Hidden Employment Relationships – Integration into Labour Law?

- The German Case –

by Wolfgang Däubler, Bremen

1. Introduction

During the last twenty years, labour law had to defend its position. Its field of application became narrower – service relationships governed by civil law increased. The ILO-Recommendation No. 198 is an interesting reaction to this phenomenon. Unfortunately, it is more or less unknown in Germany. Courts and lawyers have made great progress in recognizing the existence and the practical impact of EC law, but international conventions still remain outside their field of interest. As to ILO-Conventions, there are some very rare exceptions in the case law of the Federal Labour Court. Recommendations, however, are totally beyond the horizon; good wishes may come from different parts of the world, but in serious lawyers´ lives they do not play any role. Even an article published in a law journal would be of a higher importance, because it may indicate how courts will decide a conflict. ILO- Recommendations cannot fulfil a comparable function being deprived of any real influence on decision making in our country.

Is it not inadequate or impolite to tell this in such a harsh way? Of course, the mainstream in legal literature would not do it and assert that these ILO-rules are "not yet" taken into account. But can we detect elements that could justify the hope for a better situation in the future? An expert would know that the form of recommendation was probably chosen because of the fact that a convention about "contract labour" would not be accepted by the Labour Conference. Even in the ILO, there was no political will to change the existent situation and to impose legal obligations on the Member States. Under these conditions, it is up to the national legislator to deal with the problem of hidden employments. It is, therefore, a reasonable project to collect national solutions which have been developed during the last twenty years.

What can the outcome of a project searching for hidden employment relationships be? We can include them in the rules of labour law and provide the workers concerned with some

protection. What we can not do is to overcome two structural obstacles for an efficient protection for all those who deserve it.

- A hidden employment relationship does not exist in cases in which the working person is not obliged to follow the instructions of another person during the performance of his or her work. The pure fact to depend economically on one major "customer" is not sufficient to create an employment relationship. Like other legal orders, German law requires a personal subordination.[1]
- The existence of a labour relationship does not guarantee a sufficient protection of workers´ basic interests. Labour law is helpless if the owner of an enterprise sells it to a buyer which will not behave like a traditional employer. What can labour law do if the buyer takes measures to dissolve the enterprise and eliminate by this way an unwelcome competitor? What can labour law do if the buyer closes down some important parts of the enterprise in order to sell the remaining parts for a better price because of their high profitability? What can labour law do if the buyer does not take the necessary investments and goes bankrupt after some years? Will workers have a right of veto, if the enterprise has to take over the debts which the purchaser has made in order to finance the deal? The list of examples could easily be completed. In all these cases, labour law plays a passive role reducing in a modest way the disadvantages, especially the loss of working places suffered by the workers affected by these transactions. Shareholder-value capitalism has shown these problems in a massive way. But even labour lawyers who discuss these evils are difficult to be found.[2] Is it not up to company law to find a solution in such cases?

2. Disguised employment relationships - the current situation in Germany

Like in other countries, 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

[1] Details in *Däubler*, Arbeitsrecht 1, 16th edition 2006, p. 69 ff.
[2] An exception is *Wolter*, Die Finanzmärkte, das Arbeitsrecht und die freie Unternehmerentscheidung, AuR 2008 p. 325 ff.

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. Four 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 enterprise or in the branch;

- Fixed-term contracts. This form comprises employment relationships 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 are not covered by labour law, even if depending on one major customer.

In most of the above-mentioned cases, the existence of an employment relationship is clear. There is no doubt that a saleswoman in a supermarket or a worker operating a machine are belonging to the category of “employee”. Uncertainties arise especially in four specific constellations:

- Workers on call may have a “framework-agreement” with an entrepreneur. The latter may ask them to come for a day, a week or three months concluding in each case a new employment contract. The framework agreement as such may not be governed by labour law. The “employer” remains free to ask the “partner” or not to ask him to come. The persons concerned have no protection against dismissal, their working life becomes unpredictable.

- Employees are defined to be independent workers. A journalist working only for one newspaper as a free lance may serve as an example. The advantages for the entrepreneur are considerable: There is no paid annual leave and no continued payment of wages during six weeks of illness (both being legal rights of employees), there is no protection against dismissal. In German law, the most important effect is that self-employed persons work outside the social security system. Some 43 percents of the wage costs shall no longer be paid (normally by both sides), the self-employed becoming by this way extremely inexpensive workers. Why should an employer not use this possibility and declare for instance his field staff to do independent work?
- Certain persons are declared to be "volunteers". They just collaborate to qualify themselves, to get work experience which will be useful for their position on the labour market. They get no money or just a symbolic sum. After leaving the university, a lot of people are in such a situation. A special case is an "assimilation period" of one or two weeks in which the "candidate" gets acquainted with the way of working in the firm – of course without any salary.
- One could finally mention work in the informal sector. An agreement exists between "owner" and "working person", subordination may be quite clear as well as a salary paid every month, but social security and state agencies shall not be informed. No taxes and no social security contributions are paid, no labour permit is asked for migrant workers from outside the EU. It is an employment relationship without labour law and social security – just governed by informal social rules. What would happen if such an informal worker would go to court and ask for holidays or for adequate payment?

Before looking for solutions and transforming the hidden in an open employment relationship, we should clarify two conditions. Which can be in the German system an authority to whom the employee can go and ask for help? Could other persons do it at his place? And secondly: Which are the concrete requirement a legal relationship has to fulfil in order to be considered an "employment" relationship?

3. Institutions

a) Courts

In Germany, the most important authority to realize labour law rules are the labour courts. A worker whose rights have been violated (or allegedly violated) can go to court and ask for compensation or for damages. Every year, about 600 000 workers (among 35 million) use this possibility.[3] In most of the cases, the legal action is introduced after the end of the labour relationship, especially after dismissal. As a rule, only public employees (and civil servants) go to court during an "existing" labour relationship. Exceptions are people who accept to run a high risk to be dismissed some time after the lawsuit has ended; others may be very convinced to be right or to be supported by many collaborators of the firm. Courts can, therefore, help in individual cases, but cannot provide for a general solution.

b) Labour inspection

Labour inspection has a very narrow field of action in Germany. It can control only whether the rules about health protection including legal working time have been observed. It has no competence to verify if labour contracts and collective agreements have been observed. Theoretically, they could ask whether a certain person is an employee because the Act on Working Time applies only to employees. In practice, nobody has ever raised this question; it would, by the way, only be important if the limit of 48 hours weekly (in an average of 6 months) had not been respected by the person concerned. As the capacities of the labour inspection are not sufficient to monitor the majority of enterprises during the year, they concentrate their activities on subjects which seem to be of higher importance.

c) Social security authorities

The social security system is less based on the liberal idea of individuals going to court. It includes special authorities with investigation power which can control whether the necessary contributions have been paid or not. The obligation of the employer depends on the amount of money the worker has to receive, not on the real money paid. If an independent worker is

[3] See www.bmas.de

considered to be an employee by the authority, the employer has to pay the contributions for both sides, even four years back. That is a very severe sanction which can, however, be inflicted only if the person has performed in reality subordinate work. If he or she is a real independent worker, organizing the activity by his or her own, no social security contributions have to be paid and no sanctions are possible.

d) Works Councils and Unions

It is difficult to conceive that work councils or unions would intervene in cases of a hidden employment relationship. Unlike in France, they have no right to go to court in order to ask the employer to observe the laws, the collective agreements and labour contracts. The works councils have the task to control whether "protective rules for employees" have been observed within the enterprise, but they have no means to change the situation: They can just ask the employer to comply with the rules but if he has another view on them or if he follows another interpretation, he will not change his behaviour. The union can just send a letter asking the employer to act in a correct way. It depends on his free will whether he will answer or not. To go to strike would be quite unusual for the union and feasible only in enterprises with high union density; the fact of being an employee is normally uncontested under such circumstances.

If there is a case of grave misconduct – employees are e. g. exposed to hidden cameras even in toilets – works councils and unions can tell it to journalists or protest publicly against such a situation. But only obvious violations of the law may be the starting point of a campaign. To find such a case in our field of research would be quite difficult because of the vagueness which characterizes the notion of "employee".

4. The notion of an employee

To detect a hidden employment relationship requires an adequate definition of the phenomenon looked for.

a) Definition or Description?

There is no legal definition of the term "employee" or "employment relationship" (Arbeitsverhältnis) in German labour law. Statutes use the term without giving any hint as to its contents. The independent worker as such is not defined in statute law either. It is therefore up to the labour courts to give a definition and thus decide the field of application of labour law.

According to the Federal Labour Court, the term "employee" has the same meaning in all parts of labour law,[4] but some statutes provide for exceptions.

Social security law requires an "occupation relationship" (Beschäftigungsverhältnis) for integration into the social insurance scheme. Section 7 § 1 of the Social Security Code, Book IV, defines it as "dependent labour especially as an employee". The wording makes it clear that even there the notion of employee is not defined and that non-employees may be included in social security (which has been made for some small groups e. g. artists)..

According to case law, the border-line between employees and self-employed depends on the "degree of personal dependence." An "employee" has to perform his or her services in a work organization whose structure has been determined by another person. This "integration" becomes obvious if the employee has to follow instructions with regard to time, length, site and contents of the services. The courts often refer to Section 84 § 1 of the Commercial Code which defines a self-employed commercial representative as a person who is able to organize his activity and to determine his working time. Despite its narrow area of application, the provision expresses a general principle in the sense that people unable to organize their work and spend their time as they want are considered to be employees.[5]

The obligation to follow instructions with regard to time, length, location site, and contents of the service is not required to be "universal" in the sense that all aspects of the work must be covered. The critical requirement is that one must be at the disposal of the employer during a certain period of time. So, for example, a chief doctor of a hospital is considered to be an employee despite the fact that he freely decides about the measures to be taken in his job.[6]

[4] *BAG* AP Nr. 48 zu § 5 BetrVG 1972
[5] *Däubler*, Arbeitsrecht 1, loc. cit., p. 72 ff
[6] BAG AP Nr. 24 zu § 611 BGB Ärzte, Gehaltsansprüche

Similarly, a person in charge of controlling whether people pay their fees to public radio stations can have such a heavy workload that the lack of express time limitation on the work is of no importance; they are employees, too.[7] The judge has to give a general evaluation of the situation using all sorts of reasonable criteria.[8] The fact that the individual has to perform the services personally is indicative of the existence of an employment relationship, but the right to send another person is not automatically incompatible with the status of a worker.[9] Nor do certain economic criteria play a role: The manner of payment, the risk taken by the employee or the lack of personal economic dependence on the partner is without any importance. For example a very wealthy person would be treated as an employee if his activity fulfils the above-mentioned criteria. On the other hand, as a practical matter in the vast majority of cases, the employee loses his economic existence by losing his job.

According to case law, "employee" is what we call a "Typus" (type), not an exact notion. It is sufficient if some of the criteria are found; the absence of others is of no importance, if – seen as a whole – the activity to be done is characteristic for an employee. The Federal Labour Court has clearly declared that there are no abstract criteria applicable to all employment relationships.[10]

What is the basis for judging whether a person has to follow instructions or fulfils other conditions of an employment relationship? The courts generally agree that the name of the contract is without importance. A worker cannot become a self-employed person merely by changing the heading of his contract.[11] Moreover, if there is a contradiction between the contract and the way services are actually being performed, the practice prevails. Thus, a clause providing for "voluntary performance" has to be put aside if the circumstances show that the worker may not refuse to come without risking to lose the job.[12]

In its methodology of describing the employee, the Federal Social Security Court follows the Federal Labour Court; the results are more ore less identical.

b) Problems of application

[7] BAG AP Nr. 104 zu § 611 BGB Abhängigkeit
[8] See note 7
[9] BAG AP Nr. 90 zu § 611 BGB Abhängigkeit
[10] BAG AP Nr. 48 zu § 5 BetrVG; BAG AP Nr. 90 zu § 611 BGB Abhängigkeit
[11] BAG AP Nr. 48 zu § 5 BetrVG 1972; BAG AP Nr. 90 and 103 zu § 611 BGB Abhängigkeit
[12] BAG AP Nr. 90 zu § 611 BGB Abhängigkeit

The lack of a clear definition makes it difficult to use the above-mentioned instruments in order to integrate certain persons into labour law. The number of court decisions dealing with the question whether a person is an employee has increased considerably during the last 15 years. There are very different fields where the problem has been raised; we can give only a short overview.

The most controversial area concerns journalists who work for newspapers and radio stations. The Federal Labour Court, in some cases, has tried to find quite an easy solution. If the same activity is performed by employees, too, the journalist can ask to be considered as an employee because it would infringe the general principle of equality to make such a distinction in status without any obvious justification.[13] If that approach were not available, the Court has examined whether or not the person was free in organizing his or her work. On the one hand, a photographer who is only obliged to deliver a certain quantity of photos a month without being obliged to be present at certain moments was considered not to be an employee but a free lance.[14] On the other hand, a journalist who is entitled to refuse certain shifts was considered to be an employee because he was expected to accept the shift proposal by the director.[15] The same approach was taken with a contributor to the radio show "Deutsche Welle" which is broadcast world-wide with introductions in several languages. He had to collect information, draft a text and read it at 6 p.m. Despite the fact of being free to start working at his discretion - at, say, 9:00 or 11:00 a. m. – the actual constraint of working intensively was considered to be decisive.[16] Newspaper men are normally employees[17] but a different result is possible if their workload is so heavy that it can only be done by several persons.[18]

Another important group are teachers. The Federal Labour Court classifies teachers at general state schools as employees, whereas teachers at adult educational centres are considered to be self-employed persons.[19] The reasoning does not seem to be very convincing. The activity in adult educational centres is deemed to be essentially schematic such that the owner of the school gives no additional instructions in "completing" the contract. In addition, the teacher

[13] BAG AP Nr. 10, 16, 17 and 20 zu § 611 BGB Abhängigkeit
[14] BAG DB (= Der Betrieb) 1992 p. 1781
[15] BAG AP Nr. 74 zu § 611 BGB Abhängigkeit
[16] BAG AP Nr. 15 zu § 611 BGB Abhängigkeit
[17] BAG DB 1992 p.1429
[18] BAG AP Nr. 4 zu § 611 BGB Zeitungsausträger
[19] BAG AP Nr. 61 zu § 611 BGB Abhängigkeit

normally has the freedom to choose the time of the courses which he offers two times a week. In a more recent decision, however, teachers doing vocational training were considered to be employees because the owner of the school determined the objects of the training, as well as the time and place of the teacher´s activity.[20] Teachers in night schools (where one can study for die Abitur) are employees for the same reasons.[21] However a person who has to analyse social science publications and provide a short summary with some headwords was a free lance because the contents of his work were carefully established in the labour contract by way of "directives" and because he was not obliged to be present at any specified times. The fact that a certain quantity of work had to be done during a fixed period of time had minor importance as self-employed persons have to be on time as well.[22] This decision was criticized, however, because "subordination" can be evidenced not only by concrete instructions, but also by a meticulous redaction of a labour contract.[23]

In the transport sector, lorry drivers, who had worked under labour contracts, were transferred to self-employed persons as "common carriers". The Federal Labour Court accepted that contract if the driver had the right, practically and not only in theory, to secure work from other customers.[24] Obviously, this was not so when he was obliged to phone the employer every hour, from morning to night, to learn whether there was a job to be done.[25] However, the fact that a driver worked only for one entrepreneur is not of essential importance because, in another case, his freedom to organize the work was judged sufficient to render him a free lance.[26] The Federal Supreme Court (Bundesgerichtshof) came to the same conclusion when the driver had two lorries and employed a worker whom he could send in his place.[27] A customer service man was considered to be an employee because he had to work under general instructions of the owner and at a time and place the customers wanted.[28]

[20] BAG AP Nr. 133 zu § 611 BGB Lehrer, Dozenten
[21] BAG AP Nr. 122 zu § 611 BGB Lehrer, Dozenten
[22] BAG AP Nr. 48 zu § 5 BetrVG 1972
[23] Otto, note to BAG op. cit. (note 22)
[24] BAG DB 1998 p. 624; BAG DB 1999 p. 436
[25] BAG see note 24.
[26] BAG AP Nr. 103 zu § 611 BGB Abhängigkeit
[27] BGH (= Bundesgerichtshof) DB 1999, p.151
[28] BAG AP Nr. 102 zu § 611 BGB Abhängigkeit

Some cases concern whether franchisees were self-employed persons or employees. Applying the general criteria, the regional labour courts came to different results;[29] the Federal Courts have never had to take a clear position.[30]

It is relatively easy to criticize the Courts´ approach. One can rarely know in which cases the "evaluation of all the circumstances" will lead the judge to conclude that the person is an employee or a self-employed. This kind of legal uncertainty vexes as it concerns the crucial question whether labour law is or is not applicable.

For employers, this situation is rather comfortable for two reasons. First, they can intentionally conclude contracts in the grey area of uncertain classification. Realistically, they can expect that the dependant person will not sue and so risk a loss of employment. Second, they can change the organisation of the work in a way that the "dependant" will nevertheless, in his own interest, "function" according to his partner´s desires. In this way, the costs of the employer can be reduced considerably.

5. Transforming hidden into recognized employment relationships?

Let´s come back to the four cases described in part 2. Is there any way to bring persons into the field of application of labour law who are considered to be self-employed?

If there is a framework agreement about possible short-time jobs which the worker is entitled to refuse the chances to come under labour law are quite modest. The Federal Labour Court has clearly decided that the framework agreement is no employment contract.[31] The arguments are in a certain way formalistic stressing upon the fact that the individual may refuse at any time to conclude a new contract. The economic constraint that will often oblige the person to accept the offer of the employer is not really taken into account. In some cases there may be another way out. Fixed-term contracts require a "just ground" which cannot be found if the employee comes always back to do the same job. An intelligent employer will, however, get good advice from lawyers in order to prevent such a situation. Even a less intelligent one would run no big risk: The only way for the worker to get the normal protection of labour law would be to sue the employer at the labour court. He would run the

[29] LAG (= Landesarbeitsgericht) Düsseldorf DB 1988 p. 293; LAG Rheinland-Pfalz LAGE (Sammlung von Entscheidungen der Landesarbeitsgerichte) § 611 BGB Arbeitnehmerbegriff Nr.32
[30] See BGH DB 1999 p. 152
[31] BAG DB 2003, 96 = AuR 2003, 307

risk that after some time the employment relationship would find its end "for other reasons". To go to the social security authority would not be helpful; during the short jobs the employer will normally pay social security contributions or use an exception rule for casual work.[32] The fact of being deprived of paid holidays and protection against dismissal is no matter of interest for social security bodies.

Free lances were the second case. As the references to the court decisions show many people had tried to find a solution with the help of the labour jurisdiction. But it would be wrong to have a look only on those going to court. Works councils and unions in this sector normally give a lot of examples that people do not go to court even in the public sector because the outcome of the lawsuit is unpredictable. If the employee fails to win, his situation becomes difficult. Labour courts are helpful in specific cases, not as a general remedy. The intervention of the social security authority may be much more effective but there is the same problem of vagueness: How is it possible to prove that a person was not employed according to his contract as a free lance but as an employee? How to prove that there were instructions and strict time limits? Will other people in the enterprise tell the social security officer that the person concerned had to follow instructions or did exactly the same job as employees? Will they do that even if the employer had told them that he will be forced to pay all social security contributions for the last four years and that this enormous sum could endanger his whole activity?

In 1998, the legislator intervened exactly in this point. The notion of the "occupation relationship" in Art. 7 of the Social security Code Book IV was changed. The legislator established four criteria which could more easily be proved than the traditional "employment" or "occupation" relationship; if two of them were fulfilled there was a presumption the person concerned being an employee. The "employer" had to prove that the presumption was wrong and that the person was working as a self-employed.[33] The four criteria were:

- The person does not employ other persons as employees
- The person works essentially for one single customer
- The person is performing work which is typically done by employees
- The person does not offer his services or his products at the market.

[32] Art. 8 § 1 of the Social Security Code Book IV

[33] Gesetz zu Korrekturen in der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte v. 17.12.1999, BGBl I S. 3843 ff. changing Art. 7 § 4 of the Social Security Code Book IV

The resistance of small employers was considerable. Mass media made a campaign against this "stupid way" of forcing people into social security. The chancellor himself, member of a law firm, was quite furious because his firm had to pay social security contributions for three lawyers they had occupied as "free lances". The idea behind the law was a good one, but the concrete rules were too strong in a certain way: An employer run a very high risk if he made a mistake in qualifying a person as self-employed. The decisions of the social security bodies can be controlled by the Social Security Courts, of course, but it may take several years before the employer (like other people) gets a decision. In the meantime, he has to pay. The law was changed in 2000:[34] Among five criteria three had now to be fulfilled. But the main point was that the employer could ask the administration whether a person is a self-employed one or an employee. Contributions were to be paid only for the time after the statement of the authority the person being an employee. Afterwards, the situation calmed rapidly. The problem of "fictitious self-employment" disappeared. One may presume that in some cases contributions are paid in which they were not paid before, and that in some other cases the work is organized in a way that nobody can pretend the person being in reality an employee. The demand for low-paid work-force was in the following years met by temporary agency workers earning about 40 % less than comparative workers in other sectors of the economy. They took over the function the pretended free lances had to fulfil in the nineties.

The problem of "volunteers" who are in reality employees at the beginning of their career still exists. Unions and several political parties ask for an amendment of the law in order to integrate these people into labour law. But there is no political will being sufficiently strong to realize such a demand. One could add the argument that the problem is not so much a legal one: The persons concerned normally fulfil the same tasks as employees except of needing some useful hints from colleagues – a situation typical for all beginners, but never an argument not to consider them as employees. The proof that they are employees would not be very difficult but nobody goes to court: They want to continue working with the firm or obtain at least a certificate declaring their excellent capacity to do a job with high responsibility. The labour inspection has no possibility to intervene (because health protection and the 48-hours-week are observed), the social security authorities could, but they still see problems of proving the correct nature of the activity. Works councils and unions may protest, but the problem is not "broad" enough for triggering a general pressure against the employer or even strikes. So business goes on as usual.

[34] Gesetz zur Förderung der Selbständigkeit, BGBl 2000 I p. 2

Work in the informal sector may be no gainful employment (activities in the family, in associations, churches, political parties, unions etc) which is outside the scope of this study. Gainful work which is not declared to state or social security authorities remains important: There are serious estimations that 14.7 % of the gross domestic product is produced in this way.[35] There may be a lot of small businesses doing (real) self-employed work but salaried activities are well known in this sector, too. A lot of households practice it (the cleaning lady getting cash), the construction sector has the same reputation as well as restaurants and hotels. You will even find a lot of foreign citizens from countries outside the EU without any permit. Normally, the legal situation does not create any doubts. State authorities fight against these phenomena and get some success especially in the construction sector, but this does not lead to a fundamental change. The employees are normally interested in conserving the situation because the alternative would be unemployment; in the case of foreigners the obligation to leave the country is added. As to the work in the household, it may be a second or a third activity; there is no need to pay contributions to the social security because the integration is guaranteed by the first job. A cleaning lady informing the social security authorities would, by the way, be considered a very unfair person breaching rules generally accepted.

6. Perspectives

a) A new notion of "employee"?

One could, of course, create a new notion of employee which would comprise all kinds of activities except those which are typical for an entrepreneur: going voluntarily to the market for goods and services having at the same time a chance for profit as well as running economic risks. There is a scientific study putting such a notion at the place of the traditional vague concept of employment relationship[36] which even got the support of two regional labour courts.[37] The main argument is that the "notion" of an employee is not linked to the purpose of labour law: Expressed in a simplified manner, the protection by labour law rules should be given to all those who need it, not to a group which is characterized (in a certain way by chance) by a personal subordination. If employees get six weeks paid in case of illness

[35] Vogler/Ludwig, in: European Employment Observatory, Undeclared work, Munich 2007 (www.eu-employment-observatory.net)
[36] Wank, Arbeitnehmer und Selbständige, München 1988
[37] LAG Niedersachsen LAGE § 611 BGB Arbeitnehmerbegriff Nr. 24; LAG Köln LAGE § 611 BGB Arbeitnehmerbegriff Nr. 27

– why should a free lance depending (more or less) on one enterprise be deprived of it? If employees are protected against unfair dismissal, why should a free lance lose his job from one day to the other without having any legal remedies? Why are only employees covered by social security? The Federal Labour Court did not follow these arguments and did not change its case law. After the bad experience with the reform of the Social Security Code the legislator does not want to enter into new experiments.

b) The employee-like person

There is one possible way out which has to be mentioned here. Beside the "employee" German law has developed the so-called employee-like person (arbeitnehmerähnliche Person). These persons are formally independent contractors without any personal subordination, but are characterized by a position of economic dependence; they are regarded as needing protection similar to that of employees.

To be a worker-like person does not automatically mean that a definite set of legal norms apply. Specific legislation exists for home-workers and commercial representatives. All other employee-like persons are subject to some labour law statutes and principles, the number of which is, however, not always clear.

c) Home-workers as a special group

The oldest group, whose social problem became notorious by the end of the nineteenth century, are homeworkers.[38] Their actual situation is regulated in the Homeworking Act[39] and in a number of specific Labour Law Acts in which they are expressly included. The number of homeworkers nowadays is approximately 150.000.[40] They do not benefit from the expansion of telework; teleworkers are normally employees because of their integration into the employer´s organization.[41]A homeworker is a person who, in a workplace of his or her own choosing, normally the home, undertakes paid work for traders who sell the products afterwards. Homeworkers have no direct contact with the market for goods, and they are not "employees" because they organize their work themselves.. Up to 1974, only typical blue-collar work could be the object of homeworking. This was changed, but until now it is still not

[38] Historical development described by Hromadka NZA (= Neue zeitschrift für Arbeitsrecht) 1997, 1249
[39] Heimarbeitsgesetz vom 14. 3. 1951 (BGBl I 191), last modification 31.10.2006 (BGBl I 2407)
[40] Kittner, Arbeits- und Sozialordnung, 34. Aufl. 2009, p. 818
[41] More details see Wedde, Telearbeit, 3rd edition 2002, p. 17 ff.

quite clear whether all white-collar work is included or not. The customer has to be a "trader" which excludes the state and other public organs.

The main rules governing the status of a homeworker are the following:
- Collective agreements for homeworkers are possible but virtually non-existent. Consequently, the legislature has provided for homeworking committees organized by the labour administration. These are normally composed of two union and two employers´ representatives (a civil servant being chair) and can determine minimum wages and other working conditions for the branch where they exist.[42] Section 25 of the Act gives the labour administration the right to sue the customer without any special authorization; the judgment is valid for the homeworker.
- The periods of notice which have to be respected by employers if they dismiss an employee also apply to homeworkers if they work mainly for one person. If a homework relationship is to be terminated, there is a danger that the employing person will allocate less work and so reduce the homeworker´s income in the interim.The law provides that a certain minimum calculated on the basis of the last 24 weeks has to be paid automatically.
- Homeworkers are integrated in the works constitution of the enterprise they predominantly work for.[43]
- Homeworkers have a right to annual paid leave and are included in all social security systems.
- The only remaining differenc of importance concerns the protection against dismissal. Under German law, the employer can only dismiss an employee if there is a "just ground" making the dismissal "socially acceptable". This rule does not apply to homeworkers. There may be a certain minimum protection excluding arbitrary dismissals[44], but there is no real case law about it.

d) Commercial Representatives

Commercial representatives are persons arranging or concluding transactions for one or more entrepreneurs. They are not employees, indeed, their legal status is quite far from labour law rules even if they depend economically on another enterprise. They are governed by Sections

[42] Sections 17 to 22 of the Homeworking Act
[43] Section 5 § 1 of the Works Constitution Act
[44] BAG NZA 1998, 1003

84 ff. of the Commercial Code; only very few labour law rules are applied by analogy. The Commercial Code contains the following salient features:

- Definition of the circumstances under which the representative earns a commission.
- Periods of notice which are different of those of employees.
- After the end of their job, representatives have a right to a compensation payment because the customers they had won for the enterprise will continue their contracts.[45] This is the only case in which German law provides for an automatic compensation in the end of a "labour relationship".
- Collective agreements cannot be concluded for commercial representatives. Section 12a § 4 of the Act on Collective Agreements excludes it expressly.
- Unlike other employee-like persons, representatives can go to the labour courts only if they do not earn more than 1000 Euros per month. In practice, this means that normally the ordinary courts will have jurisdiction.

e) Employee-like Persons in general

If an employee-like person is neither a homeworker nor a commercial representative, a set of labour law rules applies because of an explicit inclusion by certain laws.

- Employee-like persons have the same legal right as emloyees to four weeks of annual paid leave.[46]
- Employee-like persons are explicitly included in the general rules of health protection at the workplace.[47]
- The Antidiscrimination Act explicitly includes employee-like person.[48]
- The new law on nursing care at home for family members (Pflegezeitgesetz)[49] includes employee-like persons, too.
- Sec. 12a of the Act on Collective Agreements permits the conclusion of collective agreements for employee-like persons. This is of considerable importance in state-owned radio and television stations where a lot of "freelances" are covered by collective agreements. In the private sector, nearly no agreements can be found.

[45] Section 89b of the Commercial Code
[46] Sec. 2 of the Act on Annual Paid Leave (Bundesurlaubsgesetz)
[47] Sec. 2 § 2 Nr. 3 of the Act on Health Protection (Arbeitsschutzgesetz)
[48] Sec. 6 § 1 Nr.3 of the Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz)
[49] 28 May 2008 (BGBl I 874), Sec.7 § 1 Nr. 3

- Sec. 5 § 1 phrase 2 of the Act on Labour Courts[50] extends the jurisdiction of the labour courts to all employee-like persons. This is of practical importance to the application of other rules of labour law because ordinary courts would be much more inclined exclusively to use civil code provisions.

The application of labour law rules to persons who are not legally "employees" does not exist in two important fields. Employee-like persons do not participate in the Works Constitution; nearly all authors agree that the express inclusion of homeworkers operates to exclude other employee-like persons from integration into the system of the Works Constitution. Further, the Act on Protection against Dismissals is limited to employees.[51]

As to other rules of labour law, the situation is more or less unclear. The right to organize would probably be accepted by the courts because it is a precondition for concluding collective agreements. The same would be so for the right to strike, but there are no court decisions on the subject. In a ruling, the Federal Labour Court has applied labour law rules governing covenants not to compete which means that after the conclusion of the contract, such a restraint is permissible only if the person receives compensation of at least 50 % of the salary he had as an employee and which restraint must not last more than two years.[52] The reasoning of the court was quite strict in stressing that a similar need of protection exists related to employee-like persons. Whether this is a new approach or not cannot be seen at the moment. As to the maximum working hours regulated by the Act on Working Time,[53] employee-like persons are generally excluded. This is taken for granted because of the pure fact that the Act uses the term "employee". The discussion is underdeveloped in the field of maternity protection as well. The inclusion of most of the homeworkers is considered to be a sufficient reason not to apply the Act to all other employee-like persons. As to youth employment protection, the relevant Act[54] includes workers, homeworkers and persons delivering services which are similar to those of workers and homeworkers. The decisive point is, therefore, the nature of the activity and not the economic dependence and the need for social protection. This is in contradiction to all the other rules on employee-like persons;

[50] Arbeitsgerichtsgesetz dated Sept. 3 1953 BGBl I p. 1267), last modification by Act of dec. 21 2008 (BGBl I p. 2940)
[51] See Rost in: Kommentar zum Kündigungsschutzrecht (KR), 7. Aufl. 2005, Arbeitnehmerähnliche Personen Rn 34 ff. with further references
[52] BAG DB 1997, p. 1979
[53] Arbeitszeitgesetz, dated June 6 1994 (BGBl I p. 1170), last modification by Ordinance October 31 2006 (BGBl I p. 2407)
[54] Jugendarbeitsschutzgesetz dated April 12 1976, last modification by Ordinance October 31 2008

some authors try to assimilate both concepts by including those young people who, by direct or indirect economic need, are constrained to deliver certain services.

Theoretically, one could apply all labour law rules to employee-like persons except those which presuppose the employer´s right to give instructions. Until now, the Courts have not been willing to go so far. Some legal authors are more inclined to extend labour law rules but it does not seem very probable that the Courts will share this view. On the other hand, such a solution would make most of the discussions about the complicated concept of "employee" superfluous. If we would add the right of the union to sue the employer or if we would enlarge the control capacity of the labour inspection we would approach more and more to a situation where all people working under an employment relationship are really treated as employees. Despite all difficulties, let us keep some elements of optimism.