

## **The retaliatory termination - an overview**

*An employee asks for a salary increase during the annual appraisal interview. The employer is irritated by this demand given the poor economic situation of the company. Therefore, the employer intends to terminate the employment relationship. A plan that could take revenge?*

**By Polia Rusca and Marcel Steinegger**

### **1. Freedom of termination and its limits**

The principle of freedom of termination is firmly anchored in Swiss employment law. Both the employee and the employer can terminate the employment relationship at *any time* and *without special cause*, subject to the applicable statutory or contractually agreed notice period. However, the principle of freedom of termination is not absolute; it is significantly limited by the *timely* and *material* protection against termination:

The *timely protection against termination* (Art. 336c Swiss Code of Obligations, "CO") stipulates that the employer is not allowed to terminate the employment relationship during certain periods (so-called *protecting periods*, e.g. during pregnancy and illness). Therefore, an ordinary termination given by the employer during protecting periods is null and void.

In contrast, the *material protection against termination* is directed against ordinary terminations which are given for *abusive reasons*. Abusive terminations do not lead to their nullity. They remain valid. However, if the terminated employee successfully claims abusive termination in court, he is entitled to compensation. The constellations considered abusive by the legislator are set out in a non-exhaustive list in Art. 336 CO. The *event of retaliatory termination* is explicitly stated.

### **2. The retaliatory termination**

The law stipulates that a retaliatory termination exists if one party terminates the employment relationship because the other party asserts *claims* arising from the *employment relationship in good faith* (Art. 336 para. 1 lit. d CO). The purpose of this provision is that a (judicial) examination of asserted claims should be possible during a non-terminated employment relationship without the contractual party asserting the claim having to reckon with corresponding sanctions, in particular with the issuing of an ordinary termination.

In practice, employees in particular claim that they have been terminated in retaliation. The existence of a retaliatory termination is affirmed if the terminated party - in the following it is assumed that this is the employee - proves that (i) he *asserted a claim* against his employer, whereby (ii) he could assume *in good faith* that he was *entitled to this claim* and that this request was (iii) *causal* for the *termination decision of the employer*. The term "*assertion*" is understood to mean any conduct on the part of the employee by which the employee *manifests his will to the employer* to enforce a claim to which he believes he is entitled, e.g., by approaching his superior. The term "*claim*" is to be understood in a *comprehensive sense*. It refers to all claims to which an employee is entitled as a result of the contractual cooperation with the employer. Apart from the refusal to take on an activity not contractually agreed upon and the assertion of overtime compensation, according to case law even requesting for a salary increase is covered by the term "claim". Terminations of "whistleblowers" who have pointed out irregularities in good faith within the company can also fall under the definition of retaliatory termination. The employee is acting in accordance with the *principle of good faith* if, *from his point of view*, he had *good reasons* to assert the claim to which he was supposedly entitled. It is not necessary that the asserted claim is legally justified. The employee's *good faith* is *presumed*. The so-called causal connection is given if there is a close *timely connection* between the assertion of a claim and the termination. If the employee asserts a claim to which he is supposedly entitled today and is terminated tomorrow, it is likely that the employer's decision to terminate is directly attributable to the employee's conduct.

### 3. Procedure and time limits

If an employee believes that there has been a retaliatory termination, he is required to follow the procedure provided by law.

First, the employee must *object* to the ordinary termination. This objection must be received in writing by the employer no later than the last day of the notice period. If this deadline is not met, the employee cannot claim compensation. In terms of *content*, it is sufficient if the objection states that the employee does *not agree* with the termination. However, if the employee only requests the written reasons for the termination, this does not constitute an objection. If no agreement can be reached between the parties as a result of the objection raised - which will regularly be the case in practice - and the employee wishes to continue to claim compensation, he is required to *file a lawsuit within 180 days of the termination of the employment relationship at the latest*. In order to meet the deadline, it is sufficient to initiate the conciliation procedure, whereby the date of the postmark of the conciliation request is decisive for assessing whether the time limit has been met. If this deadline is not met, any claim for compensation shall be forfeited.

The law stipulates that the terminated party is entitled to compensation in the case of a retaliatory termination. This compensation cannot exceed the amount of six months' salary of the employee. The court decides on the actual amount of compensation at its discretion, taking into account all the circumstances. In this context, various factors come into play, including the severity of the employer's fault, any contributory negligence on the part of the employee, as well as the duration of the employment relationship and the economic consequences of the termination for the employee.

### 4. Protection in case of gender discrimination

Art. 10 of the Gender Equality Act regulates a *special case of termination in retaliation* and even provides that the continuation of the employment relationship can be ordered by a court: Accordingly, a termination by the employer is *contestable* if it is made *without reasonable cause* in response to an *internal complaint about discrimination* or to the employee's *request for conciliation by a conciliation authority or a court*. The *protection against termination* exists for the duration of an *internal complaint procedure, conciliation or court proceedings* and *for six months beyond*.

This protection against termination only applies if an employee complains about *gender discrimination* within the company or in court proceedings and consequently is terminated by the employer. In this case, the employee can either challenge the ordinary termination, i.e. he can ask the court to *annul* it and continue the employment relationship, or he can accept the termination and claim *compensation* of up to six monthly salaries.

### 5. Conclusion

Employers are well advised to exercise caution should an employee assert contractual claims. In particular, they should not immediately terminate an employment relationship in this context, unless the employee is attempting to thwart an already looming termination on the part of the employer or to enforce obviously unjustified claims. Once the accusation is made that an employee was terminated out of retaliation, such a situation can quickly end in time-consuming and costly legal proceedings. Therefore, it is recommended that the employer in the above outlined example refrains from immediately terminating the employment relationship as a reaction to the demand for a salary increase, as this approach could otherwise prove costly.

## **Questions and answers on the topic of "retaliatory termination"**

Employers regularly find themselves in the area of conflict between freedom of termination and the protection of the employee to make claims. In the following, various practice-relevant questions on the topic of "retaliatory termination" will be discussed:

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**Question:** As an employer, what do I basically have to pay attention to when I intend to ordinarily terminate an employment relationship?

**Response:**

The principle of freedom of termination is sometimes significantly restricted by the material protection against termination. An abusive termination is valid but has financial consequences for the terminating party. With regard to an intended termination, the employer should therefore - if the circumstances allow - check whether this could qualify as an abusive termination. Based on this assessment, appropriate precautions can be taken. Such precautions may consist, for example, in refraining from issuing an ordinary notice of termination at all for the time being, or in offering the employee the conclusion of a termination agreement in which the parties comprehensively contractually regulate the amicable and consensual termination of the employment relationship on balance of all claims.

**Question:** The employee requests a written statement of the reasons for termination after notice has been given. What happens if I do not comply with this request?

**Response:**

The law stipulates that the terminated party is entitled to a written statement of the reason for termination. The purpose of the statement is to enable the terminated party to assess whether the ordinary termination could be abusive. However, the law has not defined any legal consequences in the event that the request to give reasons for the termination in writing is not complied with. Accordingly, the termination does not become invalid or abusive. Neither does a refusal to provide written reasons for termination result in a presumption in court proceedings that the termination is abusive. However, the fact that a written statement of reasons was refused may be taken into account in the assessment of the evidence by the court. In addition, a failure to give reasons for termination in court proceedings may have an impact on the consequences of costs and compensation to the detriment of the terminating party.

**Question:** How do I behave towards an employee who asserts claims that do not exist from the employer's point of view?

**Response:**

Seek the dialog and explain to the employee why, in your view, these claims do not exist and document yourself accordingly in the form of a meeting protocol. If the claims asserted by the employee do not lead to the fact that a continuation of the employment relationship is no longer possible for you, refrain from immediately terminating the employee as a reaction to the assertion of the claims. Such a termination could be qualified as a retaliatory termination.

**Question:** I would like to terminate an employee ordinarily because he regularly refuses to follow instructions. Do I expose myself to the risk that the intended termination will qualify as a retaliatory termination?

**Response:**

In such a situation, the employee may claim that it is his right to refuse to follow the instructions because they are instructions that are illegitimate. Therefore, the employee is asserting a claim to which he is contractually entitled from his point of view. In such constellations, it is also advisable to seek the dialog and to

protocol the respective meeting - so that you are well documented in the event of an escalation. Depending on the circumstances, it may even be necessary to issue a warning. If neither a discussion nor a warning changes the employee's attitude and your instructions are legally permissible, it can be assumed that a subsequent termination on your part would not be qualified as a retaliatory termination.

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