

Employment News No.

62

Age Discrimination: New case law of the Swiss Federal Supreme Court on terminations of employees a few years before retirement

Terminating the employment of older employees a few years before retirement often entails the risk that the termination will be qualified as wrongful. In the case of a wrongful termination, the employer must pay compensation. The Federal Supreme Court has now clarified and relativised its case law on age discrimination in its ruling 4A_44/2021 of 2 June 2021.

Restrictions on the freedom of termination due to age discrimination



By **Ueli Sommer**
Dr. iur., LL.M., Attorney at Law
Partner
Telephone +41 58 658 55 16
ueli.sommer@walderwyss.com

An employment relationship for an unlimited period may be terminated by either party subject to the statutory or contractual notice period (Article 335(1) Swiss Code of Obligations). In contrast to other jurisdictions, freedom of termination applies as a matter of principle under Swiss law. No specific reason is required to justify termination of employment. However, the freedom of termination is limited by the facts of wrongful termination, which are explicitly listed in the law or have been developed by Federal Supreme Court case law.

In its recent ruling 4A_44/2021 of 2 June 2021, the Federal Supreme Court has now once again addressed the question under which circumstances the termination of employment shortly before the retirement of employees is to be qualified as wrongful.



and **Angelina Pellegrini**
MLaw, Attorney at Law
Associate
Telephone +41 58 658 58 68
angelina.pellegrini@walderwyss.com

Extended duty of care of the employer

When employees are terminated a few years before their regular retirement, employers' approach in the termination process is often important for the judicial assessment. According to constant case law, employers' actions can trigger a wrongful termination, which can result in a compensation payment at employers' expense of up to six months' wages. In principle, employers have an extended duty of care in the event of the intended termination of employees a few years before retirement and are required to avoid the termination of these employment agreements if possible. With the new case law, the Federal Supreme Court has now restricted the conditions under which such an extended duty of care exists, thus somewhat relativising its previous case law.

Which employees are subject to an extended duty of care?

In the Federal Supreme Court's judgment 4A_44/2021 of 2 June 2021, it was questionable if the termination of the employment of a 60-year-old CEO with 37 years of service was wrongful. The previous instance affirmed that the termination was wrongful since the res-

pective employee, due to his age and the number of years of service, undoubtedly belonged to the specially protected category of employees and thus benefited from the employer's extended duty of care. The extended duty of care requires employers to take appropriate measures before issuing an ordinary notice of termination so that the employment relationship can be continued. For example, employers must try to resolve any conflicts and offer the employee a chance to change the behaviour or improve the performance. Alternative solutions such as assigning other work may also be considered. In the specific case, the employer did not comply with these obligations, which is why the previous instance concluded that the employer's termination was wrongful.

The Federal Supreme Court approved the appeal against the ruling of the previous instance and accordingly denied that the termination had been wrongful. Although the age, the number of years of service and the remaining time until retirement suggested a wrongful termination under previous case law, the Federal Supreme Court argued that the employee's position within the company must also be taken into account. The employee was a member of the board of

directors, Chief Executive Officer and received a relatively high salary (approximately CHF 230,000 gross per year). He therefore had considerable decision-making powers and great responsibility within the company. The Federal Supreme Court argued that the employer had not been obliged to seek alternative solutions to the termination. This would have required that employment could have been continued in any form at all. However, the Federal Supreme Court concurred with the employer that a continuation of employment would have been difficult to implement due to the employee's position. Therefore, the employer had a great interest to execute its freedom to terminate the employment relationship. Furthermore, the Federal Supreme Court also rejected that the employee should have been warned in advance or confronted with the reasons for termination so that he could have improved his behaviour.

Relativisation of case law

The Federal Supreme Court conceded in the reasons for its ruling that its previous case law on the termination of employment at an older age had probably been too absolute. In the past, the Federal Supreme Court's case law was criticised for restricting the freedom of termination. It was also argued that the extended duty of care could not be derived from the law. Now the Federal Supreme Court put its case law into perspective and stated that the reasonableness of the employer's measures prior to termination must be considered in the context of the overall circumstances and also depend on the employee's professional position. Thus, continued employment elsewhere in the company must actually be possible, which is associated with practical difficulties in the case of management positions. However, in view of the reference to the employee's high salary, the Federal Supreme Court judgement can also be interpreted in such a way that especially those occupational groups with lower salaries and without management positions should benefit from the extended

duty of care. In any case, the judgement shows that an assessment must always be made on a case-by-case basis.

Recommendations for employers

Employers should exercise increased caution in any termination after the age of 50. First of all, it must be assessed whether the person in question belongs to the specially protected category of employees and therefore the extended duty of care applies. The criteria of age, years of service, income, position in the company, area of responsibility and possible alternative employment opportunities of the employee must be taken into account. Depending on the individual criteria, such a classification is not always clear-cut. Even under the new case law, the termination of a heating engineer at the age of 63 and with 44 years of service would still be wrongful (cf. BGE 132 III 115). Nevertheless, under the new case law it cannot be predicted, for example, that the termination of a 61-year-old team leader of 20 employees of a medium-sized company after 25 years of service and with an annual salary of CHF 180,000 would be assessed differently in the future. If the person in question possibly counts as a specially protected employee on the basis of the above-mentioned criteria, it should be ensured that employers regularly carry out documented employee appraisals at an early stage. If the employee stands out negatively due to insufficient performance, lack of productivity, violations of regulations, etc., he or she should always be confronted with these issues so that the employee has the opportunity to comment and knows what needs to be changed. A so-called performance improvement plan, combined with the threat of termination, is regularly recommended. In individual cases, other measures may also be indicated, such as targeted training or coaching. In any case, it is recommended that all steps are documented in writing so that in the event of a lawsuit it can be proven that the duty of care has been fulfilled.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

© Walder Wyss Ltd., Zurich, 2021

Contact persons



Ueli Sommer
Partner, Zurich
Phone +41 58 658 55 16
ueli.sommer@walderwyss.com



Philippe Nordmann
Partner, Basel
Phone +41 58 658 14 50
philippe.nordmann@walderwyss.com



Irène Suter-Sieber
Partner, Zurich
Phone +41 58 658 56 60
irene.suter@walderwyss.com



Davide Jermini
Partner, Lugano
Phone +41 58 658 44 02
davide.jermini@walderwyss.com



Olivier Sigg
Partner, Geneva
Phone +41 58 658 30 20
olivier.sigg@walderwyss.com



Stefano Fornara
Partner, Lugano
Phone +41 58 658 44 23
stefano.fornara@walderwyss.com



Daniel Staffelbach
Partner, Zurich
Phone +41 58 658 56 50
daniel.staffelbach@walderwyss.com



Maurice Courvoisier
Partner, Basel
Phone +41 58 658 14 52
maurice.courvoisier@walderwyss.com



Davide Cerutti
Counsel, Lugano
Phone +41 58 658 44 22
davide.cerutti@walderwyss.com



Christoph Stutz
Counsel, Zurich
Phone +41 58 658 56 57
christoph.stutz@walderwyss.com



Alex Domeniconi
Managing Associate, Lugano
Phone +41 58 658 44 06
alex.domeniconi@walderwyss.com



Jonas Knechtli
Managing Associate, Basel
Phone +41 58 658 14 82
jonas.knechtli@walderwyss.com



Fabian Looser
Managing Associate, Basel
Phone +41 58 658 14 61
fabian.looser@walderwyss.com



Simone Wetzstein
Managing Associate, Zurich
Phone +41 58 658 56 54
simone.wetzstein@walderwyss.com



Laura Luongo
Senior Associate, Geneva
Phone +41 58 658 30 21
laura.luongo@walderwyss.com



Flora V. Palovics
Senior Associate, Lausanne
Phone +41 58 658 83 79
flora.palovics@walderwyss.com

Contact persons



Christoph Burckhardt

Associate, Basel

Telefon +41 58 658 14 34

christoph.burckhardt@walderwyss.com



Nadja D. Leuthardt

Associate, Basel

Telefon +41 58 658 14 62

nadja.leuthardt@walderwyss.com



Yannik A. Moser

Associate, Basel

Phone +41 58 658 14 85

yannik.moser@walderwyss.com



Angelina Pellegrini

Associate, Zurich

Telefon +41 58 658 58 68

angelina.pellegrini@walderwyss.com



Céline Squaratti

Associate, Zurich

Telefon +41 58 658 30 23

celine.squaratti@walderwyss.com



Stephanie Wichmann

Associate, Zurich

Telefon +41 58 658 52 42

stephanie.wichmann@walderwyss.com



Chiara Wirz

Associate, Zurich

Phone +41 58 658 52 46

chiara.wirz@walderwyss.com