

Employment Law in Germany and Ontario, Canada – Overview and Comparison

by

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

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I. Introduction

In the course of constantly increasing globalization, not only goods and services are transferred across national borders. Often, workers are employed abroad. The possible advantages are obvious: Employers can benefit from the skills and expertise of foreign workers, while for employees, working abroad can be economically beneficial and an important experience. Corporations operating internationally are likely to deploy qualified personnel not only in their home countries but wherever they are needed most. Due to the differences between the respective jurisdictions, employing foreign employees may result in legal complications arising out of divergent expectations and at worst legal disputes. This essay is intended to help establish a basic understanding of claims and expectations which parties holding divergent perspectives might have as well as to fill knowledge gaps and to eliminate misconceptions.

The essay focuses on individual employment law, i.e. the law governing the relationship between employer and individual employee. The complement to individual employment law, collective labour law, regulates codetermination as well as collective bargaining by unions and employers' associations. Even though a number of topics could be discussed, the following deliberations concentrate on protection against unlawful dismissal, fixed-term employment contracts, sick leave, vacation entitlement, overtime and minimum wage.

Even though both Canada and Germany are federal states, the influence of the Canadian Provinces and Territories on employment law is far greater than that of the German *Bundesländer*. In Ontario, there are thus employment relationships that are governed by the law of the Province of Ontario, and others which fall under federal jurisdiction, especially the Canada Labour Code, e.g. those of employees of the federal government, banks, railroads, and airlines. This essay focuses on the law of the Province of Ontario.

Both in Germany and in Ontario, solutions to legal issues are closely linked to the individual case at hand. Therefore, this essay cannot substitute qualified legal advice; it is, rather, intended to provide a basic understanding of both jurisdictions' employment law provisions.

II. Protection against unlawful dismissal in Germany and Ontario

Employment contracts are concluded for the long haul, this means that employer and employee agree that in the future, the employee will provide services and will receive remuneration from the employer. For all kinds of reasons, it can be in the interest of one party to terminate the contract prematurely. A contract can be terminated unilaterally by dismissal or resignation. In order to prevent abuse, both Ontario and German employment laws provide protection against unlawful dismissal.

1. Protection against unlawful dismissal in Germany

A dismissal is a unilateral declaration of intent aimed at the termination of an employment contract. Regardless of which party to the employment contract wishes to terminate the employment relationship unilaterally, he or she will have to keep in mind the requirement of written form regulated by the *Bürgerliches Gesetzbuch* (BGB, i.e. German Civil Code), section 623. The dismissal has to be received by the other party in written form, which means that the declaration has to be in writing and signed by the issuer with his or her name in his or her own hand. The original document must be delivered to the recipient, either by means of handing it over to him or her in person or by dropping it in his or her letterbox. A dismissal declared by e-mail is null and void, as well as a written and signed dismissal which is sent by telefax because the recipient will only receive a copy of the dismissal instead of the original declaration.

Compared to the legal situation in Ontario, the most important difference is that in Germany, a dismissal can be contested in court. If the court finds the dismissal to be unlawful, it will hold the dismissal to be ineffective and, therefore, the employment contract to not have been terminated. Rather, the employment contract continues to be the legal basis for mutual rights and obligations.

a. Dismissal

With regard to effectiveness, there are several differences between terminations of employment contracts, depending upon whether the employer dismisses the employee or the employee resigns. German law primarily protects employees because of their structural inferiority compared to employers. It is hardly surprising that, in practice, the vast majority of legal disputes concerning the effectiveness of terminations involve dismissals contested in court.

i. Action against unlawful dismissal

In Germany, there exists a special system of labour courts. According to the *Arbeitsgerichtsgesetz* (ArbGG, i.e. German Labour Courts Act), section 2 (1) no. 3 lit. b, the labour courts have exclusive jurisdiction on legal disputes between employers and employees concerning the existence or non-existence of employment relationships. At first instance, judgments will be delivered by the local labour court. In the case of actions against unlawful dismissals, the right to appeal on the basis of facts and law to the *Landesarbeitsgericht*, i.e. the superior labour court, is guaranteed by law, c.f. German Labour Courts Act, section 64 (2) lit. c. An appeal against a judgment of a *Landesarbeitsgericht* to the *Bundesarbeitsgericht*, i.e. the Federal Labour Court of Germany, located in Erfurt, can only be based on points of law and has to be admitted by either the *Landesarbeitsgericht* or the *Bundesarbeitsgericht*.

Upon reception of a dismissal issued by the employer, a period of three weeks begins during which the employee has to decide whether or not he or she wishes to contest the dismissal in court, c.f. the first sentence of section 4 of the *Kündigungsschutzgesetz* (KSchG, i.e. German Protection Against Unfair Dismissals Act). If the employee fails to bring his or her case to court

within this period, access to the labour courts will not be obstructed entirely as the period of three weeks is not a procedural time limit. Rather, failure to comply with the time limit leads to a preclusion of any legal objection concerning the dismissal, c.f. German Protection Against Unfair Dismissals Act, section 7. In other words, once the three weeks have passed, an employee can no longer contest the effectiveness of the dismissal in court for any reason whatsoever. The basic idea behind this fairly short time limit and the drastic consequence of preclusion of legal objections is both parties' interest in clarifying as quickly as possible whether or not the dismissal will be regarded effective.

ii. Special protection against dismissal

German law provides for special protection against dismissal in numerous situations of which a few shall be outlined below.

In case a *Betriebsrat* exists, i.e. a works council, an organization representing employees, according to the *Betriebsverfassungsgesetz* (BetrVG, i.e. German Works Constitution Act), section 102 (1), the employer will have to consult the works council before issuing a dismissal. However, that does not mean that the works council could prevent the employer from dismissing the employee. But if the works council objects to the dismissal and the employee contests the dismissal duly and on time in accordance with the German Protection Against Unfair Dismissals Act, the employer will have to retain the dismissed employee until the proceedings have reached a final conclusion, c.f. BetrVG, section 102 (5). Without prior consultation of the works council, a dismissal is ineffective.

Dismissal of a female employee during her pregnancy or for a period of four months after childbirth is ineffective in cases in which the employer is aware of the pregnancy or the childbirth at the time he or she issues the dismissal, or if he or she is informed within two weeks after reception of the dismissal, c.f. *Mutterschutzgesetz* (MuSchG, i.e. German Maternity Protection Act), section 9 (1). However, employers are not allowed to question female applicants as to current or intended pregnancy during an interview. If the question is asked nonetheless, the applicant may answer it falsely without having to fear any negative consequences. A female employee must not be dismissed because of her pregnancy since this would constitute discrimination against women.

Severely disabled persons also are protected by the law. A dismissal of a severely disabled person requires the consent of the *Integrationsamt*, i.e. a German authority charged with securing the integration of severely disabled persons in the work force, c.f. *Neuntes Buch Sozialgesetzbuch* (SGB IX, i.e. Volume IX of the German Social Insurance Code), sections 85, 91. In order to request this consent before issuing a dismissal, the employer needs to have knowledge of the severe disability. Comparable to the situation with female applicants who must not be asked questions with regard to pregnancy, employers are prohibited from asking

applicants whether they are severely disabled during an interview. Even for the first six months of employment, this question is forbidden. However, after six months of employment, an employee has to answer truthfully if asked whether he or she is severely disabled. According to a recent decision of the Federal Labour Court, it is contradictory to rely on one's severe disability when seeking protection against a dismissal in court after having answered the employer's question in the negative. Therefore, in that case, it was held to be detrimental to answer the question falsely. If the employer was not aware of the employee's severe disability and thus issued the dismissal without the required consent of the *Integrationsamt*, the three-week time limit according to the first sentence of section 4 of the German Protection Against Unfair Dismissals Act applies. In order to invoke his or her severe disability, the employee will have to contest the dismissal within the time limit. Additionally, the employee is now obliged to inform his or her employer of his or her severe disability within the same time limit in order not to forfeit the special protection against dismissal.

Generally speaking, a dismissal during parental leave is also ineffective, c.f. *Bundeselterngehalt- und Elternzeitgesetz* (BEEG, i.e. German Federal Parental Allowance and Parental Leave Act), section 18. The special protection starts to apply when parental leave is demanded, yet not until eight weeks before the leave.

iii. Extraordinary dismissal

German employment law differentiates between extraordinary dismissals and ordinary dismissals with notice. Extraordinary dismissals are colloquially often referred to as "dismissal without notice". While it is true that a dismissal without notice will always be an extraordinary dismissal, it is not inevitable that an extraordinary dismissal is issued without notice. In fact, an extraordinary dismissal may be subject to an appropriate phase-out time under certain specific circumstances. Therefore, hereinafter, solely the term "extraordinary dismissal" will be used. It is recalled that, generally, extraordinary dismissals will terminate an employment relationship immediately. It is already perceivable from the nomenclature that an extraordinary dismissal will only be effective under extraordinary circumstances. Primarily, if any dismissal is issued it should be, as a general rule, an ordinary dismissal with notice.

According to the German Civil Code, section 626 (1), an extraordinary dismissal requires a compelling reason. There are two steps to examine whether such a compelling reason exists in a particular case: At first, one has to ask if the case at hand is likely to constitute a compelling reason. For instance, theft or fraud to the detriment of the employer, sexual harassment of fellow workers or disclosure of trade secrets could well be a compelling reason. Even the mere suspicion of serious misconduct can destroy the parties' relationship of trust sustainably and justify the instant and unilateral termination of the employment contract. An exhaustive list of cases that could constitute a compelling reason within the meaning of the German Civil Code, section 626 (1), does not exist since the requirements are constantly subject to clarification by the

courts. Employers are thus advised to always issue an alternative ordinary dismissal in addition to an extraordinary dismissal.

If the case on hand could constitute a compelling reason, one has then to weigh in a comprehensive manner all the interests at stake in the particular case. Generally speaking, (extraordinary) dismissals must remain *ultima ratio*, meaning that dismissals shall only be issued if other measures are out of the question. A warning notice is an important sanction of misconduct because it is often required to be issued prior to a dismissal. Yet, contrary to a widespread misconception, not every kind of misconduct will have to be sanctioned with a warning notice prior to the issuance of a dismissal. An employee who, for instance, has stolen from his or her employer can well be dismissed without prior warning.

Extraordinary dismissals have to be issued in written form as well. The compelling reason does not have to be included in the letter. Yet, the employer must notify the employee on his or her demand of the grounds for the extraordinary dismissal without undue delay in writing. Also, once the employer acquires knowledge of a situation which could constitute a compelling reason, he or she must not hesitate unduly because according to the German Civil Code, section 626 (2), an extraordinary dismissal has to be issued within two weeks of obtaining knowledge of the facts.

From the extraordinarily dismissed employee's point of view, it is crucial to observe the three-week time limit according to the German Protection Against Unfair Dismissals Act, sections 4 and 7, which is also applicable in case of extraordinary dismissals, c.f. the second sentence of section 13 (1) of the German Protection Against Unfair Dismissals Act.

iv. Ordinary dismissal with notice

Ordinary and extraordinary dismissals differ with regard to their particular impact mainly because of the fact that according to the German Civil Code, section 622, ordinary dismissals terminate the employment contract with notice. The duration of the notice period increases incrementally with the length of service, c.f. the first sentence of section 622 (2) of the German Civil Code. Section 622 (2) 2 of the German Civil Code, which exempted work experience accumulated up until the age of twenty-five from being taken into account in determining the length of the notice period, was held to be invalid by both the European Court of Justice and the Federal Labour Court because of its breaching of the principle of non-discrimination on grounds of age established by the law of the European Union. Since ordinary dismissals constitute a less radical termination of contract compared to extraordinary dismissals, it is possible to re-interpret a disproportionate extraordinary dismissal as an ordinary dismissal, c.f. the German Civil Code, section 140.

According to the provisions of the German Civil Code, an ordinary dismissal does not require a specific reason. As long as the required notice period was observed, an employee could be dismissed for no particular reason. However, this would not apply if the provisions of the

German Protection Against Unfair Dismissals Act are applicable. The above-mentioned sections 4, 7 and 13 of the German Protection Against Unfair Dismissals Act are always applicable, but the applicability of the remaining sections must be assessed separately. According to the second and third sentence of section 23 (1) of the German Protection Against Unfair Dismissals Act, a company must employ a specific number of workers. Employees appointed after December 31, 2003, (termed “new employees”) can only rely on the protection provided by the German Protection Against Unfair Dismissals Act if the company employs more than ten employees on a regular basis. Trainees do not count at all, part-time employees only to some extent, cf. the fourth sentence of section 23 (1) of the German Protection Against Unfair Dismissals Act. Employees appointed before January 1, 2004, (termed “old employees”) can only invoke the rights under the German Protection Against Unfair Dismissals Act if the company employs more than five “old employees” on a regular basis. The latter only applies to “old employees”. In other words, if more than ten employees, be they “old” or “new”, are employed by a company on a regular basis, each of them can rely on the provisions of the German Protection Against Unfair Dismissals Act, while solely “old employees” benefit from this protection if the company employs more than five of them on a regular basis.

Example: A company employs ten full-time employees, five of whom were appointed before January 1, 2004, while the other five joined the company after December 31, 2003. None of the employees can invoke the rights provided by the German Protection Against Unfair Dismissals Act. The “new employees” do not benefit from protection under the Act because the company employs only ten, instead of more than ten, on a regular basis. The Act is inapplicable even with regard to the “old employees” since there are not more than five “old employees”.

Still, even in small companies whose number of staff falls short of the numbers outlined above, a minimum of protection against unfair dismissal is ensured by German law with regard to individual cases, but of course this protection is inferior to that provided by the German Protection Against Unfair Dismissals Act.

In cases in which the necessary number of staff is employed, and the employment relationship of the particular employee in question has been put into practice more than six months earlier, an ordinary dismissal is ineffective unless it is socially justified, c.f. German Protection Against Unfair Dismissals Act, section 1 (1). Social justification of an ordinary dismissal requires the existence of a reason for dismissal. According to the German Protection Against Unfair Dismissals Act, section 1 (2), an ordinary dismissal can be socially justified for conduct-related, personal and business reasons.

A dismissal for conduct-related reasons requires controllable misconduct on the part of the employee that could, in general, constitute a reason for dismissal. Moreover, the comprehensive weighing of all the interests at stake in the particular case must turn out to the disadvantage of

the employee. The numerous examples stemming from judgments of labour courts, such as drunkenness at the work place, not-permitted private internet usage or bullying at work, should always be considered from the perspective that each decision is dependent on the individual case.

The most common cause of dismissals for personal reasons is the employee's ongoing sickness although sickness as such does not constitute a reason for dismissal. However, sickness can lead to a reason for dismissal in cases in which it interferes with the employment relationship. This may be the case if the prognosis with regard to the employee's ability to fulfill his or her contractual obligations in the future turns out negative, having a significant adverse effect on the company's interests, and if the comprehensive weighing of all the interests at stake in the particular case militates against continuation of the employment relationship.

For a dismissal for business reasons to be socially justified, an urgent operational requirement must exist. Necessary to that end is a corresponding entrepreneurial decision leading to the cutting of existing jobs, e.g. the decision to close down a specific plant section or to partially transfer ownership of the company. The entrepreneurial decision of an employer as a manifestation of his or her basic right of freedom to choose and exercise a profession is protected against state intervention. It is merely subjected to judicial examination as to whether it is not unreasonable, arbitrary or lacking in objectivity. Since the operational requirement has to be urgent, the decision can also be examined with regard to its proportionality. Before definitively terminating an employment relationship for business reasons, the possibility of transferring the employee in question to a new work place within the company or of dismissal with the option of altered conditions of employment must be considered. In cases where an urgent operational requirement exists, a proper selection process based on social criteria according to the German Protection Against Unfair Dismissals Act, section 1 (3), has to be carried out. Particularly seniority, age, support obligations, and severe disability of an employee have to be taken into account as criteria.

v. Speciality: Dismissal with the option of altered conditions of employment

In this regard, the *Änderungskündigung*, i.e. dismissal with the option of altered conditions of employment, shall be mentioned. It differs from the types of dismissals outlined above, which are meant to terminate the employment contract, to the extent that the employer combines the dismissal with an offer to continue the employment relationship under altered conditions. Such a dismissal with the option of altered conditions of employment is legitimate only if the employer does not have the power to impose the alterations unilaterally.

When he or she receives a dismissal with the option of altered conditions of employment, the employee can react in four different ways. Firstly, the employee can reject the offer to continue the employment relationship under altered conditions and refrain from taking legal action against the dismissal, resulting in the termination of the employment relationship. Secondly, he or she can reject the offer to alter the employment conditions and can bring the case of the dismissal

before the local labour court within the three-week time limit, yet bearing the risk of the action being dismissed and of ultimately losing his or her job if the labour court finds the dismissal to be socially justified. Thirdly, he or she can accept the amendment and continue to work for the employer under altered conditions. Fourthly, according to the German Protection Against Unfair Dismissals Act, section 2, it is possible to accept the offer to alter the employment conditions with the caveat that it shall not take effect unless the alteration is socially justified. In most cases, employees will be advised to choose the fourth option as long as they are generally willing to continue to work for their current employer. The employee's acceptance including the caveat has to be declared to the employer within three weeks of the date on which the notice of dismissal with the option of altered conditions of employment was received. Additionally, the employee has to bring the case before the local labour court during the same time period, demonstrating that the alteration of employment conditions is not socially justified or is ineffective for another reason. By doing so, the employee preserves the chance to maintain the status quo while, on the other hand, he or she can be sure of continuing to be employed, even though potentially under altered conditions.

b. Resignation

Of course, the employee can also terminate the employment relationship in an extraordinary or ordinary way. Generally speaking, the rules discussed above apply vice versa. From the legislator's point of view, however, employers need less protection than employees, so that, for instance, duration of the notice period does not increase incrementally with the length of service. The German Protection Against Unfair Dismissals Act is not applicable if an employee resigns. Accordingly, employees can terminate the employment contract for no specific reason as long as they comply with the notice period. Only in cases of extraordinary, i.e. instant, resignation a compelling reason must exist according to the German Civil Code, section 626 (1). It might well constitute such a compelling reason for resignation if the employer, for example, does not remunerate an employee for a considerable period or fails to pay a considerable amount of the agreed wages. Yet, the Federal Labour Court held that an offer of a better job does not constitute a compelling reason. Therefore, an employee who wants to accept a lucrative offer will have to terminate the employment relationship ordinarily, complying with the four-week notice period according to the German Civil Code, section 622 (1).

2. Protection against unlawful dismissal in Ontario

In Ontario, statutory and common law provisions regulate the issue of how an employment relationship can be terminated, and how an employee can respond to being fired.

a. Termination of the employment relationship

Generally speaking, there are three common ways to bring an employment relationship to an end. Firstly, the employer can terminate the employment relationship with due notice or pay in lieu. Secondly, the employer can issue a summary dismissal, and thirdly, the employee can render his

or her resignation. The latter has to be distinguished from constructive dismissal.

i. Termination with due notice or pay in lieu

Termination with due notice or pay in lieu means that the employee is dismissed without just cause. Where the employment contract was entered into for an indefinite period, an employer must, in the absence of a just cause for a summary dismissal, provide the employee with reasonable notice of the termination or pay in lieu thereof.

The parties are free to set a notice period in the employment contract. The same applies in respect of the mode in which notice is given. The law itself does not prescribe that notice has to be given in a specific form, e.g. in writing. However, in order to effectively start the countdown of the notice period, the notice must be specific, precise and clearly communicated. Moreover, it is advisable to give written notice in order to prevent the effectiveness of the dismissal and the date on which it was given from being questioned.

The Ontario *Employment Standards Act*, 2000, section 57, sets out minimum notice periods that correspond to the employee's period of employment, starting at a minimum of one week before the termination if the employee's period of employment is more than three months but less than one year, up to a minimum of eight weeks before the termination, if the employee's period of employment is eight years or more.

Yet, these minimum notice periods can be largely extended. In a common law jurisdiction like Ontario, judges have far more powers than judges in civil law jurisdictions. Thus, it is very difficult to precisely predict the actual amount of due notice an employee is entitled to upon his or her termination because it is dependent on the individual employee's case. However, there are certain factors that judges will usually consider, especially the employee's age, position, length of service with the employer, level of compensation and probability of finding alternative employment. An employee who is not satisfied with the notice given can consider suing for damages for wrongful dismissal.

It is important to note that there are numerous exceptions where notice to terminate or payment of wages in lieu of notice is not required by law. For example, construction employees are not entitled to notice of termination or termination pay under the Ontario *Employment Standards Act*, 2000, c.f. the Termination and Severance of Employment Regulations, O Reg 288/01, section 2 (1) 9. The same applies to an employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer, c.f. the Termination and Severance of Employment Regulations, O Reg 288/01, section 2 (1) 5.

Where the employer wishes the employee to leave immediately but does not have a cause for a summary dismissal he or she can, instead of giving notice of the termination, pay the employee remuneration equivalent to what he or she would have received had he or she worked for the entire notice period. This payment of wages in lieu of notice can be regarded as liquidated

damages because, technically speaking, the employer's failure to give notice of termination constitutes a breach of contract.

Under the circumstances set out in the Ontario *Employment Standards Act*, 2000, section 64, and the Termination and Severance of Employment Regulations, O Reg 288/01, section 9, an employee whose employment relationship is terminated may also be entitled to severance pay, i.e. a lump sum payment.

ii. Summary dismissal

Summary dismissal, or dismissal with cause, constitutes the exception to the general rule that requires an employer to give notice of the termination, or pay wages in lieu thereof. In a nutshell, any conduct inconsistent with the employee's conditions of service, regardless of whether the employment contract explicitly states or implies them, is considered to be just cause. Where the employee's conduct constitutes a breach of his or her fundamental obligations to the employer it amounts to just cause and gives the employer the right to end the employment relationship without notice.

Generally speaking, one can say that certain behavior, such as dishonesty (which can include theft, fraud, or lying), insolence and insubordination, disobedience, being late for work or absent without leave, incompetence, or sexual harassment, may give an employer the right to summarily dismiss the employee. However, it is not as simple as that. The list of potential just causes is long and far from being conclusive. There are hardly any automatic grounds for dismissal, if there are any at all. In each and every case, a contextual approach has to be taken while assessing the existence of a just cause for dismissal. Accordingly, not only the misconduct in question is of importance, but rather the entire history of the employment relationship, including its length, the employee's position and duties, and any prior incident of misconduct. The reason for the employee's conduct will be relevant as well. The courts have adopted, based on the notion of proportionality, a practice of taking into account a wide range of factors that argue against a finding of just cause.

If an employee who was summarily dismissed brings forward a wrongful dismissal action, and if the employer is alleging just cause, the onus of proof will be on the employer to establish that a just cause for the dismissal of the employee exists. Since wrongful dismissal cases are civil actions, the employer will have to prove "on a balance of probabilities" that the alleged misconduct took place. However, in cases where the alleged misconduct was of criminal nature, e.g. theft or fraud, judges have held that the standard of proof may be higher, approaching the level of "beyond a reasonable doubt".

There is no general duty of the employer to inform the departing employee of the reason for the summary dismissal. However, the Supreme Court of Canada held that employers shall be "candid, reasonable, honest and forthright" in the course of a dismissal. Especially where an employee is to be dismissed due to misconduct, this duty makes it advisable for employers to

inform the employee of the allegation of misconduct, and to give him or her the opportunity to respond.

iii. Resignation

An employee who wishes to end his or her employment can resign. If the employee does this freely and voluntarily he or she will be entitled neither to claim wrongful dismissal nor to claim severance pay or pay in lieu of notice. A resignation is binding if the employee's conduct unequivocally manifests his or her intention to quit, and leads a reasonable person in the position of the employer to believe that the employee carried out this intention. However, the resignation will not be enforceable until the employer accepts it. The employee may withdraw his resignation prior to the employer's acceptance. This means that an employer who wishes to end the employment relationship should be as quick as possible to communicate acceptance.

The employee has to give reasonable notice because it is common law theory that the notice obligation in the employment relationship is reciprocal. Yet, this does not mean that the notice period the employer would have to give if he decided to dismiss an employee and the reasonable notice the employee would have to give are identical because the respective notice obligations serve different purposes. While reasonable notice on the employer's part is supposed to help the employee to cope with the imminent unemployment, the purpose of determining reasonable notice on the employee's part is to give the employer enough time to react to the future absence of the employee by, for instance hiring or training a replacement. Not surprisingly, reasonable notice for an employee is, generally speaking, considerably less than reasonable notice for an employer.

iv. Constructive dismissal

Not a resignation but a constructive dismissal occurs where an employer significantly changes a fundamental term or condition of the employment without the employee's actual or implied consent and the employee thus decides to quit and sue for damages. However, this decision should not be made imprudently. In any event, the employee should seek legal advice before taking the risk of being unemployed without having a reasonably strong case.

The doctrine of constructive dismissal was recognized by the courts after employers had tried to avoid liability for wrongful dismissals by making the working environment unbearable for employees, i.e. by implicitly forcing employees to resign. The law of constructive dismissal has changed vastly over the past decades. In the 1980s, the courts rather opposed changes in the workplace and the corresponding effects these changes would have on employees. During the 1990s, however, when the overall economic situation deteriorated, judges appeared to become increasingly tolerant of changes in the workplace. As a result, it was held in fewer cases that an employee had been constructively dismissed. It can be observed that the courts usually take the economic situation into consideration while assessing cases of alleged constructive dismissal; when the economy does well, courts tend to be less sympathetic to changes in the work place.

Accordingly, when the economy is on a downturn, the courts will rather allow a company to introduce changes with negative effects on employees if this is done in order to keep the company in business.

In a rather recent case decided by the Ontario Superior Court of Justice, the employer, who was experiencing financial losses, reduced the employee's salary significantly. The employee's lawyer wrote to the employer that the salary reduction amounted to constructive dismissal and that the employee would not accept it. But instead of quitting, the employee continued to work for the employer while also suing for constructive dismissal. The employer argued that by continuing to work, the employee had implicitly agreed to the reduction in salary. The Ontario Court of Justice held that the employee had rejected the change of the terms and conditions of his employment and that his continuing to work could not be regarded as acceptance of the lower salary. Rather, it would have been up to the employer to either tell the employee to leave the workplace or to keep the old terms and conditions in place for the period of due notice. Since the employer did neither, the employee was allowed to continue to work because the employer was aware of the fact that the employee had taken the view that he had been constructively dismissed, and that he did not accept the reduction in salary.

b. Possibilities to respond to a dismissal

When an employee is dismissed he or she may not want to accept the termination of employment for one reason or another. The employee will usually bring forward a wrongful dismissal action. An employee who falls under the jurisdiction of the Province of Ontario will most commonly sue for damages. Under the *Employment Standards Act*, 2000, it is not even possible to claim reinstatement as a remedy in a wrongful dismissal action. However, under specific circumstances referred to below, an employee may be able to apply to the Ontario Ministry of Labour for an order that he or she be reinstated.

i. Wrongful dismissal action

As pointed out above, wrongful dismissal actions are most commonly brought forward to receive monetary compensation. However, one has to keep in mind that under the law of the Province of Ontario, not every single employee who has been dismissed is entitled to damages. Rather, in order to successfully sue for damages, the dismissal must have been wrongful; this means that the dismissal was not issued in full compliance with the law. Therefore, dismissing an employee without any reason whatsoever does not constitute a wrongful dismissal as long as the requirement to give due notice or to pay wages in lieu is met. Accordingly, a summary dismissal will be held to have been issued wrongfully if the employer cannot prove the facts that would constitute a just cause, or if the employee's misconduct, though undisputed, is not severe enough to give the employer the right to terminate the employment without due notice or pay in lieu. In a nutshell, a wrongful dismissal action is meant to provide the employee with appropriate compensation for loss of employment. But the employee also is under obligation to mitigate his

or her damages. Just because the employer failed to give sufficient notice of termination, the employee is not automatically entitled to the exact amount he or she would have earned if he or she were still employed. The basic idea behind the duty to give notice of termination is to enable the employee to look for a new job. If the employer is able to demonstrate that the employee who brought forward the wrongful dismissal action did not make reasonable efforts to find alternate employment, and that suitable work could have been found if the employee had made reasonable efforts to find it, the court may deduct the income the employee could have generated elsewhere from the amount he or she would have received if the employer had given due notice of termination.

ii. Reinstatement

The Ontario *Employment Standards Act*, 2000 provides for a few, very specific cases in which employees can apply to the Ontario Ministry of Labour for an order requiring their employer to reinstate them, c.f. *Employment Standards Act*, 2000, section 104. Generally speaking, such an order that an employee shall be reinstated requires that an employment standards officer finds that the employee was fired for exercising his or her rights under the *Employment Standards Act*, for instance, the right to ask the employer to comply with the *Employment Standard Act* and its regulations, the right to make inquiries about one's rights under this Act, or the right to take a leave of absence in accordance with the provisions of the Act.

III. Fixed-term employment contracts

Employment contracts can be concluded for an indefinite or merely for a specified period of time. In the latter case, one speaks of fixed-term employment contracts. A fixed-term employment relationship enhances the flexibility of both parties to the employment contract and thus is an appropriate method especially in times of tense employment situations. At the same time, it involves the danger of abuse because the employer could avoid the risk of having to dismiss employees by concluding numerous successive short-term employment contracts.

1. Fixed-term employment contracts in Germany

The basic legislative concept in Germany is that, as a rule, employment contracts shall be concluded for an indefinite period of time, not least in order to prevent the statutory protection of employees against dismissals from being undermined. Entering into a fixed-term employment contract shall remain the exception and is therefore subject to additional requirements.

The limitations on fixed-term contracts are regulated in a separate statute, the *Teilzeit- und Befristungsgesetz* (i.e. German Part-Time and Fixed-Term Employment Act). This Act applies to both calendric fixed-term contracts (Example: “The employment will terminate December 31, 2013.”) and fixed-term contracts for a specific purpose (Example: “The employment will continue until the employer's building project in ... is completed.”) as well as resolutive conditions.

a. Requirement of written form

If an employment contract shall be fixed-term, it is – from the employer’s point of view – of special significance to comply with the requirement of written form according to the German Part-Time and Fixed-Term Employment Act, section 14 (4). Even though in practice, the vast majority of employment contracts are concluded in writing anyway, the law does not require written form for the effective conclusion of an indefinite employment contract. Solely from the provisions contained in the *Nachweisgesetz* (i.e. German Act on Notification of Conditions Governing the Employment Relationship) arises the need to put the essential terms of the contract into writing. Still, as it becomes apparent from the wording of the *Nachweisgesetz*, section 2 (1), it is sufficient to do so retrospectively. Generally speaking, parties to an employment contract are free to conclude the contract verbally as long as the essential contractual terms are put into writing within a month after the stipulated beginning of employment, c.f. the first sentence of the *Nachweisgesetz*, section 2 (1). The German Part-Time and Fixed-Term Employment Act differs from this principle only with respect to fixed-term agreements for which the written form is mandatory. If the requirement of written form is not met, the fixed-term agreement is void. Notably, the requirement of written form also has to be followed in the following situation: If an employer agrees to continue employing an employee who has been dismissed for the duration of ongoing proceedings initiated by that employee against the dismissal, and if the court later confirms termination of the employment relationship, the continuing employment will only be temporary for the duration of the court proceedings and under the condition that the agreement was made in writing.

b. Fixed-term contracts for objective reasons

Entering into a fixed-term employment contract is permitted if justified by an objective reason. The second sentence of the German Part-Time and Fixed-Term Employment Act, section 14 (1), contains a non-conclusive list of objective reasons, which includes, for instance, a fixed-term contract to try out an employee, or to substitute for an employee who suffers from a long-term illness, or who is suspended, seconded abroad or on parental leave.

Especially in large companies the objective reason for substitution can lead to “consecutive fixed terms” because along with the increasing number of employees the probability of one employee being temporarily unable to work also increases. The legislator actually tried to prevent “consecutive fixed terms”. Lately, a few such cases have occupied the courts. In the case C-586/10, *Küçük/Land Nordrhein-Westfalen*, the European Court of Justice held that the national law in Germany was in line with the law of the European Union. However, in the assessment of the issue whether the renewal of fixed-term employment contracts is justified by the particular objective reason, the national courts had to take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer. Subsequently, the Federal Labour Court held that in a case where an employee had concluded 13 (!) consecutive fixed-term employment contracts with the same employer for a period of eleven years, abuse of law was indicated. The circumstances of another case involving four fixed terms in seven years and nine

months, on the contrary, were held to not yet indicate abuse of law. Case law with regard to this issue is still evolving, guidelines and rules of thumb are – as far as can be seen – yet to be established.

c. Restrictions concerning fixed-term contracts for no objective reasons

Even where no objective reason exists, a fixed-term employment contract can be concluded. However, it is then subject to the stricter provisions of the first sentence of the German Part-Time and Fixed-Term Employment Act, section 14 (2). According to this, a calendric fixed-term contract is only permitted for a maximum duration of two years. In cases where a shorter term was initially agreed upon, extensions are possible, but not more than three times and not exceeding the maximum duration of two years in total.

Another restriction is contained in the second sentence of the German Part-Time and Fixed-Term Employment Act, section 14 (2), according to which a fixed-term contract without an objective reason is prohibited if an employment relationship – be it temporary or unlimited – existed before with the same employer. The scope of this restriction was defined more precisely lately. In 2011, the Federal Labour Court held in contradiction to its former judgments that the word “before” in the second sentence of the German Part-Time and Fixed-Term Employment Act, section 14 (2), was not to be interpreted in the sense of “ever before”. Prohibiting any kind of prior employment relationship for an unlimited period of time could involve the danger of becoming a legal obstacle with respect to recruitment, thus disproportionately restricting the basic right of freedom to choose and exercise a profession as provided for by the *Grundgesetz* (i.e. Basic Law, the German Constitution), Art. 12 (1). Therefore, the second sentence of the German Part-Time and Fixed-Term Employment Act, section 14 (2), had to be interpreted in light of the constitution to the effect that prior engagement with the same employer would only preclude the conclusion of a fixed-term contract if it took place in the past three years.

d. Consequences and judicial assertion of ineffective fixed-term contracts

If the fixed-term agreement is void, for instance because it was not put into writing or because it is not justified by an objective reason and the term of contracts exceeds the maximum duration of two years, the employment contract will be regarded as indefinite according to the German Part-Time and Fixed-Term Employment Act, section 16. In case the employer still wanted to terminate the employment contract, he or she would then have to dismiss the employee.

Nevertheless, this only applies if the employee invokes the invalidity of the fixed-term contract. To do so properly, he or she must apply to the local labour court. If the employee fails to bring his or her case to court within three weeks after the agreed lapse of the fixed-term contract in a “*Entfristungsklage*” (i.e. an action against fixed-term employment contracts, according to the German Part-Time and Fixed-Term Employment Act, section 17), any legal action will be precluded. Yet, the wording of the German Part-Time and Fixed-Term Employment Act, section 17, is ambiguous: The employee does not have to wait until the contract term has passed in order to bring his case to court within the next three weeks. Rather, it can be advisable to take legal action before the end of the fixed-term employment contract but, since a legal dispute with the

employer might well have an ongoing negative effect on the employment relationship, general advice cannot be given. This question will have to be answered in light of the circumstances of each individual case.

2. Fixed-term employment contracts in Ontario

Compared to the legal situation in Germany, entering into a fixed-term employment contract is by far easier under the law of the Province of Ontario. Generally, an employment relationship is being entered into for an indefinite period. Where this is the case, it is a fundamental employment law principle that an employment contract can only be terminated if reasonable notice is given. However, this principle does not apply if the employment contract was entered into for a fixed term. At the conclusion of the fixed term, the employee will not be dismissed or terminated but the employment simply ends in accordance with the terms of the contract. The courts will only accept an employment contract depriving the employee of his right to reasonable notice if the language used in the contract is unequivocal and explicit. If the contract is ambiguous the courts will interpret it against the interests of the employer, assuming that it was the employer who drafted the contract.

Ever since the early 20th century, it has been established in Canada that an employee who was hired for a term of one year but continued to work for the employer even after the expiry date was deemed, thereafter, to be employed for an indefinite term. Thus, such an employee would be entitled to be given reasonable notice upon termination.

If a fixed-term employment contract does not include a provision for termination prior to the expiry date, e.g. termination for just cause, the employer may be required to pay out, upon prior termination, all wages and benefits the employee would have earned during the remainder of the contract period. Therefore, employers are advised to seek legal counsel before using fixed-term contracts.

IV. Sick leave

It is an equally important question to both employers and employees which consequences arise from an employee's incapacity for work due to illness.

1. Sick leave under German employment law

It is a general principle of German Contract Law that someone who does not receive the performance he or she is contractually entitled to because the other party is not able to perform is likewise released from consideration. Applied to employment law, one can summarize this general principle in the words "no work no pay". This general principle has its statutory basis in the German Civil Code, sections 326 (1) and 614. Especially in employment law, however, a few exceptions to this general principle exist. One of them is regulated in the *Entgeltfortzahlungsgesetz* (i.e. the German Continued Remuneration Act), section 3, according to which an employee who is incapable of working due to illness can, for a period of up to six

weeks, claim continued remuneration unless the employee is responsible for his or her illness.

a. Conditions of entitlement

An employee is entitled to continued remuneration provided that he or she has worked for the particular employer for four weeks without intermission. The legislator introduced this four week waiting period because being entitled to continuing remuneration without ever having worked for the employer was regarded as incompatible with the principle of performance and consideration.

Entitlement to continued remuneration requires incapacity for work to be due to illness. One has to note that not every medical condition results in incapacity for work. In this context, illness means abnormal physical or mental state. For instance, normal pregnancy is not an illness in the sense of the law because the state during a pregnancy cannot be categorized as abnormal. By contrast, the Courts held that alcoholism was an illness. At all events, one has to distinguish between illness and incapacity for work. Being incapacitated for work means that the employee is objectively unable to perform as he is contractually obliged to, or that he must not work because according to a physician's prognosis it would hinder or delay his recovery. An employee is not incapacitated for work due to illness unless his illness is the sole cause of his incapacity for work. In this regard, one speaks of the requirement of monocausality. An employee would not be entitled to continued remuneration if there was yet another cause hindering him or her from fulfilling his or her contractual obligation.

Example: If an employer sends all employees home because working has become impossible due to a blackout, a single employee's illness will not be the sole cause of his or her incapacity for work on that particular day since he or she would not have been obliged to work that day even if he or she had been capable.

Employees are legally required to immediately notify their employer of their incapacity for work due to illness. They have to provide their employer with an incapacity certificate issued by a physician when they have been ill for three days at least. Both the incapacity for work and its anticipated duration have to be certified. However, the employer is, at his or her own discretion, free to request submission of such a certificate at an earlier date. The Federal Labour Court recently held that the employer's discretion is not limited in any way.

Eventually, the employee must not be responsible for his own incapacity for work due to illness. Yet, a definition of responsibility operates which differs from that which applies in the case of the general law of obligations, according to which one is responsible for deliberate or negligent breach of duty. In the context of claims for continued remuneration, the employee's misconduct will only preclude him or her from claiming continued remuneration if it constitutes a gross infringement of a reasonable person's own interests.

Example: If the employee is incapacitated for work because of injuries suffered in a road accident caused by him- or herself while under the influence of alcohol, he or she will not

be able to claim continued remuneration, because he or she is deemed responsible for his or her incapacity for work. Every grown-up knows that drunk driving increases the risk of an accident because alcohol consumption considerably decreases one's ability to react correctly.

b. Special conditions in case of repeated incapacity for work due to illness

If an employee repeatedly becomes incapacitated for work due to illness, whether he can claim continued remuneration each time will be subject to the circumstances of the particular case. One can differentiate between three constellations.

If the reason for the incapacity for work is a different illness each time, the employee will be entitled to continued remuneration each time. A different illness can be assumed if the causes of the current and the previous illnesses differ and are not based on the same underlying disease.

It becomes more complicated if the recurrence of a disease is based on the same underlying disease because, generally speaking, employees are entitled to continued remuneration only once for each specific disease. The second sentence of the German Continued Remuneration Act, section 3 (1) regulates two exceptions to this general principle. Even if the previous and the current illnesses are identical, an employee will be entitled to continued remuneration for a period of up to six weeks provided that (i) he or she has not been incapacitated for work due to this particular illness for the last six months or (ii) that twelve months have passed since he or she first became incapacitated for work due to the same illness.

c. Scope of entitlement

According to the German Continued Remuneration Act, section 4 (1), an employee is entitled to the same remuneration he would have received if he had worked regularly. However, section 4 (1a) of the Act excludes overtime pay regardless of whether the particular employee regularly works overtime.

Determining the amount of entitlement is largely dependent on the circumstances of each case. In order to make such a determination, it is recommended that a lawyer be consulted.

2. Sick leave under Ontario employment law

Under the Ontario *Employment Standards Act*, 2000, some employees have the statutory right of up to ten days of unpaid job-protected leave each calendar year due to illness, injury and certain other emergencies and urgent matters. This is known as “personal emergency leave” and only employees who work for employers who regularly employ at least 50 employees are eligible for it. All other employees have to rely on other levels of legal protection. Firstly, if an employee is dismissed, constructively or otherwise, because of personal illness, he or she may be able to sue for wrongful dismissal. Secondly, the employment contract may include a term entitling the employee to sick leave with or without pay.

V. Vacation entitlement

Various employees' rights exist in order to protect them from exploitation, one of them being the right to vacation. Employees shall be enabled to stay away from their workplace for a certain period in order to rest and, ideally, restore their energy and productivity.

1. Vacation entitlement in Germany

In Germany, employees are legally entitled to paid vacation according to the provisions of the *Bundesurlaubsgesetz* (i.e. Federal Vacation Act). This means that if an employer grants an employee vacation, the employee will not have to work for the relevant period but will nonetheless be entitled to remuneration. The vacation entitlement regulated in the Federal Vacation Act constitutes a minimum standard, i.e. contractual provisions cannot fall short of the statutory entitlement. But of course, employers are free to grant more vacation than prescribed by law.

a. Duration of vacation

According to the Federal Vacation Act, section 3 (1), employees are entitled to 24 workdays of vacation per year. However, this provision has to be read in the context of section 3 (2) of the Act which defines workdays to be all days except Sundays and holidays. In other words, the provisions of the Act are based on the assumption of a six-day week. It would be unfair to award employees who work six days per week as many vacation days as those who work five days per week or less. Therefore, while employees who work six days per week are entitled to 24 vacation days, i.e. four weeks of vacation in total, employees who work five days per week are only entitled to 20 vacation days because 20 days are equivalent to a total of four weeks of vacation. In other words, one can calculate the number of annual vacation days by multiplying the contractually stipulated number of workdays per week by four.

b. Transfer of vacation entitlement to the next calendar year

The statutory vacation entitlement is limited to the relevant calendar year. This arises from the wording of the Federal Vacation Act, section 1, according to which employees are entitled to paid vacation each calendar year. According to the Federal Vacation Act, section 7 (1) and (2), granting vacation is not at the employer's discretion. Rather, the employee's wishes have to be considered and, generally, vacation shall be granted continuously. Even though the situation is often different in reality, one has to keep in mind that employees are entitled to be granted vacation. Employers are legally obliged to grant vacation and to consider the employee's wishes with regard to the period of time. They can deny granting vacation for a specific period only in cases in which there is a conflict with compelling operational reasons or with wishes regarding vacation scheduling on the part of other employees who should be treated preferentially in this context under consideration of social aspects.

Example: If two employees of approximately the same qualification both hold a key position within a company and therefore have to substitute for each other, and if both of

them wish for vacation for the same period during school vacation but only one of them has children of school age, the wish for vacation of the childless employee will have to be subordinated.

Hence, it can be for numerous reasons that an employee may not have been granted all the vacation to which he or she is entitled by the end of the calendar year. Generally, the residual vacation entitlement expires at the end of each calendar year because the statutory concept only allows for employees taking a break for a certain period of time each year in order to recover and, ideally, to become fully operational once again. Accumulating vacation days over years is incompatible with this legislative goal and would also fail to take proper account of the employer's interests.

Thus, it is only possible in exceptional cases to transfer a vacation entitlement to the next calendar year, and even then, the transfer is generally restricted. According to the Federal Vacation Act, section 7 (3), the (residual) vacation entitlement will only be transferred to the next calendar year if this is justified by compelling operational reasons or the personal circumstances of the employee.

Example: An employee who works five days per week had already been granted ten of his or her 20 vacation days in May 2012. He wanted to use the residual ten vacation days to go on a skiing vacation in December 2012 and in a timely manner notified his employer of this plan. However, a number of fellow employees became ill at the end of November 2012 so that the employer needed all other employees in order to continue operations. The situation was not defused until January 2013. In this case, the residual vacation entitlement would have been transferred to 2013.

It is important to note that, if a (residual) vacation entitlement is transferred to the next calendar year for compelling operational reasons or due to the personal circumstances of the employee, the transferred vacation has to be taken by the end of March. Generally, after March 31, the vacation entitlement will expire ultimately.

Recently, the Federal Labour Court, based on the decision of the European Court of Justice in Case C-350/06, *Schultz-Hoff/Deutsche Rentenversicherung Bund*, held there was an exception to this general principle if an employee was unable to "exercise" his or her vacation entitlement during the transfer period, especially if he or she was incapacitated for work due to illness.

Example: If an employee who had not been granted any of his 20 vacation days in 2012 became ill and was therefore incapacitated for work until July 2013, he would, according to the new approach of the Federal Labour Court, retain his vacation entitlement for 2012 and additionally be entitled to vacation for 2013. As a result, he would be entitled to 40 vacation days in 2013.

This new approach of the Federal Labour Court has had a far-reaching impact and has kept

Labour Courts busy ever since. Both employers and employees are advised to keep an eye on further developments and should, in case of doubt, seek help from a qualified lawyer.

c. „Urlaubsentgelt“, „Urlaubsgeld“ and „Urlaubsabgeltung“

During the time of vacation, employees are continuously remunerated. The law speaks of “*Urlaubsentgelt*” (i.e. vacation pay), c.f. the Federal Vacation Act, section 11. The actual amount depends on the average remuneration the employee received for the 13 weeks prior to his vacation, but exclusive of overtime payment.

Conceptually and legally, “*Urlaubsgeld*” (i.e. vacation bonus) is a different matter. Some employers promise their employees extra payment they call vacation bonus in the employment contract or collective agreement. A claim for a vacation bonus may also arise from a company agreement. Yet, it has nothing to do with the entitlement to paid vacation.

Again, both vacation pay and vacation bonus have to be distinguished from “*Urlaubsabgeltung*” (i.e. payment in lieu of vacation). The latter means financial compensation for vacation that was not granted. As long as the employment relationship still exists, the rules of transfer and expiry of vacation entitlements outlined above apply primarily. According to the Federal Vacation Act, section 7 (4), payment in lieu of vacation is only obtainable in the event of vacation not having been granted before the employment relationship is terminated. The Federal Labour Court recently held that the claim for payment in lieu of vacation is a mere pecuniary claim. The vacation entitlement is automatically converted into a pecuniary claim and no further action, neither by the employee nor by the employer, would thus be needed.

2. Vacation entitlement in Ontario

Employees whose employment is governed by the law of the Province of Ontario are entitled to a vacation of at least two weeks each vacation entitlement year, c.f. the Ontario *Employment Standards Act*, 2000, section 33. The vacation entitlement year commences on the date that the employment relationship commenced. According to the Ontario *Employment Standards Act*, 2000, section 35, the vacation shall be completed no later than ten months after the end of the vacation entitlement year for which it is given. During vacation, employees shall receive vacation pay of at least 4 % of the wages earned during the period for which the vacation is given. Although they seldom do, employers have the right to dictate when employees can take their annual vacations.

VI. Overtime and excess work

Most employment contracts define the quantity of work owed by the employee by determining a specific amount of work hours, e.g. by stating a certain number of hours per week. However, it happens time and again that the work actually rendered exceeds the hours of work the parties to the employment contract agreed upon. Where this is the case, the questions are if and how

overtime should be compensated and whether an upper limit of hours of work exists.

1. Overtime and excess work in Germany

German law regulates the maximum permitted hours of work per day and the distribution of working hours in respect of individual weekdays as well as mandatory breaks and rest days, whereas it leaves open the remuneration of overtime. The legislator left the latter for employers and employees to agree upon in employment contracts, collective or company agreements. Instead of financial compensation, the parties can agree that overtime shall be replaced by leisure time, i.e. an employee who has worked overtime will be allowed to work less or may not have to work at all another day while still being paid.

a. Limitations to weekday working hours

As a protection for employees, the *Arbeitszeitgesetz* (i.e. the German Working Hours Act) provides for several limits. There exist special provisions that apply only to specific industries or professions. The following remarks will only refer to the provisions of the German Working Hours Act that are generally applicable.

The German Working Hours Act defines “working hours” as the period of time between the commencement and the end of work except for breaks. In case an employee works for more than one employer his or her working hours have to be totaled up.

Generally, working hours shall not exceed eight hours per workday. Prolongation up to ten hours will only be acceptable if the average working hours within six calendar months or 24 weeks do not exceed eight hours per workday. Workdays are all weekdays except for Sundays and holidays. In general, it is inadmissible to employ workers on Sundays and holidays.

If the working hours are more than six and up to nine hours, employees will be entitled to a minimum break of 30 minutes; if the working hours exceed nine hours, employees will have to have a 45-minute break at least. The time of day of the break has to be set beforehand. It is possible to divide breaks in periods of no less than 15 minutes. Employees must not work more than six consecutive hours without a break. Having finished their daily working hours, employees are entitled to a break of at least eleven consecutive hours.

b. Particularities of overtime lump sum clauses in standard business terms

A particularity can arise from an overtime lump sum clause in the employment contract if the employment contract is a standard contract subject to review. (Example: “As full compensation for all services provided the employee shall be paid at the rate of 2,500.00 Euros net. The salary shall settle all claims for compensation of overtime the employee was required to work.”)

i. Excursus: Review of standard business terms in employment contracts

Many employment contracts in Germany are subject to review within the meaning of the German Civil Code, sections 305 ff., because they constitute *standard business terms*. A contractual term

is regarded as a standard business term when it has been drafted in advance for the purpose of numerous uses and is presented by one party, typically the employer, to the other, typically the employee, upon concluding the contract. So, if an employer does not negotiate the content of the employment contract with the employee clause by clause but instead chooses to present a pre-drafted contract to be signed by the employee the contract is likely to be a standard contract, consisting of standard business terms. Since the legislator realized that, regularly, the user of standard contract is in a far stronger position and therefore able to create good conditions for him- or herself, standard business terms are subject to judicial review. They must not unreasonably disadvantage the other party to the standard contract; a provision unreasonably disadvantaging the other party is ineffective. One significant aspect of the judicial review of standard business terms is the requirement of transparency according to the German Civil Code, section 307 (1). Among other examples, a provision that is not clear and comprehensible may constitute an unreasonable disadvantage.

ii. Lack of transparency of overtime lump sum clauses

According to recent decisions of the Federal Labour Court, overtime lump sum clauses in standard contracts are not clear and comprehensible because employees cannot make out from the contract's wording what they will have to do in order to be paid the remuneration stipulated in the contract. Thus, they do not know what awaits them. As a result, such a clause makes it possible for an employer to indirectly reduce an employee's hourly wage by ordering him or her to work overtime.

The ineffective overtime lump sum clause leaves a gap in the contract. According to the Federal Labour Court, this gap can be filled by correspondingly applying the assumption embodied in the German Civil Code, section 612 (1). Consequently, overtime has to be remunerated if the remuneration granted under the contract does not constitute good consideration for the services rendered, and if in the circumstances it is to be expected that the services are rendered only for remuneration.

2. Overtime and excess work in Ontario

Generally, employers in Ontario are not allowed to require or to permit an employee to work more than eight hours in a day, and 48 hours in a week, c.f. the Ontario *Employment Standards Act*, 2000, section 17 (1). However, an employer and an employee can agree in writing to work a specified number of hours in excess of this regular ceiling up to 60 hours per week if the following conditions are met. Firstly, the employer has to provide the employee with the "Information Sheet About Hours of Work and Overtime" produced by the Director of Employment Standards.¹ Secondly, approval from the Director of Employment Standards to assign the excess hours must have been granted upon the employer's application.

¹ C.f. http://www.labour.gov.on.ca/english/es/pdf/info_hours.pdf

Throughout Canada, working overtime “triggers” the right to overtime pay. As in many other jurisdictions, the statutory rate according to the Ontario *Employment Standards Act*, 2000, section 22 (1), is at least one and one-half times the regular rates of the affected employees. In Ontario, employees are generally entitled to overtime pay for each hour of work in excess of 44 hours in each work week.

VII. Principle of equal treatment and non-discrimination

The principle of equal treatment and the principle of non-discrimination are characteristics of what is commonly regarded as “justice”. Since the understanding of justice may differ according to personal opinion and cultural background, implementing the principle of equal treatment and the principle of non-discrimination can give rise to some difficulties in practice.

1. Legal situation in Germany

Even though the purposes of the principle of equal treatment and the principle of non-discrimination are similar to each other, there are differences between the two principles.

a. Principle of equal treatment in Germany

The principle of equal treatment in employment law is binding upon the employer. He or she must treat equal matters equally and unequal matters unequally according to their characteristics. The principle is codified only for special cases, e.g. with regard to part-time and fixed-term employees in the German Part-Time and Fixed-Term Employment Act, section 4. However, it is generally accepted that furthermore, the principle of equal treatment is generally applicable in employment law. Depending on the situation, the principle can be the basis of a claim, or it can restrict the employer from exercising his or her rights.

In order to apply the principle of equal treatment, the measure of the employer has to be of a collective nature, i.e. it is required that he or she perceivably forms groups. This is the case where the employer, for example, grants benefits according to a specific, noticeable and generalizing scheme or establishes specific requirements or a particular purpose.

Moreover, in order for the measure to constitute unequal treatment, it must lack an objective reason for such treatment. Certain distinguishing features, e.g. sex, age, race etc., can never justify unequal treatment.

Example: An employer who employs four female accountants must not exclude one of them who is a single mother simply because he does not approve of her way of life for personal reasons when he pays a Christmas bonus to the other three.

The legal consequences of a breach of the principle of equal treatment are dependent on the individual case. Generally, the disadvantaged group can claim to be treated equally to the advantaged employees.

b. Principle of non-discrimination in Germany

Since 2006, the *Allgemeines Gleichbehandlungsgesetz* (i.e. the German General Equal Treatment Act) is in force in Germany. According to the German General Equal Treatment Act, section 1, the Act's goal is to prevent and eradicate discrimination on grounds of race or ethnic origin, sex, religion and belief, disability, age, or sexual orientation.

The General Equal Treatment Act has a particular impact on job advertisements and application procedures. If a job advertisement indicates that younger applicants, male applicants or non-disabled applicants will be treated preferentially, discrimination will be assumed by the law if a young, male or non-disabled applicant is hired eventually. An applicant who shows characteristics which constitute illegal distinguishing features might, under specific circumstances, be entitled to damages for not having been seriously considered. However, such damages are limited to a maximum of three months' gross salary if the applicant would not have been employed in any case. At the trial, the employer would have to bear the onus of proof, i.e. he would have to establish that the applicant was not subjected to discrimination.

Example: If a job advertisement reads "In order to strengthen our team we are looking for a *young* candidate" and the application of a 50-year-old is rejected while a 20-year-old applicant is hired, it is by law assumed that the employer's rejection of the older candidate's application was based on grounds of the rejected applicant's age. If the rejected applicant claimed damages, the employer would have to demonstrate and prove that, despite the wording of the job advertisement and the fact that he or she had hired a young applicant, the applicants' respective ages were immaterial. Presumably, it would be difficult to do so.

It goes without saying that the statutory assumption only applies if the rejected applicant was in a comparable situation to the candidate who was eventually hired, especially with respect to his or her objective suitability to the vacancy.

2. Legal situation in Ontario

The principle of non-discrimination has been implemented in the statutory law of the Province of Ontario, whereas the principle of equal treatment is only regulated to a certain extent.

a. Principle of equal treatment in Ontario

One could say that in the Province of Ontario, the principle of equal treatment has been reduced to the notion of "equal pay for equal or similar work, or for work of equal value".

According to the Ontario *Employment Standards Act*, 2000, section 42 (1), no employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when they perform substantially the same kind of work in the same establishment, their performance requires substantially the same skill, effort and responsibility, and their work is

performed under similar working conditions. However, there are exceptions to this principle of equal pay for equal or similar work. It does not apply when the difference in the rate of pay is determined on the basis of a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any factor other than sex, c.f. the *Ontario Employment Standards Act*, 2000, section 42 (2).

The provisions of the *Ontario Employment Standards Act*, 2000, are complemented by the *Ontario Pay Equity Act*. The pay equity model is based on the concept that employees should receive equal pay for work which is of “equal value” to the employer and not just for similar or substantially similar work.

b. Principle of non-discrimination in Ontario

In Ontario, the principle of non-discrimination is contained in the human rights legislation which was originally designed to be of general application and to protect individuals against many types of discrimination and human rights violations. However, the *Ontario Human Rights Code* also specifically deals with discrimination in the employment relationship. According to the *Ontario Human Rights Code*, section 5 (1), every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. The prohibition of discrimination on said grounds includes both direct and indirect discrimination.

VIII. Minimum wage

Whether a statutory minimum wage is necessary to improve the income situation within the low-pay sector, or whether it will ultimately result in job cuts, is a social-policy and labour market policy matter. This essay focusses on outlining the differing legal situations in Germany and Ontario rather than attempting to answer questions that, more appropriately, would be the subject of controversial political discussions. Therefore, the question is left open.

1. Minimum wage in Germany

In the Federal Republic of Germany, there is no general statutory minimum wage that applies to all employment relationships. At present, introducing such a general statutory minimum wage is not even a subject of legislative procedure. Rather, it is left to unions and management to establish minimum wages in collective agreements. The problem with this practice is, however, that those agreements only apply within the specific industry sector in question, and generally only if both employer and employees are bound by the collective agreement, i.e. generally, the employer has to be a member of the organisation that acted on behalf of the employers, and the employee has to be a member of the relevant trade union. However, it is possible to declare collective agreements generally applicable so that they bind even those employers who originally

were not a party to the collective agreement.² As a result, to some extent, minimum wages vary considerably. Often, the minimum wages set out in collective agreements for Eastern Germany are lower than those in Western Germany.

Irrespective of minimum wages set out in collective agreements, a certain amount of protection results from the ban on immoral wages arising from the German Civil Code, section 138 (1). Whether an agreement on wages is immoral or not is dependent on the particular circumstances of the individual case because, according to the Federal Labour Court, wages cannot be held to be immoral on the basis of the level of remuneration alone. Rather, the content, motive and purpose of the agreement also have to be taken into account. Where remuneration only amounts to two third or less of the wages normally paid in accordance with the collective agreement of the relevant industry sector in the region in question, there is a clear discrepancy between the work performed and the remuneration, indicating a case of immoral wages.

2. Minimum wage in Ontario

All jurisdictions in Canada have enacted regulations governing the provision of minimum wages to certain employees. In Ontario, the minimum wage has been \$10.25 an hour since March 31, 2010. However, the Ontario Exemptions, Special Rules and Establishment of Minimum Wage, O Reg 285/01, section 5 (1.3), provides for special minimum wage rates that apply, for instance to students under the age of 18 who work less than 28 hours a week during their school years, or to employees who, as a regular part of their employment, serve liquor directly to customers.

The minimum wage legislation applies regardless of how the employee's wages are calculated. This means that it is the employer's responsibility to ensure that wages comply with the regulations even where employees are not paid on an hourly basis.

² A list of all collective agreements that were declared generally applicable is published annually by the Federal Ministry of Labour and Social Affairs; the list is accessible on the internet (<http://www.bmas.de/EN/Home/home.html>) under "Our Topics", "Labour Law", "Collective agreements".

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