

THE LABOUR AND
EMPLOYMENT
DISPUTES REVIEW

SIXTH EDITION

Editor
Carson Burnham

THE LAWREVIEWS

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PREFACE

It is my honour and great pleasure to have been selected as editor of this year's *Labour and Employment Disputes Review*. Our distinguished contributors continue to show us a variety of perspectives as we consider how best to advise our clients seeking a global approach to employment concerns.

While the pandemic continues to influence all aspects of the employment relationship, we are seeing structural changes beyond any that could have been predicted in a pre-pandemic era. Employers are learning to accept the reality that employee expectations for flexible work arrangements have changed, and accommodating these expectations has become critical to maintaining employee engagement and retention. We also notice a shift in the power structure of the relationship, where employers no longer have a settled expectation regarding the willingness of employees to devote their full lives to work. With the advent of 'soft quitting' and employees' persistent intentions to work remotely from the location of their choosing, employers are having to thoroughly rethink their long-established methods of attracting and retaining top talent.

These shifts in the workplace are reflected in the increase in employment disputes noted throughout this Review, and particularly disputes in the arenas of bullying and moral harassment, whistle-blowing, and the right to disconnect from work that have been particularly noted throughout these chapters.

We also see trends resulting from employers' attempts to adjust to shifts in employee expectations. On the one hand, employment disputes arising from remote working relationships have increased, such as those concerning whether and to what extent an employer must pay for employees' expenses incurred to facilitate the employee's ability to work. On the other hand, we note a marked increase in employers' attempts to circumvent the strict requirements of the employment relationship altogether, such as by engaging independent contractors and leased workers or by using fixed-term contracts to limit exposure to employee-favourable legislation or collective bargaining agreement terms designed to protect employees' right to continued employment on favourable terms.

As trends in employment disputes continue to influence adjustments in legislation to accommodate new realities in the working relationship, we look forward with interest to continued developments in the years to come.

Carson Burnham

Ogletree, Deakins, Nash, Smoak & Stewart, PC

Boston

July 2023

SWITZERLAND

Thomas Kälin, Cosima Trabichet-Castan and Hannah Cipriano-Favre¹

I INTRODUCTION

Switzerland has a well-developed system of employment and labour law that aims to protect the rights of employees and ensure that employers abide by their legal obligations. For the private sector, the statutory framework for employment and labour law in Switzerland is governed by the Swiss Code of Obligations (CO), which sets out the basic legal principles for employment relationships, including the obligations of employers and employees, and the rights and duties of both parties. For employees in the public sector, employment relationships are governed by federal, cantonal and sometimes even communal rules. Special regimes can also apply to employees of diplomatic missions, under certain conditions.

One of the fundamental principles of Swiss employment law is the freedom of contract, which means that the parties to an employment contract have considerable flexibility to negotiate the terms of their agreement. The CO sets out the general principles of employment contracts, stating minimum standards such as termination conditions, paid holidays, statutory leave and protection against unfair dismissal, which apply if the parties have not stipulated specific conditions for their contractual relations. Some provisions can only be modified to the advantage of the weaker party, namely the employee.

There is no minimum wage at the federal level, but several cantons (Geneva, Ticino, Neuchâtel, Jura and Basel City) have recently introduced a minimum salary. Minimum wages can also result from collective bargaining agreements negotiated between employers' associations and trade unions for certain branches of the economy. These agreements often go beyond the minimum standards set by law and cover various aspects of work relations. If applicable, the minimum standards set by these agreements have the force of law and must be respected.

Further laws and regulations apply, such as the Federal Labour Act, which includes mandatory provisions for working hours and occupational safety and health, the Federal Act on the Leasing of Services and the Federal Act on Gender Equality.

The general tenor of Swiss employment and labour law is one of balance between the interests of employers and employees. The law not only provides a range of protections for employees, but it also recognises the importance of allowing employers to operate their businesses in a competitive environment. As a result, Swiss employment and labour law is generally viewed as fair and balanced.

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In terms of dispute resolution, Switzerland has a well-established system of labour courts, which are responsible for hearing and adjudicating disputes between employers and employees. These courts are usually organised as parity jurisdictions, with both employer and employee representatives. Employers and employees are encouraged to resolve conflicts amicably, and the law provides for several mechanisms to facilitate this. In case of a dispute, parties may also resort to mediation or, in some cases, to specialised arbitration bodies, which can provide an efficient and relatively speedy resolution.

II PROCEDURE

As in any civil dispute in Switzerland, with a few exceptions, in the event of a dispute between an employee and an employer subject to private law, the claimant must first refer to the conciliation authority. According to the Swiss Code of Civil Procedure (CPC), the cantons are responsible for the organisation of the courts and the conciliation authorities, which explains why the organisation of the latter varies greatly from one canton to another.

In the case of private labour disputes, the CPC provides for two alternative fora, namely the court of the defendant's domicile or registered office, or the court of the place where the employee works. Notably, according to the case law of the Swiss Federal Court, most labour law disputes cannot be submitted to arbitration. Therefore, even if an arbitration agreement is concluded, the ordinary courts in general cannot decline jurisdiction if a dispute is referred to them.

The conciliation authority, which is sometimes a joint body, hears the parties and tries to promote an amicable settlement. If no solution to the dispute is found on this occasion – bearing in mind that the conciliation authority may also reconvene the case to give the parties time to negotiate further – an authorisation to proceed is issued to the claimant, allowing them to proceed before the court with jurisdiction on the merits within three months.

Litigation with a value in dispute of up to 30,000 Swiss francs is subject to a simplified procedure, the aim of which is to achieve a rapid investigation and decision of the case. In this case, the formal requirements for the application to the court are reduced. In particular, it does not have to contain any legal motivation, which facilitates access to the court for natural persons who are not assisted by a lawyer. The simplified procedure also applies regardless of the amount in dispute to claims based on the Federal Act on Gender Equality. In the other cases, the ordinary procedure applies.

The defendant has the possibility to raise counterclaims against the plaintiff in the proceedings, provided that they are subject to the same procedure.

The Swiss courts charge court fees for these proceedings. However, the CPC provides for a fee exemption for employment disputes with a value in dispute of up to 30,000 Swiss francs or based on the Federal Act on Gender Equality. If these exceptions are not met, costs are generally charged in proportion to the value in dispute, according to a tariff fixed at the cantonal level. Costs may also be awarded to the successful party to compensate for its legal fees, although this will often not cover the full amount of those fees. Many cantons provide for more extensive fee exemptions, which can potentially determine the choice of forum for the action.

The language of the proceedings is determined by the canton, namely German, French, Italian or Romansch. This means that if evidence documents are written in English, they will generally have to be translated to be used in the proceedings, unless the court accepts them just in English.

In practice, we note that despite the application of the simplified procedure, proceedings in front of the labour courts often last at least one year from the filing of the request for conciliation, and often much longer until a decision is rendered by the first instance authority. This is mainly due to the fact that labour law disputes often involve the hearing of numerous witnesses (e.g., superiors and colleagues), which slows down the investigation of the case. Indeed, given the large number of proceedings in the court's docket, it is often difficult to quickly reconvene a hearing when the witnesses are excused.

Notably, specific provisions apply if the dispute concerns claims based on the Unfair Competition Act. Similarly, disputes between a public official and a state authority (whose legal relationship is governed by public law) are subject to separate procedural rules. Collective bargaining agreements may also contain special provisions for dispute resolution, for example containing negotiation and mediation clauses or referring disputes to bodies other than the ordinary courts.

Decisions rendered by the first instance courts can be challenged at second instance before an appellate court located in the same canton that is empowered to review both the fact and the law. Decisions of the appellate court may be appealed to the Federal Supreme Court under certain conditions. The latter, however, has a power of cognition limited to the law or to the arbitrary finding of facts in the case.

III TYPES OF EMPLOYMENT DISPUTES

In Switzerland, there is a distinction between the types of employment disputes that arise according to the type of claimant. Claims brought forward by employees usually revolve around the following:

- a* termination: claims regarding unfair dismissal or the violation of a consensual termination agreement, disputes regarding the issuing of documents by the employer at the end of the employment relationship (such as reference letters), among other issues;
- b* bonus and compensation (including payment of vacation and overtime); and
- c* personality protection (discrimination, mobbing and other types of harassment in the workplace) and data protection.

Conversely, claims brought forward by employers mainly concern the breach of contractual duties by the employee (e.g., duty of loyalty and duty of care) or the breach of a non-competition or confidentiality clause.

The CO contains a chapter on protection against termination, which sets out a list of circumstances under which a termination is deemed to be abusive. The list is not exhaustive, however, and these provisions have thus given rise to an abundance of case law. Except for cases of gender discrimination, in the private sector, the law does not provide for a right to reinstatement, which means that even if the dismissal is found to be wrongful, the claimant will only be entitled to monetary compensation. According to the law, such compensation is capped to a maximum of six months' salary. There is also a large body of case law relating to the determination of the amount of these compensation payments.

In cases of dispute, the courts will examine whether the contractual stipulations between the parties or, in the absence of specific agreements, whether the legal provisions providing for the minimum framework have been complied with. As the burden of proof rests with the claimant, it is in the claimant's interest to provide as much evidence as possible in written form. However, if the employer is the defendant, depending on the subject matter of dispute,

it has a duty to collaborate and to provide information that the employee would otherwise not have in their possession (e.g., record of hours worked and annual turnover allowing the calculation of a possible bonus).

As a general rule, all claims that arise from the employment relationship fall due when such relationship ends. Note also that Swiss substantive law provides for certain time limits for claimants to proceed, failing which their claims will lapse. A claim for compensation for abusive termination must be initiated within 180 days after the end of the employment relationship; other claims become time-barred after five or 10 years, depending on the nature of the claim. The CO further provides that the employee may not waive the protection afforded by mandatory provisions of the law or that has arisen from a collective labour agreement during the term of the employment relationship and during the month following the end of the contract.

Unsurprisingly, in practice most disputes materialise at the time of termination of the contract, which is why there is an extensive amount of case law on this subject. In some cases, only a part of the claim remains in dispute at the stage of the proceedings before the courts. The nature of the contractual relationship should always be analysed first, as the legal protections apply only to parties to an employment contract and not if their relationship falls under another type of contract.

IV YEAR IN REVIEW

i General principles and procedural aspects

Partial Claims

Federal Court Decision of 23 June 2022 (4A_307/2021)

An employee was employed both as a dentist and as a centre manager by a dental clinic under two different employment agreements. Both employment agreements were terminated by the employer. The employee filed four partial actions (initially two in parallel due to alleged abusive termination and later two regarding salary and further claims) in separate proceedings. The amounts that the employee claimed were 29,999 Swiss francs in three claims and 8,587 Swiss francs in one claim.

The cantonal court decided to deal with the four claims in one proceeding, rather than in four separate proceedings. As a result, the claimant could no longer benefit from the simplified and cost-free proceedings, which are applicable for claims up to an amount in dispute of 30,000 Swiss francs. The employee appealed against the decision and requested the proceedings to be free of charge.

The Federal Court held that the limit to filing partial actions to benefit from the simplified proceeding rules and the respective advantages (such as exemption from court costs) is the prohibition of abuse of rights and the requirement of good faith.

The Federal Court ruled that the employee did not simply limit her claim to comply with the upper limit of 30,000 Swiss francs but filed four separate actions with the purpose of circumventing these limits and benefiting from simplified, free-of-charge proceedings for claims exceeding 100,000 Swiss francs in total. As a result, these filings undermine the purpose of the limitation of the amount in dispute, which is to enable parties to obtain a judicial assessment with reasonable efforts and within a small period, where comparatively small amounts are in dispute, particularly in matters of social private law.

The claimant's procedural behaviour was considered abusive, and thus her appeal was rejected.

Jurisdiction

Federal Court Decision of 22 March 2022 (4A_548/2021)

A company with its registered seat in Berne hired a Swiss employee domiciled in Geneva as an international market manager. The employment agreement stated that the place of work was Berne, but that the employee may be called upon to carry out his activities elsewhere in Switzerland and abroad. However, the parties entered into a work from home agreement, according to which the employee was allowed to work from his home in Geneva, while his office at the company's headquarters in Berne remained available. It was specified that the place of work remained determined by the individual employment agreement.

The dispute centred on whether the employee's usual place of work was in Berne or in Geneva, and consequently, which city's courts had jurisdiction for disputes.

The Federal Court held that both quantitative and qualitative aspects must be considered. If the employee is simultaneously employed in several locations, the one that is clearly central to the activity carried out shall prevail. Where an employee is assigned to work in several territories with no geographical connection, such a connection can be made to the place where the employee plans and organises his or her travel and performs administrative tasks. This may be the employee's personal residence.

In this case, the Federal Court ruled that the effective place of work was Geneva, despite the contractual agreements to the contrary.

ii Qualification of contract and collaboration

Employment versus self-employed or staff leasing

Federal Court Decisions of 30 May 2022 (2C_34/2021 and 2C_575/2020)

In October 2019, the cantonal authority in Geneva found that Uber had entered into employment agreements with its drivers and qualified as a transport company operator, triggering certain obligations towards its drivers in terms of working conditions and social protection.

Upon appeal by Uber, the Federal Court noted numerous elements indicating a subordination relationship between the drivers and Uber, including:

- a* the drivers provide a long-term work service remunerated by Uber;
- b* the price of cab rides (pricing conditions and invoicing to customers) is fixed unilaterally by Uber;
- c* Uber issues instructions on the performance of its service (e.g., on the handling of the vehicle, the route to take and the behaviour to be followed by the drivers); as the instructions are specific, they indicate a subordination relationship;
- d* Uber monitors drivers' activity through geolocation, and a rating system allows the company to deactivate the driver's account if he or she repeatedly refuses rides or if he or she is the subject of a complaint; the account can further be deactivated at Uber's sole discretion, without drivers being able to find out who entered a rating or filed a complaint; and
- e* although drivers can freely disconnect from the Uber app, they are encouraged by text messages to connect to the app and can be sanctioned following the cancellation of trips; the business model for drivers is similar to on-call work.

According to the Federal Court, an employment relationship is not precluded by the fact that drivers are not personally selected by the company, do not have a work schedule or location, or are free to pursue a side business. The existence of an employment relationship between Uber and the drivers was therefore confirmed by the Federal Court.

In another case regarding the meal delivery service 'Uber Eats', the Federal Court concluded that the Uber Eats drivers on the one hand are considered employees, rather than self-employed. On the other hand, the Federal Court denied a staff leasing constellation, as there is no transfer of the right to give instructions from the employing Uber entity to the third party involved, namely the restaurant operator. Therefore, the specific staff leasing rules are not applicable.

iii Termination

Immediate termination and loss of work permit

Federal Court Decision of 8 February 2022 (4A_447/2021)

An association based in Switzerland hired an Italian employee who had her domicile in Lugano, Switzerland. The employment agreement was concluded for an undetermined duration.

The employee moved from Switzerland to Italy and communicated this relocation to her director, inviting him to support a request for her obtaining a cross-border work permit. Instead of providing support, the director terminated her contract with immediate effect, arguing that the employee was no longer authorised to work in Switzerland.

The Federal Court held that an employment agreement is valid, in principle, even if the employee is not authorised to work in Switzerland. An exception to this principle exists, however, if the agreement makes the authorisation a condition precedent of the employment.

The Federal Court further held that in the absence of a valid work permit during the employment relationship, such as if an authorisation is not extended, each party may terminate the employment agreement for just cause if the conditions set forth in the law are met. In this case, the Federal Court concluded that the employer did not have justified reasons to refuse the administrative support for obtaining the frontier work permit. The employee did not set reasons that rendered the continuation of the employment relationship in good faith unconscionable for the employer.

The termination with immediate effect was considered unjustified.

Immediate termination and termination based on suspicion

Federal Court Decision of 5 April 2022 (4A_365/2020)

In June 2008, a bank hired an employee as an investment manager and then promoted him to the rank of director. In 2013, they agreed to a minimum duration of the employment relationship during which neither party would be able to terminate, save for good cause, and the granting of a bonus under the firm condition that the employee remained employed by the bank for the entire minimum duration until 30 June 2016.

On 5 November 2015, the bank was informed that the employee had approached five members of his team and tried to convince them to terminate their employment relationship to join a competitor. The bank terminated the employment agreement without notice for valid reasons on 6 November 2015.

The employee raised several claims based on an unjustified immediate termination. The cantonal court ruled that the termination was wrongful as the bank did not take the time to verify the veracity of the denunciation.

According to case law, termination without notice must be applied restrictively and only particularly serious misconduct can justify such a measure. On the basis of suspicion, a termination is justified if the employer later succeeds in proving the suspicion to be true and the relationship of trust to be irreversibly broken.

The Federal Court held that the bank should have heard the employee. However, it also concluded that the cantonal court was not entitled to limit itself to a finding that the requirements for a dismissal without notice on mere suspicion were not fulfilled, but also had to examine the facts. The Federal Court therefore accepted the appeal and sent the matter back to the cantonal court.

Abusive termination: employee close to retirement age

Federal Court Decision of 1 February 2022 (4A_390/2021)

In 1993, a Swiss employee first started working as a caterer and then as a cashier and kiosk assistant. As of 1996, in the same company, she became secretary and executive assistant. The employee signed a new employment agreement, confirming her employment as a full-time executive assistant for an indefinite period. Two interim work certificates showed that the employer was fully satisfied with the employee's work.

When a new director was appointed, he required strict working hours, deviating from the employee's regular schedule, and no longer invited her to coordination meetings with the board members. The employee's health deteriorated. After being unable to work for one year, the employer asked the employee by registered mail to send back the keys and all other access to the workplace, clarifying that this was not a termination. One month later, the employer terminated the employee's employment agreement due to organisational reasons with effect from 31 March 2016. In January 2017, the employee reached retirement age.

Under Swiss Law, an employment agreement concluded for an indefinite period may be terminated by either party. However, the fundamental right of each contracting party to unilaterally terminate the contract is limited by the provisions on unfair dismissal.

The Federal Court had previously ruled that the termination of a 63-year-old employee a few months before retirement age, after 44 years of service, was abusive. However, the Federal Court already had the opportunity to point out that this previous case was exceptional, even extreme, and that all the circumstances of a particular case must be considered and not solely the age of the employee when deciding whether or not a termination is abusive. Furthermore, after the period of protection against untimely termination due to being unable to work, it is permissible for the employer to dismiss an employee due to an illness that impairs his or her performance.

In the case at hand, the Federal Court ruled that the termination was not abusive.

Abusive termination: termination against good faith

Federal Court Decision of 5 August 2022 (4A_157/2022)

An employee working part-time was given permission to take on a secondary employment with another company for a limited period of four and a half months. Two years later, the employee was informed that an internal investigation would be opened into her secondary employment, following which she terminated the secondary employment. Subsequently, the employee's workload was increased to full time by mutual agreement. Two months later, the employer terminated the employment agreement with the employee.

The dispute centred on whether it was wrongful to dismiss the employee after unfaithfully pretending to continue the employment relationship.

The Federal Court held that, in principle, the substantive protection against wrongful dismissal is linked to the motive for the dismissal. However, abusiveness can also result from the way the terminating party exercises its right. Even if a party terminates the agreement for lawful reasons, it must observe the requirement to exercise its right respectfully; in particular, it may not contradict the principle of good faith (e.g., a serious violation of personality rights in the context of a dismissal can render the termination abusive). In contrast, merely indecent conduct on the part of the employer that is unworthy of orderly business dealings is not sufficient to make the dismissal appear abusive.

In the present case, the Federal Court denied any wrongful nature of the dismissal. The judges concluded that the employer did not unfaithfully pretend to continue the collaboration by agreeing on an increased workload. Rather, it must have been clear to the employee that the internal investigation was still ongoing, and a consequential termination was still possible.

iv Termination agreement

Reciprocal concessions and time to consider

Federal Court Decision of 21 September 2022 (8C_176/2022)

In this case, which concerned an employment relationship governed by public law rules, an agreement was signed between the employee and his superiors regarding the termination of the relationship by mutual consent. The agreement provided, among other issues, for the release of the employee from his obligation to perform his work while continuing to receive his salary. The employee requested the invalidation of the agreement on the grounds that he signed it under duress, as he was given only two days of consideration. Following an internal investigation, the employer found that no coercion had been exercised. The employee insisted that the agreement was invalid and asked to be reinstated. The employer issued a formal decision confirming that the agreement was valid.

The employee appealed the case to the Federal Administrative Court, to request his reinstatement and the invalidation of the termination agreement, or two years' salary as compensation. The Federal Administrative Court rejected the appeal.

On appeal, the Federal Court held that an agreement by which the public employer and the employee terminate the employment relationship by mutual consent is a contract under administrative law, which must be interpreted according to the same rules as a private law contract. When a common will of the parties to terminate the employment relationship is established, case law additionally requires the agreement to be a genuine transaction, including reciprocal concessions of comparable importance by each party.

In this case, the employee had negotiated the payment of an additional monthly salary. It was thus held that the fact that he had entered negotiations and had received a counterproposal, which he accepted, demonstrated his willingness to terminate the employment relationship on the terms set out in the agreement. Furthermore, both parties had made concessions; there was no indication that the agreement was beneficial for the employer only. Hence, the employee's appeal was rejected by the Federal Court.

v Mass dismissal***Existence of independent establishment****Federal Court Decision of 18 July 2022 (4A_531/2021)*

After having received the termination of her employment agreement, an employee raised a claim for compensation due to abusive termination. She argued that the employer did not comply with the procedure relating to a mass dismissal. The question was whether the post office where she worked qualified as an independent establishment within the meaning of the specific rules on mass dismissal set out in the CO. If it did, then the relevant threshold for conducting the mass dismissal procedure was not met. In the employee's view, there was no independence, but the establishment was to be defined on a national level, leading to the applicability of the mass dismissal rules.

Both cantonal courts rejected the claim, agreeing with the employer that each post office constitutes an independent establishment. Despite not being completely autonomous, the post office had several employees, its own organisational structure and competencies, and was able to independently manage the majority of its operations, such as the day-to-day management of its employees, orders of supplies, office accounting and security, in order to perform its duties. Whether or not the employing company has further establishments geographically close to each other is not decisive for the assessment of the concept of an establishment within the meaning of the mass dismissal rules. Hence, the terminations in each post office must be counted separately.

On these grounds, it was held that the employer was not obliged to follow the mass dismissal procedure, with the result that the termination was not abusive.

V OUTLOOK AND CONCLUSIONS

There are currently no significant legislative projects pending that will have an impact on the procedural rules applicable to employment and labour law disputes.

We expect litigation to continue to focus on issues such as termination of employment, whether for alleged unfairness or unjustified dismissal without notice, over the next 12 months. We see a tendency that in the context of termination of employment relationships, the parties make use of mutual termination agreements. This trend is likely to lead to an increase in disputes regarding the execution of these agreements. In this context, whether the agreement was concluded in the interest of both parties and whether mutual concessions were made are likely to be key.

There is no doubt that courts will further have to deal with disputes related to reference letters, which are still very important for employees when applying for a new position. However, such disputes are often resolved in first instance court proceedings, if not earlier at the conciliation stage.

Furthermore, atypical employment relationships are likely to be regularly judged by the courts in the coming months. Work flexibility, sometimes irrespective of borders, gig or cloud work, tasks assigned indirectly or via a third party (employer of record), among other things, can lead to questions such as which parties have entered the employment relationship or whether a cooperation is to be qualified as an employment relationship at all. Furthermore, in such constellations, the question often arises as to which legal norms are applicable and which courts have jurisdiction to judge these disputes.

Swiss law, for example, has protective provisions on the hiring out of personnel, according to which staff leasing from abroad to Switzerland is prohibited. Modern forms of work that do not require physical presence at the employer's location put these norms to the test. Open questions will thus ultimately have to be answered by the courts.

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Thomas Kälin heads the firm's employment law and social security group in Zurich. As a certified specialist SBA employment law and qualified expert in social security law, he is best suited to advise clients on a full range of human resource-related matters, including representation in front of courts and authorities. Thomas has extensive experience in cross-border employment relationships, terminations of employment (including mass redundancies), employment litigation and employment aspects of restructurings. He lectures on employment law and regularly holds seminars, presentations and workshops. His clients praise him for having 'a very professional and service-oriented approach' and for being 'efficient, pragmatic and authentic'. Thomas is fluent in German and English and is conversational in French and Spanish.

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