# THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Fourth Edition

**Editor**
Nicholas Robertson

THE LAWREVIEWS

# THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

FOURTH EDITION

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# PREFACE

I was delighted to be invited to be the editor for *The Labour and Employment Disputes Review* for another year. This follows on from my move at the start of the year from Mayer Brown to become part of the 60-person employment team at Keystone Law. A number of my new colleagues have contributed to the UK chapter, primarily Alexandra Carn, Emma Clark, Fiona MacDonald and Rachel Tozer, for which I am very grateful. I would also like to record my thanks to Mayer Brown since they kindly consented to us using the previous version of the UK chapter as our starting point for this year's annual review, to maintain consistency of approach.

It is clear that one story above all others dominates employment law during 2020. The pandemic has changed the way we work and the way we think about work, and has caused employers and employees alike to focus on aspects of the working relationship that have traditionally received relatively little attention. For example, for many employees, health and safety at work was something that operated invisibly, and which employees/workers (rightly or wrongly) took for granted. Clearly this was not the case in all industries but, in precarious jobs in the gig economy, employees had only the lightest touch protection and the very low risk of facing enforcement by the health and safety authorities meant that some businesses did not feel the need to focus extensively on health and safety unless and until something went badly wrong.

That has clearly altered. Health and safety is now top of the agenda for employers and employees alike and will remain there for the foreseeable future. In the UK we have seen a test case extending the ambit of health and safety legislation to workers. The need to provide urgent protection to workers who were compelled, out of economic necessity, to carry on working during the pandemic meant that it was worth a trade union bringing a test case to prove that the UK's legislation in this area was deficient. It is notable that the legislation in question had been on the statute books for many years without being challenged, although the deficiency was well recognised.

Similarly, the European Union's framework directive on health and safety matters protects employees and workers who take steps to avert a serious and imminent danger at work, or who absent themselves from work because of serious and imminent danger. In particular, the employee must not be subjected to any detriment by the employer as a result of taking such action or staying away from work. It is clear that this is going to raise very difficult issues. What is to happen to an employee who is healthy but who considers that the employer's working practices or premises entail an unacceptable risk of catching the virus? What happens if an employee or worker is living with someone who is clinically very vulnerable, but the employee is required to go back to work by the employer? It is relatively clear, in the UK at least, that the right applies to actions by the individual to protect

themselves or to protect 'other persons' from the danger, and there is no need for those 'other persons' to be colleagues.

Looking to 2021, I anticipate that these sorts of issues will start to play out across the courts and tribunals globally. We will also have to grapple with difficult issues relating to vaccinations. Will it be lawful for employers to require employees or workers to have a vaccination? Will employers be entitled to reject applicants for jobs because they have not had a vaccination? If employers do not have a blanket right to require vaccination, are there circumstances in which it would be permissible to require vaccination? Alternatively, if there is going to be a general acceptance that it is open to employers to require vaccination for employees, are there going to be circumstances where employees can refuse, for example on health grounds, or based on religious or philosophical beliefs? These issues are controversial already and are only going to become more controversial as 2021 progresses.

It seems that those advising employers and those advising employees on legal rights would do well to remember the old Chinese curse: 'May you live in interesting times'. 2021 is undoubtedly going to be an 'interesting' year.

**Nicholas Robertson**
Keystone Law
London
May 2021

**Chapter 17**

# SWITZERLAND

*Davide Jermini and Alex Domeniconi*[1]

## I INTRODUCTION

The way in which a labour and employment dispute is resolved in Switzerland depends essentially on whether the employment relationship is governed by private law or public law, and the dispute arises from an individual employment relationship (individual dispute) or from a collective labour agreement between employers or employer organisations and trade unions (collective dispute).

This chapter focuses mainly on individual disputes with private employers, which are governed by federal laws to a large extent and, therefore, harmonised at country level. Disputes concerning public sector employment relationships are governed by a variety of communal, cantonal and federal laws, depending on the public body involved. Although the two kinds of employment relationships were treated in a very different manner by the courts in the past, nowadays we are witnessing a growing rapprochement between the two statutory systems, which is reflected in the similarity of the disputes and in the procedures used to resolve them. More specifically, the freedom of contract that characterises Swiss private employment law has been increasingly eroded for social protection reasons (e.g., by the introduction of minimum wages in certain regions and for certain professions and through an increased protection against abusive termination for older employees), while at the same time the public employment relationship tend to be more flexible and less protective for the employee (e.g., by abolishing the status of civil servant and through the introduction of terminable employment agreements). Also, with respect to the resolution of the related disputes, the two types of employment relationships are becoming more similar, for example, through the increasing use (including in the public sector) of consensual termination agreements.

The Swiss Code of Obligations (CO), the Federal Labour Act and the Swiss Code of Civil Procedure constitute the main sources of legislation for private labour and employment disputes. The Federal Act Governing the General Applicability of Collective Labour Agreements, the Federal Data Protection Act, the Federal Act on Gender Equality, and the Federal Act on Information and Consultation of Employees represent additional significant sources. Depending on the specific circumstances of the individual case, a number of other laws, ordinances or regulatory provisions may play an important part in labour and employment disputes, such as the Federal Act on Private International Law, the Federal Merger Act and the Federal Act on Foreigners.

The fairly liberal character of Swiss private employment law is reflected in the CO, which contains – in addition to certain mandatory provisions and other semi-mandatory

1 Davide Jermini is a partner and Alex Domeniconi is a managing associate at Walder Wyss Ltd.

provisions that may not be waived to the detriment of the employee – a variety of discretionary provisions, thus providing enough scope for tailor-made solutions. The CO regulates individual employment contracts, collective employment contracts and those known as standard employment contracts, which are federal or cantonal enactments regulating working conditions (including minimum wages) for certain specific professions. The Federal Labour Act lays down rules on health protection, working hours and rest periods.

In general, Swiss law appears to be well balanced in terms of the rights and duties of employers and employees; when compared with other jurisdictions, however, the system is fairly liberal, for example, with respect to the possibility of terminating an employment relationship. It is not a coincidence that, unlike some of its neighbouring countries, strikes are very rare in Switzerland, although the right to strike is expressly provided for in the Federal Constitution. The 'peace at work' that we are still experiencing is concomitant with the long tradition of avoiding industrial conflicts through negotiation.

## II PROCEDURE

In 2011, a unified civil procedural code (CPC) was introduced in Switzerland with the aim of ensuring a uniform application of substantive civil law throughout the country.

As a general rule, a civil litigation has to be preceded by a conciliation attempt before a conciliation authority. Although the parties may, with mutual consent, waive the conciliation proceedings in favour of disputes with a litigious value of at least 100,000 Swiss francs, this is seldom the case, especially in employment law litigation, which generally appears to be well suited to conciliation, both because of the personal involvement of the parties (as well as on an emotional level) and because of the fact that evidence is often based on documents (without the need for expert opinions or a long discovery phase). An application for conciliation triggers pendency. The conciliation hearing, at which the parties (with few exceptions) have to appear in person, must take place within two months of the date on which the application was received by the conciliation authority. If the parties fail to reach an agreement during the conciliation proceedings, the conciliation authority grants an 'authorisation to proceed', allowing the claimant to file the action in court within three months. Conciliation proceedings usually last between a few weeks and a few months.

As regards substantive proceedings, the CPC provides for simplified proceedings in disputes with a litigious value of up to 30,000 francs. Other than ordinary proceedings, which apply when the litigious value is higher, the court shall establish the facts *ex officio* and no court costs are charged to the parties, unless a party has proceeded in bad faith or wantonly. Compared to ordinary proceedings, simplified proceedings are more oral-oriented, faster and provide for a certain ease of pleading given a more active role of the court. First instance proceedings typically last from one to three years depending on the circumstances of the case and the type of proceeding (simplified or ordinary) applying to it.

The organisation of the conciliation authorities and of the civil courts is not governed by federal law and differs from canton to canton; it is also subject to local needs and resources. Claims arising from an employment relationship must be filed with a district court, except in certain cantons that have established specialised employment courts (employment courts exist in the cantons of Zurich, Bern, Lucerne, Fribourg, Basle-City, Aargau, Wallis, Geneva, Vaud and Jura). Appeals against first instance decisions are normally brought to the ordinary

cantonal courts of appeal and afterwards to the Swiss Federal Supreme Court. The claim must be written in the official language (German, French, Italian or Romansh) of the canton in which the claim is filed.

Class actions are not permitted under Swiss civil law and, consequently, claims must be filed by individuals, although there are some particular situations in which multiple parties are allowed to act jointly. Disputes between the parties of collective labour agreements are typically resolved by conciliation offices – usually at cantonal level or occasionally at federal level, if the dispute extends beyond the territory of a canton – or by arbitral bodies.

## III TYPES OF EMPLOYMENT DISPUTES

Employment disputes may arise for a number of reasons. Typical disputes in this context mainly involve termination (e.g., abusive termination, unjustified immediate termination, termination agreements and settlement agreements), salaries and rewards, certificates of employment, discrimination and protection of the employee's personality.

A termination may be considered abusive if a party imposes it:

*a* because of a quality inherent in the personality of another party (unless that quality relates to the employment relationship between the parties or significantly impairs cooperation within the enterprise);

*b* because the other party exercises a constitutional right (unless the exercise of that right violates a duty of the employment relationship or significantly impairs cooperation within the enterprise);

*c* to solely frustrate the forming of claims by another party arising out of an employment relationship;

*d* because another party asserts, in good faith, claims arising out of the employment relationship (also known as 'dismissal for revenge'); or

*e* because the other party performs compulsory Swiss military, civil defence or a legal duty that is not voluntarily assumed.

Moreover, the notice of termination of an employment relationship by the employer is deemed abusive if it is given: (1) because the employee belongs or does not belong to an employees' organisation, or lawfully exercises a union activity; (2) during the period the employee is an elected employee representative in a company institution, and the employer cannot prove a justified motive for the termination; or (3) in connection with a mass dismissal without prior consultation of the employees.[2] The notice of termination remains valid even if it is deemed abusive by a court. However, the employer who abusively terminates an employment relationship is required to pay an indemnity to the employee. This indemnity may not exceed the employee's salary for six months and is determined by the court.

A termination with immediate effect without good cause entitles the employee to a claim for damages in the amount he or she would have earned if the employment relationship had been terminated observing the notice period or on expiry of its agreed fixed duration. In addition, the employer may be ordered to pay the employee an indemnity determined at the discretion of the court, taking into account all circumstances of the case. However, the indemnity may not exceed the equivalent of the employee's salary for six months. On the other hand, if the employee, without a valid reason, does not appear at the workplace or

2 See Article 336, CO.

leaves it without notice, the employer shall be entitled to a claim for compensation equal to one quarter of the employee's wage for one month; moreover, the employer shall be entitled to compensation for additional damages.

Disputes about remuneration aspects of an employment relationship are quite frequent, in particular in connection with bonuses. On this specific subject, there is a rich and constantly evolving case law, as the bonus is a fairly common form of remuneration that is not expressly regulated in the CO. Remuneration disputes often concern a number of other particular situations, such as on-call work, or arise in connection with other claims by the employee, such as the right to refuse to work owing to inaction or omission by the employer.

The issuance of certificates of employment often gives rise to legal disputes. The employee may request from the employer – at any time – a certificate concerning the nature and the duration of the employment relationship, his or her performance and his or her conduct (known as a qualified work certificate). In principle, the certificate of employment should promote the employee's professional career and should therefore be written in a benevolent manner. However, benevolence finds a limit in the duty of completeness and of telling the truth. These two principles do not always coincide, giving rise to disputes between employees and employers.

The courts are also frequently faced with disputes concerning the protection of the employee's personality. The employer shall respect and protect the employee's personality, having due regard to the employee's health and care for the preservation of morality. In particular, the employer shall ensure that the employee is not sexually harassed and that victims of sexual harassment are not further disadvantaged.

## IV YEAR IN REVIEW

### i Bonus

The cantonal court denied the right to a bonus of an employee who had resigned during the year. This was because the bonus was not objectively determinable in advance and therefore constituted a gratuity, which was itself contractually subject to the condition of continuation of the employment relationship. In addition, the 'accessoriness principle' was not applicable, since the employee was earning 410,000 francs per year (i.e., above the threshold for a very high income set by the Federal Supreme Court, currently about 393,000 francs – which is five times the median Swiss salary in the private sector). The employee challenged the decision of the cantonal court in the Federal Supreme Court, arguing that the bonus should qualify as variable salary.

According to the Federal Supreme Court, a bonus should qualify as variable salary when it has been contractually promised in principle and its amount is determined or must be determined on the basis of predetermined objective criteria such as profit, turnover or a share in the operating result, and does not depend on the employer's assessment.

On the other hand, a gratuity occurs when the bonus is indeterminate or objectively indeterminable (i.e., its payment depends on the goodwill of the employer and its amount essentially rests on the employer's latitude). Case law recognises that the employer has such a discretionary power when the amount of the bonus depends not only on the achievement of a certain operating result, but also on the subjective assessment of the employee's performance; the bonus must then be qualified as a gratuity. Even when the payment of the bonus is conditional upon the achievement of objectives to be set by the employer each year, the achievement of these objectives does not give rise to a variable salary but only to a right to a

gratuity if the employer has the task and the latitude to set the objectives, to judge whether they have been achieved and to assess the employee's performance. Similarly, if a bonus has been paid regularly in the course of the contractual relationship without reservation of its discretionary nature for at least three consecutive years, it is assumed that, in accordance with the principle of trust, it is a gratuity to which the employee is entitled to, while the employer has some freedom in setting the amount if the previous amounts of the bonus were variable. In accordance with Article 322d, Paragraph 2 of the CO, the employee is only entitled to a proportionate share of the gratuity in the event of termination of the employment relationship (before the payment date) if this has been agreed upon.

There is no entitlement to a gratuity where the parties have contractually reserved both the principle and the amount of the bonus; in such cases, the gratuity is discretionary and the employee is not entitled to it, subject to the exception arising from the nature of the gratuity.

In this case, while the remuneration (bonus) system provided for by the employer was based, among other criteria, on the financial results and the rating attributed to the employee, it was established that this rating depended on the individual performance of the employee, which was assessed on the basis of qualitative criteria. The employee herself acknowledged that her performance was evaluated by her line manager, that it depended on the achievement of objectives specific to her and the way she performed her work and that her main objective was to develop the skills of her team members. The latter objective depends largely on the (subjective) assessment of the line manager. The (supposedly 'measurable') milestones set by the employer (frequency of returns, time spent in discussions and documentation provided to employees) provided essentially quantitative information and are far from substantially reducing the amount of subjectivity inherent in a (qualitative) assessment of the employee's behaviour and its impact on the development of the skills of her team members.

The fact that the employment contract or the remuneration plan refers to the notion of 'variable remuneration' or even 'variable salary' is not in itself decisive.

As a result, the disputed bonus was qualified as a gratuity which was validly subject to the continuation of the employment relationship. The accessoriness criteria was not applicable to the present case, as the employee received a 'very high income' according to case law.[3]

### ii Termination of an employment contract with a minimum duration

The Federal Supreme Court stated that an employment contract with a minimum duration (in the case at hand, one year) has to be considered as a fixed-term contract until the expiry of the minimum duration. Thus, an ordinary termination is not possible until the end of the minimum duration and the contract can only be terminated with immediate effect for good cause within the meaning of Article 337 of the CO. A notice of termination given during the agreed minimum term of the contract must be treated as an extraordinary termination according to Article 337 of the CO. Irrespective of whether such an extraordinary termination is justified, the employment relationship will end.

In another case, there was no good cause to justify the extraordinary termination of the employment relationship. The employee was therefore entitled to a compensation for lost wages up to the end of the minimum duration of the employment contract and to an additional indemnity according to Article 337c of the CO.[4]

3 Federal Supreme Court Decision 4A_327/2019 dated 1 May 2020.

4 Federal Supreme Court Decision 4A_395/2018 dated 10 December 2019.

### iii Termination for good cause

Both employer and employee may terminate the employment relationship with immediate effect at any time for good cause (Article 337, Paragraph 1, CO). Good cause is any circumstance that renders the continuation of the employment relationship in good faith unconscionable for the party giving notice (Article 337, Paragraph 2, CO).

Because of its exceptional nature, a termination without notice (for good cause) has to be admitted in a restrictive way. Only a particularly serious breach can justify the immediate dismissal of the employee. A less serious breach can only result in such a termination if it has been repeated despite a warning issued by the employer.

In the case at hand, the employee was employed as an animator and healthcare worker in a nursing home. A one-time instance of disrespectful behaviour towards residents of a nursing home is not enough to justify a termination for good cause, even if the employment contract specifies that the employee must perform his or her professional activity with kindness and courtesy.[5]

### iv Vacation pay

As a rule, employees must take their vacation in the form of time off. Vacation pay may only be paid with the monthly salary in the case of irregular activity and provided that the vacation pay is clearly and expressly separated from the base salary (the general reference 'vacation pay included' is not sufficient), both in the written employment contract and in each of the pay slips.

In the case at hand, the vacation pay was paid with the monthly salary, the work of the employee was remunerated on an hourly basis and the average weekly working time amounted to 41.9 hours, which meant that the employee had a full-time job. The lower court assumed that a full-time employment could not be considered as irregular employment and obliged the employer to pay the regular salary during the vacation period. The Federal Supreme Court,[6] however, came to the opposite conclusion and stated that irregular employment may not only occur in the case of part-time employment, but also in the case of full-time employment.

### v Employer reference

According to Article 330a of the CO, the employee may request from the employer a reference concerning the nature and the duration of the employment relationship, the quality of his or her work and conduct.

The Federal Supreme Court had to decide for the first time when a claim for the amendment of an employer's reference is time-barred.[7] General provisions governing limitation periods are applicable to claims under the employment relationship (Article 341, Paragraph 2, CO). The lower court took the view that a claim for the amendment of an employer's reference is time-barred after 10 years. According to literal, historical, teleological and systematic interpretation of the relevant rules, the Federal Supreme Court came to the same conclusion. In particular, the Federal Supreme Court pointed out that the five-year limitation period pursuant to Article 128 No. 3 of the CO only applies to salary claims in the broadest sense or monetary claims and it is to be applied restrictively as an exception to

5 Federal Supreme Court Decision 4A_21/2020 dated 24 August 2020.

6 Federal Supreme Court Decision 4A_619/2019 dated 15 April 2020.

7 Federal Supreme Court Decision 4A_295/2020 dated 28 December 2020.

the general limitation rule in Article 127 of the CO, which provides for a 10-year limitation period. The Federal Supreme Court argued that the action for amendment of the employer's reference has none of the characteristics of a wage claim, not even in the broadest sense. Therefore, the claim for an amendment of an employer's reference is subject to the 10-year limitation period.

### vi Prolixity

The Federal Supreme Court did not enter into an appeal filed by an employee, who before the cantonal court filed a reply and counterclaim of 278 pages and 1,580 annexes. The cantonal court gave the employee a deadline to submit a new, shorter version of the written submission. The employee then filed a new reply and counterclaim of 238 pages and 923 annexes. In the new written submission, the employee alleged new facts and extended his conclusions. Considering that the written submission was still too long, the court gave the employee a final deadline for rectifying it. Consequently, the employee filed a new 148-page written submission, whose margins had been reduced compared to the previous versions. The cantonal court considered that the third memorandum filed by the plaintiff was still of a prolix character and declared the reply and counterclaim as inadmissible. According to the cantonal court, the complexity of the dispute, concerning unpaid working hours and leave allegedly owing to the employee's reporting of unethical behaviour, did not justify a 148-page submission. The employee asked the Federal Supreme Court to declare his reply and counterclaim admissible.

Appeals to the Federal Court are, in principle, only admissible against decisions that end the procedure (final decisions). An appeal against prejudicial or incidental decisions is admissible only under restrictive conditions. In the specific case, the disputed incidental decision was not likely to cause irreparable harm to the employee. If the employee were not to succeed before the cantonal court, he would still have the possibility of challenging the final judgment and at the same time challenging the decision of inadmissibility of the reply and counterclaim for prolixity, and should he be successful in doing so, to obtain a new judgment on the basis of the elements presented in the non-admitted reply and counterclaim.[8]

## V OUTLOOK AND CONCLUSIONS

No significant changes to procedure that may affect employment disputes and their resolution are foreseen or expected to be announced during the next 12 months.

Topical themes that are likely to come to the attention of the courts in the coming years are those related to new forms of work performance (also called atypical work) that are not specifically codified, such as job-sharing, on-call work, freelance work, homeworking and part-time work. Certain atypical forms of work are becoming increasingly common, hence an increasing number of disputes in this area is to be expected. In particular, due to the strong recourse to homeworking for health reasons starting in 2020, it is likely that courts will be asked to decide on possible conflicts between employers and employees related to this specific form of work, which is not expressly regulated in the CO (e.g., regarding the allocation of costs and expenses, the recording of working time).

8 Federal Supreme Court Decision 4A_298/2020 dated 3 July 2020.

In more general terms, the performance of work not directly rooted within an employer organisation (as in the Uber model) is still a focus of attention for the general public on an international scale, not only in Switzerland. Among the currently known forms of the gig economy are 'crowd work' and 'work-on-demand via app', in which the demand and supply for work activities are brought together online or through the use of apps. According to various media reports, a Lausanne court of first instance ruled in May 2019 that Uber drivers are to be considered employees, at least in connection with an Uber subsidiary's termination without notice of the cooperation of an Uber driver.

All the parties affected (authorities, social insurers and interest representatives) are trying to cope with the opportunities offered by atypical forms of work and new technologies. For the labour market to continue to operate fairly, references to the new forms of work or new means of making work available need to be incorporated within the existing legal framework in a proper way, without hindering the inexorable march of change. The greatest advantage of the atypical forms of work is the flexibility offered to both employer and employee, which reduces personnel costs for employers and gives employees more freedom. The main risks are the loss of legal protection for the worker and increasing social costs for the community. We expect major changes during the next few years to the way employment relationships are managed and, as a consequence, significant changes in the way employment disputes are resolved. In particular, we believe that the (already very thin) line between work-related and non-work-related activities will finally vanish.

**Appendix 1**

# ABOUT THE AUTHORS

**DAVIDE JERMINI**

*Walder Wyss Ltd*

Davide Jermini is a partner at Walder Wyss in Lugano. He is mainly active in the fields of corporate and commercial law and mergers and acquisitions (in particular, real estate transactions). He regularly advises on employment law issues and corporate succession planning. Davide Jermini was born in 1968 and studied economics at the University of St Gallen (*lic oec* HSG, 1992) and law at the University of Basle (*lic iur*, 1995, *magna cum laude*). He was admitted to the Ticino Bar in 1999 and to the Ticino notary society in 2000. Since June 2016, he has been a member of the Royal Institution of Chartered Surveyors. He joined Walder Wyss in 2013 after having worked for five years for a major international business law firm in Zurich and having been a partner in law firms based in Zurich and Lugano for eight years.

Davide Jermini is mentioned by *Chambers* as a recognised real estate practitioner. According to *The Legal 500*, he is recommended for corporate and real estate matters. He is fluent in Italian, German, English and French.

**ALEX DOMENICONI**

*Walder Wyss Ltd*

Alex Domeniconi is a managing associate at Walder Wyss in Lugano. He was born in 1979 and educated at the University of Zurich (*lic iur* 2005, *Dr iur* 2013). He has worked as an associate in law firms in Zurich and Lugano, and as a research assistant and lecturer at the University of Zurich. Alex Domeniconi mainly focuses on employment law and corporate and commercial law. His other areas of practice are industry (including regulatory issues and product safety) and insurance as well as media and communications. He advises on dispute resolution and represents parties before state courts and in enforcement proceedings. Alex Domeniconi regularly publishes and lectures in his fields of expertise.

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