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# Indispensability of the Law of Obligations in Employment Relationships:

## Problems in Application of the Law of Obligations to Employment Relationships in Estonia

Discussions about whether the legal regulation of employment relationships should take place within the framework of civil law or outside it have been occurring from the moment of first enforcing different laws to regulate employment relationships.<sup>\*1</sup> The discussion continues to be topical in the 21<sup>st</sup> century, since the problems have remained the same. There are still countries in Europe where the main rules concerning employment contracts have been derived from civil codes. Although experts on labour law try to claim that labour law has a distinct status and has nothing in common with general contract law, they admit that general private law is also relevant to the legal regulation of employment contracts.<sup>\*2</sup>

Even though one of the first underlying investigations into the nature and peculiarities of the employment contract within the framework of the law of obligations was published in 1902<sup>\*3</sup>, the problem of the relationship between labour law and the law of obligations is still acute in both the old and new member states of the European Union. Examples can be cited of how the main rules of employment contracts have been provided in civil codes in the old European Union member states.<sup>\*4</sup> The new EU member states, however, have abandoned the principle that the general rules governing employment relationships and employment contracts should be dealt with by regulations in the law of obligations. The majority of the new European Union member states have adopted separate labour codes striving to provide exhaustive regulation of employment relationships, while providing for a conscious withdrawal clause according to which the general principles of the law of obligations are applicable in situations in which labour codes do not provide for a separate regulation.<sup>\*5</sup> Here we must point out that Estonia is the only one of the new European Union member states

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<sup>1</sup> For a summary, see G. Annuss. *Der Arbeitsvertrag als Grundlage des Arbeitsverhältnisses*. – *Zeitschrift für Arbeitsrecht* 2004/1, pp. 283–310.

<sup>2</sup> See *ibid.*, pp. 302 et seqq.

<sup>3</sup> P. Lotmar. *Arbeitsvertrag*. I Bd. Leipzig 1902; II Bd. Leipzig 1908.

<sup>4</sup> Germany, Switzerland, Austria, yet an analogous example may be brought forth from the new member states of the European Union (e.g., the Republic of Latvia).

<sup>5</sup> See, e.g., the Polish Labour Code, Art. 300. *Labour Code. Act of 26 June 1974*. – *Journal of Laws* 2004.

that has so far been unable to take a clear position as to whether and to what extent the provisions of the law of obligations should be used in employment relationships and how the legal regulation of employment relationships should be organised.

This article aims at analysing the impact of the regulation of the law of obligations on the legal regulation of employment relationships. The main hypothesis in this article is the thesis that several of the principles applied in labour law to date have to be reassessed in the application of the provisions of the general part of the law of obligations. This, however, will not undermine the position of an employee in employment relationships.

## 1. The employment contract as one of many contracts under the Law of Obligations

### 1.1. Different points of departure in characterising employment relationships

The thesis that an employment contract is one of many contracts under the law of obligations is by nature self-evident, yet, as a rule, experts on labour law are often unwilling to agree with this idea, as they tend to fear that this may lead to the extinction of labour law and thus to the disappearance of an important matter of law. Nevertheless, it is a fact that almost the majority of the European Union member states recognise at least that the employment contract is one of many civil law contracts usually requiring a distinct status or separate and distinct regulation at least in certain respects.<sup>6</sup> Above all, emphasis is placed on the social function of employment contracts and the status of an employee as a weaker party to the employment relationship who should benefit from differentiated treatment and greater social protection as would balance the legal status of the parties to the employment contract. Yet people in the Estonian legal context are unwilling to accept that the application of the provisions that stem from the law of obligations by their nature may be much more beneficial for both the employee and the employer than could be ensured through separate regulation of employment contracts.

Here we must clearly stress that no matter how hard people try to get around the regulation, dogmatics, and principles of the law of obligations, employment contracts will always be related to the general principles of the law of obligations. Nevertheless, such a situation does not always mean that the disputable questions of whether and to what extent such regulation should take place would disappear.

One must realise that discussions about labour law to a great extent emphasise that it is characteristic of labour law that the employee is a weaker party to an employment relationship, which in turn causes a situation in which application of the law of obligations provisions to an employment relationship does not produce a significant effect, but it is necessary to enforce several new rules supplanting the possibility of applying the law of obligations provisions as much as possible. It is necessary to apply to a greater extent a separate labour law regulation precluding the enforcement of law of obligations provisions. Yet we have to underscore that it may not always be wise to enforce separate regulation in labour law, as the regulation enforced under the law of obligations is in large part sufficient.

Various theories have been used to describe and characterise individual employment relationships over different periods of time. Thus, an individual employment relationship has been variously considered to be an individual–legal partnership relationship<sup>7</sup>, characterised as a special relationship of loyalty and care<sup>8</sup>, and characterised as a contractual relationship that differs from any other relationship under the law of obligations.<sup>9</sup>

The principle prevailing in the law of obligations — the principle of freedom of contract of the parties — has been significantly restricted in its application to employment relationships. It is true that the limitation is mainly applied in individual labour law, but the principle has also established itself in collective labour law.

<sup>6</sup> See, e.g., the positions of German jurist G. Annus (Note 1), pp. 302–309, R. Schwarze. *Arbeitnehmerbegriff und Vertragstheorie*. – *Zeitschrift für Arbeitsrecht* 2005/1, p. 81 et seqq.

<sup>7</sup> For a summary, see G. Annus (Note 1), pp. 299–302.

<sup>8</sup> For a summary, see R. Schwarze (Note 6), pp. 92–93 et seqq.

<sup>9</sup> See G. Annus (Note 1), pp. 302–310. Here it must be noted that such an approach was also characteristic of the former Soviet Union. Although the Labour Code of the Estonian SSR specified that an employment relationship was created under an employment contract, it did not recognise that the employment contract was merely one of many contracts in civil law. See *Eesti NSV töökoodeks. Kommenteeritud väljaanne* (Labour Code of the Estonian SSR, commented edition). Tallinn: Eesti Raamat 1978, p. 31 (in Estonian).

Collective labour law proceeds from the parity of the expedients of the parties, and thus the principles of equality and balance are fully acceptable here.<sup>\*10</sup>

Nevertheless, in individual employment relationships people have contributed significantly to the limitation of freedom of contract as applied to employment relationships also on the level of the European Union. Experts on labour law increasingly emphasise that the further development of labour law is largely determined by what provisions the European Union decides to enforce.<sup>\*11</sup> However, since the legal acts of the European Union are generated in co-operation among various member states, the member states consequently assume responsibility for the extent to which restrictions are imposed on employment relationships and to what extent the member states' freedom of choice is limited in deciding how to legally shape employment relationships. The European Union with its various labour law directives has significantly restricted freedom of contract in different areas of employment relationships recently. Here we must stress that it has not always been the case that the transposition of relevant directives into national legislation has been as liberal as the directives would allow.<sup>\*12</sup> Although the European Union with its directives has considerably restricted the principle of freedom of contract and is likely to continue to do so in the near future, this does not by its nature change the fact that the employment contract is one of the contracts falling under the law of obligations, and application of the principles contained in the law of obligations to employment relationships is inevitable and inescapable, regardless of the resistance of a considerable number of labour law experts.

## 1.2. Status of the employment contract in Estonia's legal system

In the Estonian legal system, the employment contract has unambiguously established itself in the law of obligations system, although in many cases lawyers, theorists, or practitioners are unwilling to admit to the fact.<sup>\*13</sup> In Estonian labour law, different labour law institutes have been regulated in separate legal acts, and thus there is no comprehensive labour code as it is the case in the majority of the older European Union member states. The main legislative act governing the legal aspect of individual employment relationships is the Republic of Estonia Employment Contracts Act (ECA), adopted already in 1992.<sup>\*14</sup> Although this act has undergone several changes because of the need to harmonise Estonian legislation with various European Union directives, the changes occurring in Estonian private law as a whole have not been taken into account in the Employment Contracts Act.

However, in 2002, Estonia adopted a new Law of Obligations Act<sup>\*15</sup> that is modern in the European Union context, and, according to § 1 of that act, its provisions apply also to employment contracts. This general clause does not include a reservation that the principles provided in the Law of Obligations Act are applicable only insofar as they are compatible with the peculiarities of labour law. Thus, in the Estonian legal system, the employment contract is one of many contracts falling under the law of obligations, but a regulation concerning independent employment contracts applies in addition to rules established under the law of obligations. The Law of Obligations Act and Employment Contracts Act were adopted at different times, and that is why conflicts arise between the two sets of regulations.

To a certain extent, the Law of Obligations Act entails new principles that were not previously known in employment relationships, which in turn gives rise to the need to change, above all, the attitude toward certain aspects of the employment relationship. Thus, the concept of bilateral relationships upon the performance of a contract has undergone a change, and the problem of combining the principles of good faith and application of the provision more favourable to the employee is important, along with the application of standard contract terms in the employment relationship. With regard to the Estonian legal landscape, the issue of a contract price also occupies a central position, having a direct impact on issues associated with remuneration.

<sup>10</sup> While in employment relationships the primary concern is about the employee being the weaker party to the employment relationship and care must be taken to ensure protection of the employee against arbitrary actions on the part of the employer, such concerns have been abandoned in a collective employment relationship. Collective employment relationships do not proceed from the principle that employees are the weaker party to a collective employment relationship, and consequently additional securities should be established for them.

<sup>11</sup> See, e.g., A. Junker. *Grundkurs Arbeitsrecht*, 3. Aufl. Beck 2004, p. 16.

<sup>12</sup> G. Tavits. *Muudatused töölepinguliste suhete õiguslikus reguleerimises: kaitse otsinguil Euroopa Liidu abiga* (Changes in legal regulation of employment relationships: in search of protection with the help of the European Union). – *Juridica* 2004/8, pp. 550–559 (in Estonian).

<sup>13</sup> See, e.g., *Kavandatav töölepingu seadus on töötaja vaenulik* (Planned Employment Contract Act is disadvantageous for employees). Confederation of Estonian Trade Unions. Available at: <http://www.eakl.ee/> (20.5.2004) (in Estonian).

<sup>14</sup> *Eesti Vabariigi töölepingu seadus* (Republic of Estonia Employment Contracts Act). – RT 1992, 15/16, 241; I 2004, 86, 584 (in Estonian). An English translation is available at: <http://www.legaltext.ee/>.

<sup>15</sup> *Võlaõigusseadus* (Law of Obligations Act). – RT I 2001, 81, 487; 2004, 90, 616 (in Estonian).

## 2. Legal regulation of employment contracts and the law of obligations: individual issues in the Estonian legal order

### 2.1. Contract price and remuneration

The Law of Obligations Act (LOA) provides in § 28 that contracts entered into as part of economic or professional activities are presumed to have a price. As employment contracts are usually entered into within the framework of economic or professional activities, these contracts are among those that have a price. In addition, this principle has been set forth in ECA § 26, according to which the mandatory provisions of employment contracts include wage conditions. The same principle has been laid down in the Wages Act (WA)<sup>16</sup>, whose § 3 (2) specifies that wage conditions are subject to agreement between the employee and the employer. Yet neither the Wages Act nor the Employment Contracts Act covers the situation in which wage conditions are not agreed upon in the employment contract and there are no other documents on which basis the wage conditions could be specified. An important rule is established in WA § 2 (7), according to which payment of remuneration of an employee in at least an amount equal to the minimum wage rate established by the Government of the Republic must be ensured for full-time employment.<sup>17</sup>

To date, the courts in their practice have adopted a position that if there is no written evidence concerning the amount of the wage payable to the employee, payment to the employee of remuneration equivalent to at least the amount of the minimum wage established by the Government of the Republic must be ordered.<sup>18</sup> An employee may not always benefit from this requirement, as the amount of remuneration that used to be paid or is paid to the employee in the relevant area may be much higher than the minimum wage determined by the Government of the Republic.<sup>19</sup> For such a situation, LOA § 28 (2) introduces a new option, providing that if a contract does not provide for the method for determining the price, the price to be paid shall be the price generally applied at the time of the entry into the contract at the place of performance of the contract for the fulfilment of such contractual obligations or, if no such price can be determined, a price reasonable under the circumstances. Above all, this provision gives the employee better opportunities to rely in wage disputes on the amounts actually paid by the employer or agreed upon therewith. When wage differences in different regions of Estonia are borne in mind, it is clear that an approach in which wage disputes proceed from the minimum wage clause as their basis is no longer sufficient and the principle provided in LOA § 28 (2) should be applied instead. The application of this principle guarantees the employee that the remuneration that the employer is ordered to pay is greater than the minimum wage and corresponds better to the remuneration to which the employee would have been entitled. As a rule, the remuneration paid in the various regions of Estonia is more than the minimum wage figures established by the Government of the Republic. As is clear even from this discussion alone, the principles provided in the law of obligations are not detrimental to the employee but may prove more beneficial for the employee than the principles set forth in labour laws.

### 2.2. Standard contract terms and employment contracts

The Law of Obligations Act prescribes conditions concerning standard terms that should primarily ensure protection for consumers. However, the provisions of these standard terms can be applied also to employment contracts. The application of such provisions to employment contracts has raised questions in specialist literature of whether the employee is a consumer and whether the employee should be subject to consumer protection in the wider sense of the word.<sup>20</sup> Identification of the employee with the consumer is impossible primarily due to major differences in the protection specified for an employee and a consumer. Yet it cannot be denied that standard terms play an important role also with respect to employment contracts. Thus, it is possible to say that, in the Estonian legal order, agreements on the probationary period and

<sup>16</sup> *Palgaseadus* (Wages Act). – RT I 1994, 11, 154; 2005, 29, 213 (in Estonian). An English translation is available at: <http://www.legaltext.ee/>.

<sup>17</sup> According to § 4 (1) of the Working and Rest Time Act, the general national standard for the working time of employees is eight hours per day or 40 hours per week. See the Working and Rest Time Act (*töö- ja puhkeaja seadus*). – RT I 2001, 17, 70; 2005, 24, 185 (in Estonian).

<sup>18</sup> See I.-M. Orgo, M. Muda, G. Tavits, et al. *Tööõigus. Loengud* (Labour law. Lectures). 2003, p. 170 (in Estonian).

<sup>19</sup> In 2005, the minimum wages approved by the Government of the Republic amounted to 2690 krooni, while the statistical average for wages in Estonia was 8291 krooni in the second quarter of 2005.

<sup>20</sup> For a summary, see R. Schwarze (Note 6), p. 96.

holiday terms in employment contracts serve as standard terms.<sup>\*21</sup> Internal work procedure rules are also governed by standard terms. According to the definition of standard terms provided in LOA § 35, a contract term that is drafted in advance for use in standard contracts or that the parties have not negotiated individually for some other reason, and that the party supplying the term uses with relation to the other party who is therefore not able to influence the content of the term, is deemed to be a standard term. Standard terms may be embodied in a contract or form a separate part of a contract. The internal work procedure rules established by the employer conform to the above definition. According to ECA §§ 39 (1) and 40 (1), the internal work procedure rules are a document prepared by the employer by which the employer determines the internal organisation of work in the enterprise. The regulation of internal work procedure rules that is contained in the Employment Contracts Act does not impose on the employer the obligation to negotiate the internal work procedure rules with each and every employee. At the same time, the internal work procedure rules become an inseparable part of the employment contract, and an employee not adhering to the obligations of the internal work procedure rules can be punished on the bases, and according to the procedure, provided for in the labour laws.<sup>\*22</sup> By the internal work procedure rules, the employer determines the beginning and end of the working time, occupational and fire safety rules, and the handling of issues related to the time and place of payment of wages. Besides that, the employer may determine other work-related matters in the internal work procedure rules. As the internal work procedure rules are the most important document in addition to the employment contract, the employment contract taken together with the internal work procedure rules forms the indispensable legal foundation determining the most important conditions of work. The internal work procedure rules are a universal document that applies to all of the employees working in the enterprise. When the employer introduces the internal work procedure rules, the employees may make proposals concerning the rules. The employer is obliged to take account of the employees' proposals only when they stem from law. Any other proposals remain to be judged solely by the employer. In LOA § 42 (3) is material covering conditions that are considered unfair. The list is to a large extent also applicable to the internal work procedure rules. Thus, when preparing the internal work procedure rules, the employer must take into account the provisions on standard terms that are set forth in the Law of Obligations Act, to forestall later disputes about the unfairness of some provisions in the internal work procedure rules.<sup>\*23</sup>

### 2.3. Requirement to fulfil reciprocal obligations

The employment contract is by nature a mutual contract, in which both parties — the employer and the employee — have both rights and duties. In Estonia, employment relationships are characterised by a prevailing attitude that the employee is the weaker party to an employment relationship and consequently the employer has more obligations to fulfil. Regardless of this, the principle of the protection of the employee does not change the nature of the employment contract as a synallagmatic contract. Although Estonian labour law, too, recognises the employment contract as a bilateral contract, the principles of performance of mutual contracts have not won significant recognition in employment relationships so far.

According to LOA § 111 (1), if the parties have mutual obligations arising from a contract, a party may withhold performance until the other party has performed, offered to perform, secured, or confirmed the performance. Although that principle may be self-evident in contractual relationships, it has not yet been fully applied in Estonian employment relationships. We can cite as an example the following case. According to ECA § 74 (2), an employer is required to return an employee's employment record book to the employee and to pay the final settlement on the date of termination of the employment contract. If the employee was not at work on the day of termination of the employment contract, the employer is required to return the employment record book to the employee on the date the employee makes such a request and to pay the final settlement within five calendar days from the date following the making of the request. Thus, if the employer was not at work on the date of termination of the employment contract, he must make a request to receive the final settlement. Unless the employee has made such a request, the employer is under no obligation to pay the final settlement. If we place the above scheme within the framework of the regulation of the law of obligations, the employer may refuse to pay the final settlement as long as the other party (that is, the employee) has not fulfilled his obligation — to make a request for the payment.

<sup>21</sup> According to § 33 (1) of the Republic of Estonia Employment Contracts Act, the probationary period is a matter of agreement of the parties. According to the act, the duration of the probationary period is four months. The probationary period is frequently formulated in advance, and the matter is not subject to specific negotiations.

<sup>22</sup> See the Employees Disciplinary Punishments Act (töötajate distsiplinaarvastutuse seadus; RT I 1993, 26, 441; 2000, 102, 674; in Estonian) § 2 (1).

<sup>23</sup> For example, the employee's right to demand compensation for damage caused is precluded, or an unreasonably high contractual penalty is imposed, for the violation of the obligations arising from the employment contract.

The Estonian labour laws and court practice have given rise to the problem that if the employee had not been at work and he has not made an unambiguous request for payment of the final settlement, this still automatically entails the employer's obligation to pay the final settlement. The above problem also has another aspect, on account of it being commonplace in Estonia for an employee's remuneration to be transferred to his bank account. Thus, for situations in which the employee was not at work on the day when the employment contract was terminated, court practice has demonstrated the conclusion that the employee need not make a separate request for payment of the final settlement, as the employer knows where and to what account the employer should transfer the amounts to be collected by the employee.<sup>\*24</sup> We cannot agree to such a position, as, above all, we must take into account the formulation of the employment contract where the payment of remuneration is concerned. If only the number of the bank account to which the main remuneration has to be transferred has been agreed upon in the employment contract with the employee, we cannot conclude on that basis that all amounts to be received by the employee can be transferred to that account. According to the Estonian Wages Act, the employee's wages and final settlement are two different wage categories and subject to different legal regulation. Thus, in order that the employee receive his final settlement, he must make the relevant request to the employer and indicate also the number of the account to which the employer should transfer the final settlement. As long as the employee has not performed this duty, the employer is entitled to refuse to fulfil its own obligations regarding the remuneration and the employer has not delayed the fulfilment of its obligations. Although, to date, Estonian court practice has ignored the fact that the employee has his own obligations that must be addressed in order for him to benefit from the securities provided for by law, it is only a matter of time before, in addition to the provisions formulated in the Employment Contracts Act, the general clauses contained in the Law of Obligations Act for shaping of contractual relationships are taken into account for determining the obligations of the parties in employment relationships.

## 2.4. Application of the provision more favourable to the employee and the principle of good faith

Employment relationships in their entirety have been based on the principle of application of the provision more favourable to the employee. This principle has been stated directly in the labour laws of some states, while in other states it has not been laid out directly in law but enforced by courts' actions.<sup>\*25</sup> Estonian theoretical literature on employment relationships has referred to the feasibility of application of the provision more favourable to the employee<sup>\*26</sup>, yet specific reference has not been made to the normative basis of the principle.

It has been provided in ECA § 17 that in the event of a conflict between provisions, the provision more favourable to employees applies. According to the comments issued pertaining to this section of the act, the principle applies only in the event of a conflict between provisions of the same legal act or between different provisions of the same contract.<sup>\*27</sup> However, in the event of a contradiction between the wording of legal acts that belong to different levels of the system, the problem is solved proceeding from the hierarchy of legal acts at different levels. As a result, the idea of the provision more favourable to the employee has not been directly introduced into Estonian legal acts to date. However, we also have to examine the Collective Agreements Act.<sup>\*28</sup> It states that if a condition(s) provided in the Collective Agreements Act is or are worse than what has been provided in law, the provision more favourable to the employee must be applied.<sup>\*29</sup> This provision serves not as a specific clause concerning the provision more favourable to the employee but as a restriction according to which one may not agree in the employment contract or collective agreement upon terms that are worse for the employee than those specified by law. Consequently, no general clause concerning provisions more favourable to the employee can be found in Estonian labour laws.

Yet it is always difficult to apply the principle of the provision more favourable to the employee, as it is not always possible to unambiguously determine which is the provision more favourable to the employee in a particular case. Thus, it is difficult to decide on the issue of the more favourable provision in a situation in which the employer can choose between two options — either to continue to pay the wages on the previous

<sup>24</sup> See Jõgeva County Court judgement 2-40/05 (in Estonian).

<sup>25</sup> See, e.g., W. Dütz, *Arbeitsrecht*, 9. Aufl. Beck 2004, p. 263 et seqq.

<sup>26</sup> See Note 18, p. 34.

<sup>27</sup> See I.-M. Orgo, H. Siigur, G. Tavits, *Töölepingu seadus: kommenteeritud väljaanne* (Employment Contracts Act, commented edition), third edition. Juura 1997, p. 28 (in Estonian).

<sup>28</sup> *Kollektiivlepingu seadus* (Collective Agreements Act). – RT I 1993, 20, 353; 2002, 61, 375 (in Estonian). An English translation is available at: <http://www.legaltext.ee/>.

<sup>29</sup> § 4 (2) of the Collective Agreements Act.

terms and to declare insolvency in six months at the latest or to unilaterally impose a term according to which the remuneration of all the employees is decreased by 10% for one year to preserve the competitiveness of the company and jobs for the next five to 10 years. In Estonia, both the employees and trade unions would presumably take the same attitude to the changes made in such a situation — they would not agree to the wage cuts and would opt for the possibility in which the company goes bankrupt in the next six months. Besides, the applicable Estonian legislation does not give the employer an opportunity to temporarily and unilaterally introduce less favourable terms to the employment contract. The terms of the employment contract can be amended only by agreement of the parties, as a rule. The working conditions may be amended unilaterally only if the organisation of work and production is changed, but this presumes that employees are notified at least one month in advance. In a changed economic situation, we must seriously consider abandonment of the principle of application of the provision that is more favourable to the employee. The employee is no longer so vulnerable in the contemporary environment as he used to be, and consequently there is no need to protect the employee always and everywhere via a more favourable provision clause.<sup>30</sup> The labour legislation applicable in Estonia must also take into account to a significant extent the fact that the European economic framework presumes a more flexible labour market and that thus considerably more opportunities must be provided to the employer for shaping the working conditions in line with the changed economic circumstances. In changing this possibility, it is also important to proceed from the standpoint of the economic position of the state: which is more beneficial for the economy of the state — to preserve the jobs and provide more opportunities for the employer to change working conditions or to maintain a rigid framework of labour laws that do not allow for changing the working conditions, with the employer consequently compelled to terminate employment contracts instead of continuing them under changed conditions.

According to the Estonian Law of Obligations Act, the application of the provision more favourable for the employee is governed by the principle of good faith. Pursuant to LOA § 6, obligees and obligors shall act in good faith in their relations with one another. According to subsection 2 of the same section, nothing arising from law, a usage, or a transaction shall be applied to an obligation if it is contrary to the principle of good faith. The principle of good faith contained in the Estonian Law of Obligations Act subjects to control to a large extent all situations in employment relationships in which one should proceed from the principle of the provision more favourable to the employee in the event of any of various conflicts. Since the principle of good faith provided in the Estonian Law of Obligations Act allows not to apply the requirements arising from law, the correctness of all provisions of the Employment Contracts Act and their application to the changed economic situation could be controlled by the principle of good faith.<sup>31</sup> According to the principle of good faith, the provisions on the proprietary liability of employees that stem from the labour code adopted in the 1970s must be specified. According to the proprietary liability provisions of the labour code of the Estonian Soviet Socialist Republic, only the principles of two types of liability remain applicable to date — 1) the general principle of liability, pursuant to which the employee is always responsible to the extent of his average monthly wages if he has caused damage to the employer, and 2) full proprietary liability entered into under a separate written agreement. Although, on the basis of the labour code of the Estonian SSR, a separate list of employees and positions had been introduced for which it was possible to enter into an agreement on full proprietary liability, this is no longer applicable. The situation concerning proprietary liability has now developed to a stage in which an agreement on full proprietary liability is entered into with almost every employee. This is, *inter alia*, caused by the fact that the system of proprietary liability of employees that has been in use thus far in Estonia has become largely outdated and no longer corresponds to the employer's needs. However, in order to be certain that the damage caused can be compensated for by employees, agreements on proprietary liability are entered into with nearly all employees. When the current situation is analysed in light of the Law of Obligations Act, it cannot be considered one of success. Entry into an agreement on full proprietary liability with all employees is obviously not in conformity with the principle of good faith. Consequently, the agreements on proprietary liability with those employees are subject to the principle of good faith, and thus neither these agreements nor the relevant provisions of the labour code of the Estonian SSR should be applied.

<sup>30</sup> From the employee protection angle, the principle of the more favourable provision, according to which the working conditions may not be worse than the minimum working conditions agreed upon in the act, suffices. In the case of any other conflicts, the principle of application of the more favourable provision has become outdated.

<sup>31</sup> On the application of the principle of good faith to employment relationships, see also G. Tavits. Töölepingu seadus ja muutunud majandusolustik (The Employment Contracts Act and changed economic circumstances). – *Juridica* 2003/10, pp. 694–696 (in Estonian).

### 3. Conclusions

Although there is a trend on the European Union level towards developing a European civil code and with that also common foundations of contract law, one cannot thus far perceive such a trend in the employment relationships in the European Union. Nevertheless, several European legal experts have analysed different labour law development scenarios. Examination of these scenarios has led to the conclusion that a higher degree of flexibility is required in employment relationships and civil law principles should be applied more. Yet some analyses have also pointed out that the changes that are currently being introduced to labour law to strengthen the social protection of employees are not likely to succeed. Above all, in such a sensitive area as the cancellation of employment contracts, European economic experts have recommended taking into account also the economic position of the employer as an entrepreneur in the course of establishing rules to protect against cancellation.

A more extensive application of the provisions of the law of obligations gives the employee an opportunity to shape employment relations more flexibly. Such an opportunity for more flexible regulation of employment relationships is necessary in modern economic conditions, as an employer in a context of increased competition must respond rapidly to changes in circumstances.

When the law of obligations and labour law exist side by side, one must proceed from the principle that it is not necessary to reason why the principles of civil law are applicable to employment relationships but is necessary to apply reason concerning situations of their non-application.<sup>\*32</sup>

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<sup>32</sup> See G. Annuss (Note 1), p. 310.