IN-DEPTH

Labour And Employment Disputes

SWITZERLAND

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Labour and Employment Disputes

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In-Depth: Labour and Employment Disputes (formerly The Labour and Employment Disputes Review) provides an incisive examination of the most salient aspects of the regimes governing workplace disputes across myriad jurisdictions worldwide. With a focus on the most consequential recent developments in law and practice, it covers key topics such as procedural considerations, forums, common types of dispute and an outlook for the future.

Generated: June 24, 2024

Switzerland

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Summary

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 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 the work relationship. 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.

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 the event of a dispute, conciliation proceedings take place before the actual court proceedings with the aim of settling the dispute amicably.

Year in review

Recruitment interview, health conditions and duty to inform

Federal Supreme Court Decision of 21 August 2023 (8C_387/2022)[1]

An employee interviewed with the Swiss national railway company as part of her application for the position of customer assistant. In the process, she underwent a medical aptitude test, which required her to fill in a medical questionnaire and indicate whether she was suffering from any health problems. Judged fit for the job by the doctor, and without any indication of ailments, the employee was hired on a fixed-term basis for one year, after which her contract was renewed for an indefinite period.

Shortly after signing the indefinite-term contract, the employer realised that the employee had concealed a disorder affecting her physical condition and had therefore answered the medical questionnaire in a misleading manner. The employer then terminated the employment relationship on the grounds of misconduct on the part of the employee. After the Federal Administrative Court dismissed her appeal against the decision to terminate her employment, the employee appealed to the Federal Supreme Court, who overturned the decision.

The Supreme Court judges held that the (pre-contractual) duty to disclose requires a direct link between the information requested and the employee's ability to perform the contract and therefore the duty of loyalty cannot be interpreted as an obligation to inform the employer of the occurrence of any illness. A case-by-case approach is necessary to determine if the protection of the applicant's personality rights take precedence over the employer's interest. The judges also gave a reminder that questions relating to future pregnancy, HIV infection, political opinions or lifestyle choices should not, in principle, be admissible, unless these elements are relevant to the employment relationship (e.g., the HIV-positive status of nursing staff in direct contact with patients with open wounds, or in the case of businesses or companies whose intellectual and ideological objectives directly and predominantly serve political, denominational, scientific and similar purposes).

In addition, the Federal Supreme Court noted that health-related data are among the sensitive personal data protected by the Federal Act on Data Protection (DPA). In the case of a medical examination required as part of the hiring process, the protection of the applicant's personality rights and medical confidentiality both dictate that the information communicated to the employer should be limited to conclusions about the applicant's fitness for the job in question. The employer has no right to know the reasons for unfitness or incapacity.

In the case at hand, no duty to disclose could be admitted since the employee's chronic illness had no effect on her ability to perform her duties. Even though the employee did not answer the medical questionnaire in full transparency, the fact that the wording used for the specific question was found to be confusing, combined with the fact that she had authorised the employer's doctors to obtain medical information from her treating physicians, led the Federal Supreme Court to decide that the employee had not breached any legal or contractual obligation, and that her failure to disclose all information relating to her state of health did not justify a termination of the employment relationship on the grounds of misconduct. Contrary to the position taken by the first instance court, the Supreme Court judges considered that, objectively speaking, the employee's behaviour could not be seen as serious enough to irreparably break the bond of trust with her employer. The dismissal

was therefore found abusive, and the case was sent back to the previous instance for a ruling on the compensation due to the employee.

Reflection period in case of termination combined with a new offer

Federal Court Decision of 2 June 2023 (8C_673/2023)

Following a decision to restructure, an employer notified an employee of the termination of her employment contract with effect from 31 August 2016, together with the reasons for the termination of her employment contract, namely the creation, in place of her 90 per cent position, of a 30 per cent secretarial position, a 40 per cent administrator position and a trainee position. In addition to confirming the termination of the employment relationship, the letter also contained an offer to enter into a new employment contract for the 30 per cent secretarial position, with effect from 1 September 2016. The employee was asked to communicate her decision by 30 June 2016.

After discussions regarding the working conditions of this new position, the employer's director informed the employee by registered letter dated 27 June 2016 that, as she did not accept the terms of reference as presented, her application for the 30 per cent secretarial position was no longer being considered and that, as a result, the employment relationship would end on 31 August 2016. Following the letter of 27 June 2016 from the director, the secretary of the employer's board of directors informed the employee, by registered letter of 28 June 2016, that the employment relationship would end on 31 August 2016, that she no longer had to report for duty until then and that she had to vacate the premises and return the keys by 6 July 2016. In the meantime, and still within the specified deadline, the employee expressly communicated her acceptance of the employer's proposal of the new position.

The employee objected to her dismissal and brought the dispute before the Federal Supreme Court.

According to the Federal Supreme Court, the unfairness of a termination may arise not only from the reasons for the termination, but also from the way the right to termination is exercised. Contrary to the cantonal court's view, it held that determining whether the termination combined with a new offer was unfair requires both an examination of the context in which the termination was served to the employee and of the circumstances occurring up to the expiry of the reflection period.

Insofar as the employer did not include a withdrawal reservation to its offer to enter into a new employment contract, it was held by its binding effect until the date it had itself set. Moreover, a refusal to accept the terms of reference during the reflection period was at most an indication that the employee would soon refuse to enter into a new contract but did not yet constitute a definitive refusal of the new position offered.

The Federal Supreme Court thus found that the termination was unfair, as the employer acted in bad faith by terminating the contract before the expiration of the reflection period.

Unfair dismissal: objection by the employee

Federal Court Decision of 28 March 2023 (4A_59/2023)

By registered letter dated 26 October 2016, the employer dismissed the employee with effect on 31 December 2016, releasing him from his obligation to work with immediate effect. In a second registered letter bearing the same date, the employee was invited to meet on 2 November 2016 to return all the items he had used in the course of his work. The employee was on holiday when these letters were sent and was due to return to work on 2 November 2016.

The employee received the registered letters sent to him on 3 November 2016.

By letter of 9 November 2016 sent through his legal protection insurance, the employee challenged the grounds for dismissal given in the letter of 26 October 2016 and claimed for overtime pay. He also asked the employer to grant him a reasonable period to clear out the personal belongings he was storing in the company's premises. In a subsequent letter dated 18 November 2016, his legal protection insurance took note of the fact that the employee had been 'validly released from his obligation to work' and stated its position as to the date on which the employment relationship would end.

On 2 December 2016, the employer maintained that the grounds for dismissal communicated to the employee were true and refused to pay for the alleged overtime.

On 20 December 2016, still acting through his legal protection insurance, the employee indicated that he 'objected to [the] dismissal'. He challenged the grounds for termination brought forward by the employer and the remaining term of the employment relationship, while expressly noting that the 'employment relationship will end . . . on 31 January 2017'. In a second letter sent by the employee himself on the same date, he set out various claims, including payment of his overtime, holiday pay and various business expenses, and threatened legal action.

Neither of these two letters referred to the abusive nature of the termination or to the employee's intention to claim compensation for unfair dismissal.

The employee initiated legal proceedings. Ordered by the court of first instance to pay compensation for abusive termination, the employer appealed to the Cantonal Court of the Canton of Valais, which overturned the first judgment on the grounds that the employee could not claim any compensation for abusive termination as he had not submitted an objection to the dismissal in good time within the meaning of Article 336b Paragraph 1 of the CO.

In its ruling on the employee's appeal, the Federal Supreme Court gave a reminder that there is no objection when an employee merely challenges the grounds for his dismissal and fails to oppose the termination of the employment relationship. It also upheld the second instance ruling, considering that the employee's acknowledgement of the termination of employment on 31 January 2017 must be interpreted as an acceptance of his dismissal. The Federal Supreme Court suggested, however, that the appellant could have challenged the Cantonal Court's ruling on the grounds of arbitrariness in the determination of facts or of the taking of evidence, which he failed to do in his appeal.

Unfair dismissal

Federal Court Decision of 14 February 2023 (4A_39/2023)

On 23 October 2018, the employer terminated the employment relationship after roughly two and a half years of employment with effect from 30 April 2019 and immediately released the employee from his duties. The employment relationship ultimately ended on 31 July 2019, as the notice period had been extended due to the employee's illness.

The employee claimed compensation for abusive termination and based his claim on three main arguments. Firstly, the reason for termination given by the employer was untrue; secondly, it was a case of revenge dismissal; and thirdly, the employer had breached its duty to protect the employee (Article 328, CO). After his claim was dismissed by the first instance court, he complained to the Court of Appeal that the first judges had violated his right to be heard.

On the first argument, the Federal Supreme Court held that the lower courts had rightly dispensed with an evidence-taking procedure, as an untrue justification for the dismissal does not give rise to a legal presumption that the termination was abusive. The principle of freedom of termination under Swiss employment law implies that no special reason is required for a dismissal to be lawful. When examining the question of unfairness, it is not decisive whether the stated grounds for termination are true or untrue. An untrue reason alone does not constitute an abuse of rights and does not relieve the employee from the burden of proving that the termination was abusive.

The employee secondly argued that his dismissal was motivated by revenge on the grounds that he had raised grievances with his superior, which had led to a conflict between them. However, the federal judges found that the employee was unable to sufficiently demonstrate the existence of an abuse: the general statements he formulated did not meet the requirements of a substantiated allegation and could not be made the subject of an evidence-taking procedure. The disagreement on which he made judgmental comments was not described in a way that would have enabled the court to make its own assessment of the events.

On the employee's claim that the employer had breached its duty to protect him by failing to remedy the conflict situation with his superior, the Federal Supreme Court stated that the incidents reported by the employee did not objectively go beyond what is tolerable in everyday working life, either individually or as a whole. It was undisputed that the tensions with his superior had been very stressful for the employee and had led to a medical referral and sleep disorders, but despite his subjective perception, the circumstances did not reach a level of seriousness that would have obliged the employer – if it had been informed of them at all – to take conciliation measures in terms of its duty of protection. The employee furthermore failed to demonstrate the causality between the alleged conflict and the termination.

Therefore, the Federal Supreme Court held that the lower courts did not violate Article 336 of the CO by considering that the termination was not abusive. The appeal was rejected.

Dismissal due to persistent illness

Federal Court Decision of 7 November 2023 (4A_396/2022)[2]

An employee working as kitchen staff was dismissed on the grounds of persistent illness, after having been unable to work for six months. The dismissal followed the period of protection afforded by his illness (Article 336 al. 1 let. b, CO) and a series of annual performance reviews, during which the employer indicated that he was not fulfilling the expectations of his position. The employee claimed that his illness was due to a conflict situation at the workplace, in particular with the new chef hired by the employer two years before.

While the court of first instance dismissed the employee's claims, the Court of Appeal ruled in his favour, noting in particular the existence of a poor atmosphere in the workplace and the absence of measures taken by the employer to resolve the conflict between the employee and his superior. It also ruled that the employer's inaction in the face of this situation constituted a breach of its duty to protect, which was the direct cause of the employee's incapacity to work.

The employer took the case to the Federal Supreme Court, which ruled that in principle, a termination given after the expiration of the protection period due to a persisting illness is not abusive. On the contrary, the illness's persistence constitutes a just ground for the termination of the employment relationship.

According to the federal judges, it is only in very serious situations that a termination on the grounds of persistent illness must be considered unfair within the meaning of Article 336 Paragraph 1 let. a of the CO. This can only be the case when it is clear from the evidence brought forward that the employer directly caused the employee's illness (e.g., when he failed to take protective measures for the employee such as those provided for in Article 328 Paragraph 2 of the CO, and the employee became ill as a result). In order to succeed in establishing the abusive nature of the termination, the employee must therefore demonstrate that the violation of the employer’s duty of protection is the clear cause of the illness, or that he was subject to mobbing or harassment.

In the present case, the judges held that such circumstances were 'neither established nor evident' and therefore that the required degree of seriousness to apply such an exception was not reached. Moreover, they considered that the employee had not offered to prove that he had required the employer to implement measures to protect his personality rights. The employer's dismissal was therefore not unfair, and the employee's claims were dismissed in their entirety.

In its reasoning, the Federal Supreme Court noted that the necessary degree of seriousness is rarely reached in the case of psychological illness, as was the case here. Conflicts in the workplace – especially with a new superior – can oftentimes lead to depression or other psychological disorders but such an outcome does not suffice to admit that the illness has been caused directly by the employer. The employer thus cannot be required to take every conceivable measure to avoid existing conflicts.

Unjustified departure and obligation to offer work performance

Federal Court Decision of 19 April 2023 (4A_195/2022)

The employee had been employed by the employer as a branch manager since 1 July 2007. On 21 March 2016, the employer terminated the employment relationship with effect

from 30 June 2016 and agreed a leave of absence with the employee from April to the end of June. From 5 to 8 April, the employee was unable to work due to illness. On 16 August 2016, she informed the employer that she had been pregnant since 19 May. As she got pregnant while still employed, she claimed an extension of the the notice period from 30 June 2016 to 30 August 2017. The employer, however, then argued that the employee herself resigned voluntarily with immediate effect as she had started working for another employer on 1 July 2016.

Two questions were disputed before the Federal Supreme Court: firstly, whether the employee had left her job unjustifiably (Article 337d, CO) and secondly, whether she had properly offered her work performance (Article, 324 CO).

The Federal Supreme Court found that an unjustified departure from the workplace only exists if the employee deliberately, intentionally and definitively refuses to commence or continue work. The employee had admittedly held talks with another company about a new employment contract and had worked for a few hours without pay at the latter's request in order to test her suitability. However, it could not be inferred from this that the employee intended to terminate the employment relationship with the employer abruptly and without good reason, nor did this constitute a definitive refusal to work or abandonment of the job. With the employer's consent, the employee had taken holidays during which she was looking for work. This is an activity that the employer must grant the employee after termination of the employment relationship (e.g., to conduct job interviews or assessments with potential new employers, as in this case). The employee is not obliged to inform the employer to whom she wishes to apply. The Federal Supreme Court denied that the employee had left her job without justification.

The Federal Supreme Court stated that the employee is not obliged to offer her work performance if the employer makes it clear from the outset that it will not accept such performance (e.g., by releasing the employee from work or filling the position elsewhere or if the employer is in arrears with the payment of wages). As the employer had already hired a new store manager to replace the employee in July 2016 and the employee could not have returned to a comparable position and the employer had not paid the employee any wages since July 2016, even though they were due, the employee was not obliged to offer her work as it was clear from the outset that the employer would not accept the work.

The employer's complaint was rejected.

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 forums: 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 arguments, which facilitates access to the court for individuals 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 opportunity to raise counterclaims against the plaintiff in the proceedings, provided the same procedural rules apply to both claim and counterclaim.

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, and can be German, French, Italian or Romansh. 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, 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 limited to deciding on matters of the law or the arbitrary finding of facts in the case.

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:

1. termination: claims regarding unfair dismissal or the violation of a consensual termination agreement; and disputes regarding the issuing of documents by the employer at the end of the employment relationship (such as reference letters), among other issues;
2. bonus and compensation (including payment of vacation and overtime); and
3. employee personality protection (e.g., 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 usually 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.

Outlook and conclusions

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. Compared to the past, we see that employers are less reluctant to issue a termination with immediate effect if there is a suspicion that employees have violated internal guidelines. This development might lead to more cases being brought to courts in which the employees claim compensation for unjustified immediate termination. On the other hand, case law requires the employer to take certain measures to solve an internal conflict that has arisen or give a last chance to a senior employee before terminating an employment contract. Such rules facilitate the laid-off employee's claim for compensation due to abusive termination if the employer has not followed protocol.

Further, the ongoing impetus to make work arrangements flexible, sometimes irrespective of borders, and gig or cloud work, or tasks assigned indirectly or via a third party (employer of record), can lead to disputes regarding 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 situations, 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 leasing staff from abroad to Switzerland is prohibited. Modern forms of work, which 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.

Finally, we expect a number of court cases concerning the state's recovery of short-time work benefits. During the covid-19 crisis, the processes for obtaining this state support were greatly eased administratively, making it easier for companies to obtain compensation quickly and prevent redundancies. In the aftermath of the crisis, numerous companies were checked to see whether the conditions for the payment of benefits had actually been met. In many cases, the state is now demanding substantial amounts of compensation back, leading to various legal disputes.

Acknowledgements

The authors would like to thank junior associates Elio Correia Fonseca and Julia Weber for their support.

Endnotes

1 This decision has been published in the Swiss Federal Court's official collection of rulings (ATF/BGE 149 II 337), indicating that it is a landmark decision. Back to section

2 This decision has been published in the Swiss Federal Court's official collection of rulings (ATF/BGE 150 III 78), indicating that it is a landmark decision. Back to section

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