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# Freedom of Contract in Labour Relations

## Introduction

Different countries have different approaches towards labour law and its position in the legal system. In this respect, no common standpoint has been reached to date. Before 1940, the prevalent approach in the Republic of Estonia was that labour law was a part of public law (1, p. 143). However these days, opinions to the effect that labour law belongs neither to public nor private law but is somewhere on the line between the two are also rather widespread (9, p. 38). It has been claimed that labour law is a special part of private law while the third standpoint placing labour law under a branch of private law, civil law, is not rare either (2, pp. 30-32).

Speaking about the current legal system in Estonia, the previously mentioned three approaches on the position of labour law within the domains of private and public law are prevailing. These approaches are new for Estonian labour law as during the Soviet era the classification of law into private and public was actually something that was irrelevant. There was no such thing as classification of law into two major areas: private and public law. The legal system at that time comprised individual great branches such as civil law, labour law, constitutional law, penal law, etc. In treatment of labour law, the emphasis was primarily on its relationship with civil and administrative law.

Recognition of two major branches of law within the legal system was bound to lead to the question about what areas are included in public and what in private law. Traditionally, labour law has been an area which, by the content of its norms, is not directly classifiable under public or private law. The approaches commonplace in several countries can serve as examples to the effect that labour law belongs both to private and public law. There is no clear-cut answer to the question about which norms are

more abundant in labour law. It is said that as a labour relationship involves private law elements (employment contract) while restrictions on it are prescribed by public law provisions, it is not possible to employ a uniform classification (9, p. 38).

According to the current approach in Estonia, labour law is considered to form a part of private law with certain reservations — it is called a special area of private law or a specialised private law (11). Such an approach is conditioned by the fact that a labour relationship is formed on the basis of a contract in private law — employment contract — and consequently the private law element is present one way or another. However, as different acts prescribe different minimum requirements for the parties to the labour relationship and as the parties cannot agree on conditions worse than those minimum requirements, labour law has been attributed a special status within private law.

In Estonia, employment contracts became important in the context of shaping labour relations after the adoption of the Employment Contracts Act back in 1992. Before that employees were hired on the basis of ordinances which, in essence, were administrative instruments. Such a method of hire was possible as the employers were state-owned companies and all the working conditions were virtually provided for by law. In a new economic situation it is however necessary for the parties to be able to negotiate the working conditions and freely enter into a contract. The State imposes just the minimum requirements. This demonstrates a principle of labour law according to which the State provides legal regulation of labour relations insofar as this is necessary to guarantee the co-operation of the subjects of the labour relationship based on social partnership and to protect the interests of employees who are, eco-

nomically, the weaker party (8, p. 13).

Matters connected with freedom of contract in labour relations are important in the Estonian context because according to the plans for the reform of the Estonian private law, employment contracts will become a part of the contracts in the law of obligations. Consequently, the application of the general principles of contract law will become directly relevant for employment contracts. It is, however, disputable whether the principles of the freedom of contract and private autonomy should at all times be applicable to employment contracts. At the same time, it can be claimed that although different laws restrict freedom of contract in labour relations, it nevertheless exists.

The existence of employment contracts is necessary in order to determine the scope of labour laws. Notwithstanding our point of departure in defining the scope of labour laws: be it the characteristic features of employees or of the employment contract, the voluntariness of working and the existence of an employment contract in private law are the features important in defining labour relations. Therefore, it is important to pay attention to freedom of contract in labour relations. Voluntariness of working is expressed by the existence of an employment contract. An employment contract is a transaction that involves two parties. What is important in a transaction is the will of a person as it is expressed. An expression of will, however, must concur with the actual and freely developed will of the person over time. The previously mentioned principles, used in civil law, are applicable in labour law too. The existence or non-existence of an employment contract is reducible primarily to the problem of whether the person who performs the work is an employee or not. An employment contract, which is the expression of the voluntariness of work performance, has the features characteristic of a contract. One such characteristic feature is, e.g., the written form of employment contract prescribed by § 28 of the Employment Contracts Act.

## 1. Private Autonomy and Freedom of Contract

Labour relationships built on private autonomy are the focal point of the entire labour law. At the same time, the individual right of self-determination is restricted in labour law while it is complemented by the autonomy of undertakings and collective agreements. The decisive starting point, however, is the employment contract in which the parties have agreed. The set of problems related to private autonomy in employment contract law is therefore the decisive issue for the entire labour law.

Private autonomy is understood as a possibility, granted to an individual via the legal system, to regulate his or her legal relations by concluding transactions under law (3, p. 532). Private autonomy means that an individual must be able to shape his or her legal relations by way of self-

determination and self-responsibility. The legal order must grant him or her maximum freedom in this realm of private life (7, p. 91). In a legal order built on private autonomy, contracts are an important tool in achieving the satisfaction of the needs of a private individual. Consequently, private autonomy means first and foremost freedom of contract. A private individual must have the possibility to decide freely whether he or she concludes a contract and with who he or she does it (freedom to conclude a contract) and what the content of the contract shall be (freedom to determine the content of contract) (7, p. 91).

Private autonomy also plays an important role in labour relations, particularly in employment contract relations. Although in Estonia the employment contract is not connected with other contracts in the law of obligations, it does not mean that the parties do not have the freedom to conclude a contract or to determine its content.

Private autonomy and freedom of contract exist insofar as the parties to the contract are granted, under law, a corresponding possibility to regulate their relations. Insofar as provisions of law are mandatory by nature, agreements deviating from law cannot be effective. In addition to the norms established by the State, private autonomy in labour relations is also restricted by collective agreements. Such an option can be rightfully considered a peculiarity of labour law sources (3, p. 533). Irrespective of the previous statement, it is possible in labour relations to deviate, by employment contracts, from the provisions established by laws or collective agreements, but only in the case where such arrangements are more favourable than the conditions prescribed by law or collective agreement (17, § 14).

The principle of private autonomy and one of its most important expressions — freedom of contract is guaranteed in Estonia under the Constitution. Under § 19 of the Constitution, everyone is guaranteed the right to free self-realisation. The principle provided for in § 29 of the Constitution, under which every citizen of Estonia has the right to freely choose his or her sphere of activity, profession and place of work, is especially significant in terms of labour law. The conditions and procedure for the exercise of this right may be provided for by law. The freedom to choose profession means, *inter alia*, that the parties to an employment contract are free to decide with who and whether at all the employment contract will be concluded. They may also decide on the content and conditions of the contract. What must be taken into account, of course, is that under § 29 of the Constitution restrictions may be by law established on the parties to the labour relation in the realisation of their freedom of contract. The possibility of setting restrictions by law is directly written into § 29 fourth paragraph of the Constitution, which provides that working conditions are controlled by the State. This principle means primarily that the State ensures that all the

working conditions prescribed by law are guaranteed and, if such conditions are not guaranteed or are guaranteed insufficiently, the State shall employ necessary measures. Such measures may be laws that restrict the freedom of contract of the parties. What is important is that such restrictions must be established by law. Under § 3 of the Constitution, the powers of state are exercised solely on the basis of the Constitution and the laws which comply with it.

Even in that case, private autonomy is a labour law principle under which the entire labour law is treated as integral control over freedom of contract. A legal basis is needed to restrict private autonomy. Insofar as no such provisions are established by law, the parties to the employment contract are free to decide on the content of the contract (3, p. 534).

## 2. General Bases of Freedom of Contract

Opinions about the nature of the labour relationship differ in special literature. The labour relationship has been treated as a personal legal relationship or a relationship in the law of obligations. Labour relations have also been treated as partnership relations (12). A widespread approach is that the labour relationship should be primarily treated as a special part of the law of obligations (5, p. 1). Although this standpoint has not always been considered right, the situation *de lege lata* is in some countries such that the provisions regulating employment contracts are included in the civil code, thus forming one part of the special part of the law of obligations (13). Estonia will in the near future be added to the countries in which provisions regulating employment contracts are found in the civil code. In certain Central and Eastern European countries, however, employment contracts are regulated by the labour code and there are no direct connections between labour law and civil law.<sup>1</sup>

Irrespective of whether labour law and employment contract law form a part of the law of obligations or not, the real situation is such that the employment contract involves an arrangement between the parties to which the principle of freedom of contract is applicable to a certain degree.

As a rule, the condition precedent to a relationship in the law of obligations is the existence of a contract (4, p. 15). A relationship in the law of obligations formed on the basis of contract requires the existence of a related expression of will. At that, the employment contract is a bipartite contract by which one of the parties undertakes a certain discharge of obligation because the other party likewise undertakes such discharge. With employment contracts, this principle is very clearly felt. The employee enters into an employment contract to earn a living. The employer, on the other hand, would not pay for nothing but expects the employee to perform the work; the employer expects the

employee to start working for the employer's benefit. Thus, there exists a bipartite mutual contract between the employee and the employer (4, p. 15). The contract is entered into to avoid the application of much worse contract conditions towards one of the parties compared with the other.

Bipartite contracts in particular have different goals. In, e.g., sales contracts, the seller wishes to receive the best price for the goods while the purchaser wants to pay as little as possible for the merchandise. The situation is similar with the employment contract. The employer attempts to keep the payroll and production costs as low as possible while the employee wants to receive the highest possible pay for the work. In addition, some employees certainly aim to get the highest possible salary for as little work as possible.

Freedom of contract means primarily two things: (1) the person is free to decide whether and with who he or she concludes a contract with (freedom to conclude contracts) and (2) which conditions of contract are agreed upon (freedom to formulate the contents of contract).

The freedom to conclude contracts gives an individual the chance to decide whether he or she concludes a contract and with whom he or she will conclude that contract. A person is free to decide whether he or she concludes an employment contract with his or her employer and he or she is also free to decide whether to enter or not to enter the labour market. The freedom to conclude contracts may in certain cases be restricted by the prohibition or obligation to conclude a contract. The prohibition to conclude a contract is clearly visible in labour law. Under the Estonian Employment Contracts Act it is prohibited to conclude a contract of employment with people who are less than a certain age. Neither is it allowed to employ women or minors in certain types of jobs. In addition to laws, restrictions on the conclusion of contract may arise out of the collective agreement. Under § 2(2) of the Employment Contracts Act, it is prohibited to conclude an employment contract with a minor to work in a job prohibited under the collective agreement. Restrictions to conclude an employment contract may be present also when a person is, by doctor's orders, prohibited from working in certain areas. Arrangements which are contrary to this prohibition are void. Under the Estonian Employment Contracts Act, such employment contracts can be terminated in certain cases due to violation of hiring regulations (17, § 113), in other cases, however, it is possible to revoke an employment contract. Those contracts are legally void not from inception but *ex nunc*. Thus, those contracts terminate in respect of the future. It is not possible to reclaim a work already performed or the payment of salary (5, pp. 51-52). The same principle is also provided for in the Estonian Employment Contracts Act in certain cases (17, §§ 132, 135).

Parties to a contract are also free to decide on how

they determine the content of the contract. In essence, this means that the parties themselves decide on the conditions they deem necessary to agree upon. In principle, the parties need not adhere to those types of contract expressly provided for by law but a relationship in the law of obligations may also arise out of contracts which are not provided for by law but which are not contrary to the meaning and content of the civil law (19, § 58). Even if the parties choose a contract, they may deviate from the conditions provided for by law on the premises that such an option is directly contained in the law. In other words, the parties have the freedom to choose which contract they conclude and in which conditions they agree upon.

With employment contracts the situation is somewhat different. In this respect, the Estonian Employment Contracts Act prescribes those minimum (obligatory) conditions in which the parties need to agree in to make it possible to speak about employment contract as such. In addition, the parties must comply with several different regulations which are provided in laws in protection of the employee as the weaker party to the labour relationship. It is clear that labour laws provide for minimum requirements and the parties to an employment contract cannot agree to conditions worse than those. Hence, the right to formulate an employment contract exists in the labour relationship albeit to a limited extent. Arrangements may be made which are more favourable to the employee but not, in any case, lower than those requirements prescribed by law. The Estonian Employment Contracts Act provides for the expansion of employee's rights principally in § 14, under which rights granted to the employee by law or administrative instrument can be expanded under a collective agreement or employment contract as well as in accordance with the unilateral decision of the employer. Section 15 of the Employment Contracts Act corresponds to the same section, under which those working conditions which are inferior to those prescribed by law or collective agreement are void.

One of the elements of freedom of contract is the free form of contract. According to the approach prevalent in contract law, contracts may be concluded in any form whatsoever. It is quite sufficient if the parties agree in a contract orally and obligations and rights evolve on the basis of such contract. At the same time, however, mandatory requirements of form may be prescribed by law, or the agreement of the parties, by which they agree in the form of the transaction (19, § 91(1)).

In a number of countries, the written form of employment contracts is generally not required. Estonia is an exception: under the Employment Contracts Act an employment contract must be as a general rule concluded in writing. But if the work lasts for less than two weeks, the Employment Contracts Act also provides for an oral employment contract. At the same time it should be

stressed that an employment relationship is deemed evolved also in the case when an employee has already been allowed to start work without the conclusion of a related agreement. Based on this provision, an employment contract may also be spoken about without making the employment contract relationship void. If an employment contract is never executed in the form required, the employer shall be held responsible. Responsibility arises out of public law - the Code of Administrative Offences (15, § 34).

As a rule, contracts evolve via the making of an offer and the acceptance of it (4, p. 37). Nevertheless, there is also a theory about factual contract relationship according to which a contractual relationship in the law of obligations may in certain cases evolve without a related expression of will purely via actual behaviour. A factual contractual relationship may emerge in the case of a labour relationship — as a relationship in the law of obligations — which has a lasting character. Under a lasting relationship in the law of obligations, there exists an obligation of lasting behaviour or repeated discharge of obligation (e.g. everyday working). If a lasting relationship in the law of obligations is based on a void contractual relationship, there are often consequences which cannot be easily solved. The principle of factual contractual relationship is especially important in the context of employment contracts. If there is a wish to annul an employment contract, the work already performed cannot be reclaimed. In order to alleviate such complications, the institution of factual contractual relationship is emphasised, of which contractual requirements arise out of. With employment contracts, this primarily means that until it is contested or revoked, the employee has all the rights and obligations arising out of an employment contract.

### 3. Aspects of Freedom of Contract in Labour Relations

#### 3.1. FREEDOM TO CONCLUDE CONTRACTS

In labour relations, freedom of contract has the greatest weight upon the conclusion of an employment contract. Naturally there exists a certain amount of factors which may *de facto* influence the freedom of decision of the person. Thus, a person who does not operate as an entrepreneur must live on subsidies received from the State, family or third persons or he or she may conclude an employment contract in order to earn a living. At the same time, the employer too must conclude an employment contract if he or she does not wish to be alone in running his or her business but wishes to do so together with employees who, in turn, must obey the orders of the employer. Taking into account the development of modern science and technology, an employer can no longer be a "Jack of all trades". In order to expand the business and continue to be competitive, the employer hires employees and they continue to

operate together. In such a situation, the employer must, pressed by the *de facto* situation, enter into an employment contract. Those factual decisions, however, do not concern the legal freedom of decision but build, *de facto*, frames around the guaranteed-by law freedom to conclude contracts. The freedom to conclude contracts is legally unlimited and guaranteed under § 29 of the Constitution, this is primarily the freedom of the employee to decide whether to conclude an employment contract or not. It also means that the employer is free to conclude (or not to conclude) the contract. The decision regarding the creation of jobs and the filling of vacancies with employees is not subject to any restrictions. Here the decision is made solely by the employer.

Freedom of contract in the context of employment contracts can, in principle, be restricted by law. In particular, here we mean §§ 35 and 36 of the Employment Contracts Act which provide for the prohibition to conclude employment contracts with women and minors for works in which women or minors cannot be applied. More specifically those sections provide for the right of the Government of the Republic to determine the lists of works prohibited for women or minors. Under the current Employment Contracts Act a contract is not deemed void if it is contrary to a prohibition prescribed by law but under § 113 of the Employment Contracts Act such a contract can be terminated due to violation of hiring rules.

The employee's right to choose an employer is, in principle, subject to no restrictions. Consequently, employees are free to decide which employers they conclude employment contracts with. Exclusions may appear insofar as certain labour relations require, to the extent provided by law, a special professional background, personality or other eligibility criteria. An example can be brought from the Security Service Act which prescribes that a security guard must be aged between 20 and 65 years (18, § 8(3)). Thus, the freedom of those people beyond the age range to conclude an employment contract is restricted because they are prohibited from working as security guards. In contrast to the freedom of choice of an employee to decide which employer to conclude an employment contract with, the employer's decision on which to conclude an employment contract with is subject to several restrictions - under laws, regulations and collective agreements. Taking into account the restrictions imposed in respect of an employer by law, some conclusions can be drawn from here for the Estonian legislation.

Firstly, Estonian legislation does not include the employer's obligation to conclude an employment contract with a particular employee. Hence, the employer is, in principle, free to decide with whom and whether to conclude an employment contract. Insofar as there are no discrimination prohibitions in existence arising out of law (e.g. § 10 of the Employment Contracts Act) the employer

is not prevented from choosing employees upon recruitment or hiring on the basis of any other criteria. On the other hand, the violation of the legal provisions restricting the employer's freedom of choice is not the basis that would bring along the obligation to conclude an employment contract (mandatory contract conclusion). Mandatory contract conclusion would primarily mean the employee's right to demand the conclusion of an employment contract and the employer's obligation to conclude the contract with the employee. Even where no employment contract is concluded, e.g. by violation of the discrimination prohibition, such a violation need not grant the right to demand the conclusion of a contract but just the right to claim compensation in money (14). Under § 10 of the Estonian Employment Contracts Act, it is illegal to allow or give preferences, or to restrict rights on the grounds of race, colour, sex, beliefs, etc. At the same time, the Employment Contracts Act does not specify what happens after such a violation has occurred. It is still not clear whether, e.g., an employee may demand the conclusion of an employment contract or just claim damage. Although the Estonian labour legislation guarantees freedom of choice to both the employee and the employer, it is still necessary to specify the situation after the violation of this freedom.

An employer may be prohibited from concluding employment contracts with certain categories of employees or impose certain assignments on employees in certain conditions (e.g. force a pregnant woman to work a night shift), but under the current labour law the employer is not obligated to conclude an employment contract with a particular employee.

### 3. 2. FREEDOM TO FORMULATE CONTENTS OF AGREEMENT

As mentioned above, under the private autonomy principle, the parties to an employment contract also have a legal option to determine the content of the labour relationship as agreed by them. In labour relations there exist quite many obligatory norms which are unilateral, and thus it can be concluded that there exists no option for the employer and employee to agree on individual working conditions (3, p. 535). At the same time, objections have been presented to it with a reasoning that the labour relationship is not shaped by law or collective agreement but primarily by the employment contract. The employment contract is not just a blank formula or just "a pass to the enterprise" which, if accepted, makes one subject to the already existing rules and regulations of the company (3, p. 535).

Without any lengthy explanations we can state that an employment contract is important in order to determine the work to be performed by the employee and describe the job. Work obligation can be defined, in the law of obligations, as a promise to discharge a certain obligation. In private autonomy, such a promise can evolve only via an individual employment contract and not via law or collective

agreement. Similarly, an employer can give the employee instructions regarding the work only within the framework agreed upon in the employment contract. The employer can unilaterally give the employee just those instructions which, via the type and place of work and working hours agreed in the employment contract, comply with the work to be performed under the employment contract. Giving the employee an assignment other than agreed in the employment contract would basically mean the transfer of the employee to another position. Under § 59 of the Employment Contracts Act, an employee may be transferred to another position only with the employee's consent. In cases explicitly provided by law, an employee may be transferred to another position without his or her consent. This, however, is possible only in extraordinary cases provided that the transfer does not last over one month. With such unilateral transfers, it is also important that the employee's proprietary liability does not increase (17, §§ 65-67).

In determining a work function, it is important to bear in mind that the more extensively and generally an employee's working function is defined, the more extensive is the employer's authority to give, on the basis of discretionary power, different assignments to the employee. The narrower and more specific the employee's work function, the narrower the extent of the employer's discretionary power.

An employment contract also specifies the work place. Where an employee works at the employer's specific enterprise or specific working place, the performance of principally the same work outside the agreed work place is not covered by the employer's discretionary power. The employer's discretionary power can extend only to the work agreed in the employment contract provided the work is performed at the place prescribed by the employment contract.

Working hours are also subject to the parties' agreement in an employment contract. In particular, this is true about the duration of working time. In the Estonian context, what should be specified in the first order or priority is the number of hours per day or week an employee works. The Working and Rest Time Act provides for the limits to be taken into account in determining the working time. Namely, working time cannot be longer than eight hours a day or 40 hours a week. Under the Working and Rest Time Act, Estonia generally uses a five-day working week, i.e. an employee must have at least two days off during a week. The employment contract also specifies the hours during which work is performed. This primarily denotes an agreement to the effect that a person will start work during day or night time as well as a principal agreement regarding the work in shifts (e.g. 24 hours at work and 48 hours off). The Working and Rest Time Act does not exclude the application of summarised working time accounting. The application of summarised working time

accounting means that the parties may agree on monthly, semi-annual and annual working time. However, even with summarised working time accounting, the working time agreed in the contract cannot be greater than the maximum amount provided for by law. With summarised working time accounting, the law also prescribes that where the summarised working time accounting period is longer than three months, the employer must obtain approval from the local labour inspector. This principle is required primarily to avoid employer's malpractice in imposing a working time regime on employees. But where the summarised working time accounting period is less than three months, no interference from the labour inspector is necessary and the parties are free to decide on the methods of working time accounting.

It has been claimed in special literature that if an employee can freely decide whether, where and for who he or she works, the employee must also be free to decide as from which day, for how long and at which hours he or she works (3, p. 536). This approach cannot be fully agreed with as in many respects the actual working time arrangements are conditioned by the organisation of work at the employer's premises. In addition, the Working and Rest Time Act contains a provision under which the employers must observe the precepts of local government executive bodies upon establishing the working time regimes of enterprises, agencies and organisations providing services to the public. This means that, with those enterprises, freedom of contract between the parties may be restricted by legislation imposed by the local government and both parties must observe those requirements and restrictions.

Employees have only a general say in the determination of the working time regime. An employee has sole discretion to decide on the time he or she works only in the cases provided for by law. For example, under § 14(2) of the Working and Rest Time Act, a person raising a child under fourteen years of age may only be required to work overtime or at night with his or her consent. In such case, the employer cannot demand from the employee to work at night or work overtime if the employee does not consent. At the same time, such a refusal of the employee cannot be treated as neglect of work obligations as the employee's freedom of choice is guaranteed by law. Where the employee agrees to work at the specified time, he or she must obey the instructions of the employer. In this example, working in general as well as working at a specified time is solely at the discretion of the employee.

The employment contract is also important in the determination of the wage. Wages may be viewed, in the law of obligations, as a counterdischarge for the work performed by the employee. However, the provisions regulating wages are normally specified in collective agreements. In Estonia, the number of collective agreements is relatively small and thus employment contracts are usually the

only basis in which wages are agreed upon. At that an employment contract is not just the instrument where a concrete amount of wage is agreed but other important conditions related to the payment and calculation of pay may be agreed in the employment contract. Thus, e.g., under the Estonian Wages Act (16), the employee's wage rate, additional remuneration and additional payments payable to employees, methods of calculation and procedures for payment of wages are determined by employment contracts, as under the Wages Act these are deemed to be wage conditions. Under § 3(2) of the Wages Act, the wage conditions and amendments to them are determined in the employment contract. While other wage conditions may be determined by the company's internal documents, e.g. the time, method and place of wage payment, the employee's wage rate must be set forth in the employment contract (16, § 10). Wage rate is an individual amount for each employee and cannot be imposed by collective agreement or corporate internal documents.

Wage-related issues is the area where there exist relatively few mandatory unilateral norms compared with the other areas of labour law. The parties have the greatest options to negotiate the amount of wage and other wage conditions and to apply the freedom of contract principle. Substantial restrictions prescribed by the Wages Act are, in part, the minimum rates of additional remuneration less than which an employee cannot be paid. Thus, the Wages Act provides for the minimum remuneration rates regarding the performance of certain additional work and working under special conditions where the parties cannot agree to lesser amounts (evening or night work, remuneration for overtime, working during national holidays). The most important restriction which all employers must take into account is the requirement of the Wages Act to the effect that where an employee is employed full-time, he or she must be guaranteed a minimum wage which is at least the minimum monthly wage established by the Government of the Republic (16, § 2(7)). This norm, however, is again a minimum requirement and the parties may always agree upon a higher rate.

### 3. 3. FREEDOM TO TERMINATE A CONTRACT

In addition to the parties' freedom to conclude a contract, we should not forget the freedom to terminate a contract. Although the Employment Contracts Act foresees the bases upon which an employer may unilaterally terminate an employment contract, there still exists a possibility that an employment contract is terminated upon the parties' agreement or the contract expires due to the elapsing of its term. At the same time, the employer's freedom to terminate an employment contract is guaranteed under the Employment Contracts Act. For instance, an employer may, under § 86 5) of the Employment Contracts Act terminate the employment contract due to unsatisfactory

results of a probationary period during the whole probationary period if the employer is not satisfied with the performance of the employee. In such a case, the employer need not give prior notice or pay compensation. It is also possible to follow a simplified procedure for termination of the employment contract of a part-time employee. Upon terminating the employment contract with these classes of employees, the employer need not observe the guarantees which are generally foreseen in the event of termination of employment contracts (e.g. the prohibition to terminate the employment contract with a pregnant woman; during illness, etc.).

Insofar as otherwise provided for by law, the employer may freely terminate an employment contract at any time. Such an option is foreseen, e.g., in German and Swiss labour laws. In those countries, the employer need not justify the termination of an employment contract when the labour relation has lasted less than a period provided for by law and when the number of employees of the company is less than the number provided for by law (in Germany the respective conditions are, e.g., six months and less than five employees). In Estonia, the employer's freedom to terminate an employment contract is more restricted as the employer must always have a reason to terminate an employment contract on their own initiative. In other words, the termination of an employment contract must always be socially justifiable either by company-related reasons, reasons due to the person of the employee or for reasons due to conditions of the employees acts. The reasons are detailed in § 86 of the Employment Contracts Act. If the employer dismisses an employee due to reasons not provided for by law, the termination of the employment contract is unlawful. The employer's freedom upon the termination of the employment contract due to the employee's acts is restricted also by the fact that in such cases the employer must adhere to the procedure prescribed by law for imposing disciplinary punishments. This, however, means that the deadlines established for imposing disciplinary punishments and the regulations ruling the execution of disciplinary punishments must be complied with. Failure to comply with these requirements may lead to a situation where the termination of the employment contract is declared unlawful.

At the same time, the employee too is guaranteed the freedom to terminate the contract when the employee wishes to do so but the requirement is that the employee must give the employer a notification about his or her intent at least one month in advance (17, § 79). If so agreed with the employer, the employment contract may be terminated with immediate effect (i.e. before one month has elapsed) if the employee wishes so. The employee need not give a reason to terminate the employment contract on his or her own initiative. As a general rule, the law does not obligate the employee to give proof why he or she wishes

to leave work on his or her own free will.

The termination of the employment contract by agreement of the parties is one of the most important aspects in terms of the termination of employment contract that vividly demonstrates the private autonomy of the parties. The termination of an employment contract by agreement of the parties requires, under § 76 of the Employment Contracts Act, that one party presents a corresponding written request and the other party gives written consent to the termination of the contract. Upon such a termination of the contract, the reasons why the contract was terminated by agreement of the parties are irrelevant. Besides, the employer need not adhere to the provisions of law prohibiting the termination of the contract under particular circumstances (e.g. maternity leave, temporary inability to work, etc.) An employee cannot be forced to terminate the employment contract by agreement of the parties. On the basis of the Estonian court practice to date, it is possible to state that even if an employee signed the agreement to terminate the employment contract but there exists no written request and consent prescribed by § 76 of the Employment Contracts Act, the termination of the employment contract by the agreement of the parties is illegal. The termination of the employment contract by agreement of the parties requires that the parties to the contract have negotiated it and actually come to the related agreement.

Under the freedom to conclude contracts principle, besides the employment contracts entered into for an unspecified term, contracts for a specified term may also be concluded. However, with employment contracts entered into for a specified term it is required that there exist the bases provided for by law. Despite that employment contracts entered into for an unspecified term are widespread and admissible, employment contracts may be entered into for specified terms where there exists a justified basis under law. In accordance with the Employment Contracts Act, an employment contract may be entered into for a specified term to perform works that by character are temporary, i.e. the works end sooner or later one way or another. At the same time, contracts for a specified term may be concluded for works which by character are permanent. For instance termed contracts may be concluded where the employee is given special fringe benefits or, e.g., with university-level teaching staff and researchers. Under the Universities Act (20, § 39), employment contracts for a specified term are entered into with lecturers and researchers. Under this Act, employment contracts for a specified term may be entered into but not in excess of five years. Transformation of an employment contract entered into for a specified term into an employment contract entered into for an unspecified term in the midst of the labour relationship is generally not allowed. If this is done, it is principally possible only upon the agreement of the parties. The fact that a specific legal order allows, without

restrictions, termination of employment contracts by agreement of parties and the recognition of the option of termed contracts are deemed an expression of the self-determination of contract parties in private autonomy.

Although upon the termination of an employment contract on the initiative of the employer there exist various restrictions when the employer may not terminate the contract, the Estonian labour law nevertheless recognises the freedom to terminate employment contracts. This freedom is demonstrated by the admissibility of termination by agreement and after term of the contract.

#### **4. Freedom of Contract and Collective Agreement**

Section 29 of the Constitution guarantees the freedom to belong to associations of employees or employers. Associations and unions of employees and employers may protect their rights and lawful interests by means not prohibited by law. Collective agreement is one of the means for protection of rights and lawful interests

A collective agreement is a voluntary agreement between employees or a union or federation of employees and an employer or an association or federation of employers, and also state institutions or local governments, which regulates labour relations between employers and employees. Under § 2 of the Collective Agreements Act, a collective agreement is a voluntary agreement between the employees or the employees' union or association or between state institutions and local governments which regulates the labour relations between employers and employees. Thus, collective agreements are primarily voluntary agreements by which labour relations are supplementary to regulated law.

A collective agreement is basically an agreement in which the rules, according to the will of the parties, to be applied to the labour relationship are agreed upon (10, p. 366). It may be said that in collective agreements the rules are agreed which are subject to application to third parties who are not parties to the collective bargaining. If for the purpose of entering into a collective agreement, negotiations between the organisations of employees and employers are held, the agreement is concluded primarily in the interests of the members of such organisations although the members do not directly participate in the negotiations.

It has been argued in special literature that a collective agreement comprises two sets of norms. First, a collective agreement includes norms which are directly applicable to the labour relationship. This is the normative part of the collective agreement. On the other hand, a collective agreement includes norms in the law of obligations such as the obligation to preserve labour peace which the parties must fulfil without an explicit agreement. The obligation to preserve labour peace means that the parties to the collective agreement respect the collective agreement during the

period it is valid. Therefore, during that time it is not allowed to organise a strike or lockout to amend the collective agreement. In addition, an obligation to implement the collective agreement is also an obligation in the law of obligations in keeping with which the parties must see to the fulfilment of the collective agreement (10, pp. 366-367).

Under the Estonian Collective Agreements Act, it is possible to distinguish between two types of collective agreement conditions. Under § 6 of the Collective Agreements Act, one part of the arrangements agreed in the collective agreement is formed from conditions directly pertinent to the labour relationship. The conditions of collective agreement also include the conditions specifying the supervision of compliance, conclusion, renewal of the collective agreement, etc. Under § 11 of the Collective Agreements Act, during the validity of the agreement the parties must fulfil the conditions of the agreements and not impose a strike or lockout for the amendment of the conditions agreed in the collective agreement. Thus, by concluding a collective agreement, the parties thereto assume the obligation to fulfil the agreement and must refrain — as an obligation arising directly out of law, from measures by which it would be possible to demand unilateral amendment of the collective agreement.

As with any other agreement, a collective agreement comes into being after both parties have expressed their clear wish (10, p. 370 ff). Even when a State Arbitrator interferes with the process, he or she cannot demand that the parties conclude a collective agreements on the conditions offered by the Arbitrator or a third person. Collective agreements are concluded only as a result of the consensus arrived at after collective bargaining. The State Arbitrator is just a mediator who must contribute to achieving a consensus between the parties. Consequently, the freedom to conclude a contract is applicable to collective agreements too. Legal mechanisms cannot be used to force someone to enter into a collective agreement. A party to the agreement may, by strike or lockout, force the other party to conclude an agreement but in the law it is not written that a party should conclude the collective agreement on the conditions offered. Section 7 of the Collective Agreements Act sets out that a collective agreement is concluded by negotiations between the parties on the basis of mutual trust and presentation of related information. This provision excludes the obligation or coercion to conclude a collective agreement. If collective bargaining fails, no collective agreement is entered into. Consequently, mandatory contract conclusion is not applicable to collective agreements.

It should however be noted that requirements concerning the format of collective agreements may be established. A collective agreement must be concluded in writing or else it is void with all the related consequences (10, pp. 377-378). Under the Estonian Collective Agreements Act, a collective agreement must also be concluded in writ-

ing but the Act does not specify what happens if it is not. In the Estonian context, another problem is that generally collective agreements are not treated as other contracts and consequently the provisions regarding the voidness of contracts do not apply to collective agreements. Therefore, this is an open case in Estonian legislation, both theoretically and practically. Hence with collective agreements the parties' freedom to decide on the form of agreement is not applicable. We should however mention here that it is quite impossible to imagine that a collective agreement could in reality be concluded in spoken form.

The status of collective agreements through the prism of freedom of contract is to date a topic which in Estonia has not been treated as there was no need to do so and as, traditionally, collective agreements are viewed as not belonging to the general system of contracts.

At the same time we should however note that the Collective Agreements Act does not regulate the termination of collective agreements. If collective agreements are treated as one of many contracts, there should exist the freedom to terminate it. The current Estonian legal system provides no answer to the possibility of terminating a collective agreement and to the related conditions. Under the Collective Agreements Act, a collective agreement may be entered into for a specified term. If no term is specified, the agreement remains valid for one year. After the term has elapsed, the parties are relieved from the obligation to maintain labour peace but they must, under law, fulfil the conditions of the collective agreements until a new collective agreement is entered into. But the Collective Agreements Act does not regulate how a collective agreement is to be terminated ahead of term.

## Conclusion

On the basis of the issues treated above, it can be said that although at first sight private autonomy and freedom of contract seem to be restricted in labour relations, the parties to an employment contract are nevertheless entitled to shape the legal relationship between themselves. Bases set forth in labour laws are required to restrict the freedom of contract of the parties. The freedom of contract in labour relations is guaranteed under § 29 of the Constitution. In the context of this provision too, the restriction of this freedom requires the existence of a corresponding legal basis. Under the freedom to conclude contracts principle, the employer has no obligations, under the Estonian labour law, to conclude an employment contract with a concrete employee. The shaping of the contents of the labour relationship is the aspect which is of special significance in the context of the freedom to conclude an employment contract. The Employment Contracts Act enumerates six mandatory points which must be included in every employment contract. The parties cannot ignore those provisions of law. Hence, the employment contract determines

the character of the work to be performed, related working time, place and remuneration to the employee.

Freedom of contract and labour relations are closely intertwined. In labour relations, freedom of contract implies the freedom to conclude, formulate and terminate employment contracts. While regarding individual employment contracts we can find all the three freedoms in Estonia's legal system, the freedom to terminate a collective agreement is not regulated under Estonian law.

It is not possible to speak about absolute freedom of contract in the context of employment contracts. It is the result of developments throughout history that the parties to a labour relationship are not equal. As a rule, the employer has more economic advantages in conclusion of an employment contract. To balance the status of the parties to an employment contract, the government has imposed a number of restrictions to exclude employers' malpractice in exploiting labour

It is necessary to apply freedom of contract to labour relations. At the same time, the realisation of this freedom is to a certain extent restricted by law - both for employees and employers. Those restrictions are not, however, of such a nature as to completely exclude the principle of freedom of contract in labour relations.

## Notes:

1. A.-T. Kliimann. *Õiguskord*. (Legal Order.) Tartu: Akadeemilise Kooperatiivi Kirjastus, 1939.
2. J. Baumann. *Einführung in die Rechtswissenschaft — Rechtssystem und Rechtstechnik*. Ein Studienbuch. 8. Auflage. Munich: C.H. Beck'sche Verlagsbuchhandlung, 1989.
3. B. Boemke. *Privatautonomie im Arbeitsverhältnis*. Neue Zeitschrift für Arbeitsrecht, Heft 12, 1993.
4. H. Brox. *Allgemeines Schuldrecht*. 24. Auflage. Munich: C.H. Beck'sche Verlagsbuchhandlung, 1997.
5. H. Brox, B. Rütters. *Arbeitsrecht*. 13. Auflage. Stuttgart, Berlin, Cologne: Verlag W. Kohlhammer, 1997.
6. W. Dütz. *Arbeitsrecht*. 3. Auflage. Munich: C.H. Beck'sche Verlagsbuchhandlung, 1997.
7. H. Köhler. *Tsiviilseadustik. Üldosa. Õpik*. 23. täielikult ümbertöötatud trükk. (Civil Code. General Part. Textbook. 23rd fully revised edition.) Tallinn, 1998.
8. I.-M. Orgo, H. Siigur. *Tööõigus: õpik Tartu Ülikooli õigusteaduskonna üliõpilastele*. (Labour Law: Textbook for Students of Law of the University of Tartu.) Tallinn, 1995.
9. G. Schaub. *Arbeitsrechts- Handbuch*. 8. Auflage. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1996.
10. W. Zöllner, K. Loritz. *Arbeitsrecht*. 5. Auflage. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1998.
11. Q.v. similar approaches: J. Peltonen. *Approaches from the Finnish Legal System: Basic Terms, Court, Bar*. *Fontes Iuris*, 1994. p.6; T. Mayer-Maly. *Einführung in die Rechtswissenschaft*. Springer Verlag: Berlin, Heidelberg, 1993, p. 93-99.
12. Q.v. similar approaches e.g. in: E. Wolf. *Das Arbeitsverhältnis: personenrechtliches Gemeinschaftsverhältnis oder Schuldverhältnis?* N.G. Verlag:

Marburg, 1970; S. Jochheim. *Das Arbeitsverhältnis — ein Personengesellschaftsverhältnis?* Dortmund, 1996.

13. Q.v. e.g. *Bürgerliches Gesetzbuch*. (German Civil Code.) § 611 ff; Swiss Code of Obligations (Obligationenrecht) Art. 319 ff.
14. Q.v. *BGB* (German Civil Code) § 611a(2) and (3).
15. *Haldusõigusrikkumiste seadustik*. (Code of Administrative Offences.) — RT (Riigi Teataja = State Gazette) 396; I 1999, 41, 496.
16. *Palgaseadus*. (Wages Act.) — RT I 1994, 11, 154; 1995, 12, 120.
17. *Eesti Vabariigi töölepingu seadus*. (Republic of Estonia Employment Contracts Act.) — RT 1992, 15/16, 241 as amended.
18. *Turvateenistusseadus*. (Security Services Act.) — RT I 1993, 75, 1100.
19. *Tsiviilseadustiku üldosa seadus*. (General Part of the Civil Code Act.) - RT I 1994, 53, 889 as amended.
20. *Ülikooliseadus*. (Universities Act.) — RT I 1995, 12, 119 as amended.

<sup>1</sup> Here a direct example is the regulation included in the Russian Labour Code.