, too.