THE

Labour and Employment Disputes Review

Third Edition

Editor
Nicholas Robertson

THE LAWREVIEWS

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THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

THIRD EDITION

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Nicholas Robertson

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PREFACE

It is commonplace for the senior management of a business to describe their employees as the best assets that the business has. Equally, in troubled times, it not unusual to find employers voicing concern that employees may vote with their feet and leave the organisation (irrespective of any legal claims they may have) to work for competitors.

However, the truth of the matter is that, in many jurisdictions, fine words about the rights of employees are mixed with an increasingly uncertain future for employees. One frequently hears comments about the future impact of technology on many types of jobs. This technology will know no boundaries and the only safe prediction is, I think, that the jobs most affected will include some surprises. Already we see significant friction between the attempts by businesses to organise employees into a low-cost, allegedly lower-skilled and fully flexible workforce and the conflicting desires of employees and, in many countries, legislators to have stable employment relationships underpinned by statutory and contractual rights. The battles that Uber and other 'disrupters' are facing are symptomatic of that tension.

In the United Kingdom, of course, we have now seen Brexit, finally, become a reality, although the detail of what this will mean for employers and employees remains frustratingly vague.

A similar phenomenon is at play in relation to the #MeToo movement, and its impact on workplace behaviours and relationships. The desire for those in the workplace to inhabit an environment free of unlawful discrimination has undoubtedly made progress, giving voice to employees who might previously have felt, for legal, cultural or commercial reasons, that they had no option but to accept inappropriate behaviour. The corollary of this strengthening of employees' rights is that it makes the workforce less insecure.

Indeed, in the United Kingdom, the extended debate about the degree to which it is ever permissible for employers to use non-disclosure agreements to resolve matters privately is an indication of how far the debate has moved. A time-travelling employment lawyer from 10 years ago (if such an individual existed) would be astonished at the pace of change.

In these circumstances, a book such as *The Labour and Employment Disputes Review* offers an opportunity not only to look at the bigger themes, but also to measure some of the changes taking place, year on year, as the world of work continues to evolve.

Nicholas Robertson
Mayer Brown International LLP
London
February 2020

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Chapter 19

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 (1) the employment relationship is governed by private law or public law, and (2) 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. On the other hand, 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 professions and through an increased protection against abusive termination for older employees), while at the same time the public employment relationships 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 instance 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.

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

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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 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 for certain specific professions. The Federal Labour Act, on the other hand, 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 Swiss 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. Appeals against

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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 Art. 336 CO.

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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 Termination in cases of sickness

The Federal Supreme Court was recently asked to decide whether a termination of a sick employee at the end of the protection period stipulated in Article 336c CO may represent an abusive termination.

An employment relationship of indefinite duration can be terminated by either party subject to the statutory or contractual period of notice.[3] In principle, no special reasons are required to give notice of termination. However, the freedom of termination is limited by the prohibition of abuse. A sickness that leads to incapacity to work and thus affects the employment relationship constitutes in most cases legitimate grounds for termination, at least to the extent that the protection period pursuant to Article 336c CO has expired. On the other hand, the termination could be deemed abusive if the sickness-related impairment was due to the breach of a duty of care incumbent on the employer. To be abusive, the termination requires a causal link between the banned motive for termination and the termination itself. In other words, the reason for termination that has been challenged as abusive must have played a decisive role in the employer's decision to terminate the employment relationship.

In the case at hand, the employee did not prove that his sickness was the result of a breach of the employer's duty of care. The termination was therefore considered not to be abusive.

3 Art. 335 Para. 1 CO.

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ii Termination in cases of conflict between employees

The Federal Supreme Court was recently faced with a case of a termination given for alleged sexual harassment. An employee, after having had a consensual sexual relationship with a work colleague, was accused by the latter of having sexually harassed her. The employer heard separately both employees twice, whereby the male employee denied the sexual harassment on the occasion of the hearing and, giving privacy as his reason, did not provide any further information on the relationship between him and the female employee. The employer duly terminated the employment relationship with the male employee (a manager) reproaching him for a breach of the duty of loyalty because he did not actively contribute to the clarification of the facts.

Abuse of a termination can also result from the manner in which the right of termination is exercised. In conflict situations, particularly in the case of unilateral accusations, a termination can be abusive if the employer does not sufficiently investigate the accusations. However, the burden of proof shall lie with the employee claiming the abuse.

A breach of the duty of loyalty by an employee who refuses, on the grounds of privacy, to collaborate in the clarification of accusations of sexual harassment brought against him by another employee is sufficient to exclude any abuse in the termination.

iii Non-competition clauses

Employment agreements often provide for post-contractual non-competition clauses. However, whether and under which conditions these can actually prevent competition from former employees is subject to a number of uncertainties.

In a case brought before the Federal Supreme Court an employer asked an employee to pay a penalty for an asserted violation of a contractual non-competition clause. The controversial issue was the extent of the scope of this clause. The employee worked as marketing assistant and according to the employment agreement was responsible for 'creation of sales concepts, preparation and implementation of trade fairs or events, advertising, sales promotion activities, sales and product documentation, organisation, and home page and internet'. The non-competition clause was worded as follows: 'The marketing assistant undertakes to refrain from any competing activity after termination of the employment relationship – i.e., not to engage in any business that competes with the company for his own account, nor to be active or participate in any such business. The prohibition of competition applies to the territory of Switzerland, for a period of three years. In the event of a breach of the non-competition clause, a contractual penalty of 30,000 Swiss francs will be charged. Payment of the contractual penalty does not cancel the non-compete obligation.'

A non-competition clause may not prohibit any activity except a competing activity; it may not, therefore, extend beyond the scope of the employer's activity. The prohibition on performing 'any competing activity' fulfils the requirement of Article 340a CO, at least to the extent that the competing activity is determined or determinable by general methods of interpretation.

A marketing position, even if it is related to the planning, implementation and monitoring of the company's activities, is not per se sufficient reason to prohibit all activity in a competing company on the basis of knowledge of technical, organisational or financial information that the employer would like to keep secret.

In this decision the Federal Supreme Court has eliminated at least one of the uncertainties related to non-competition clauses by making unmistakably clear that the parties to an employment agreement can also validly agree to a prohibition of 'any competing

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activity'. Although such non-competition clauses in employment agreements are valid, they can still be limited by a court as before. This means that the court can limit the extent of the non-competition clause.

iv Overtime

An employee who, after having received notice of the termination of his or her employment agreement, modifies his or her time sheet by entering overtime does not necessarily commit fraud, as long as the overtime hours subsequently entered in the working-time registration system were actually performed by the employee.

v Bonuses

In 2019, the Federal Supreme Court was once again asked to rule on the legal qualification of bonuses and in particular on the distinction between salary and gratuities.

Where an amount (no matter the designation, whether bonus or gratuity) is determined or objectively determinable (i.e., it has been contractually promised in principle and its amount is determined or must be determined on the basis of predefined objective criteria such as profit, turnover or a share in the operating result and is not dependent on the employer's assessment), it must be considered a (variable) component of the (variable) salary, which the employer is obliged to pay to the employee. On the other hand, if the bonus is indeterminate or objectively indeterminable (i.e., its payment depends on the employer's goodwill and its amount depends essentially on the employer's latitude in that it is not fixed in advance and depends on the subjective assessment of the employee's performance by the employer), it must be qualified as a gratuity.

In the present case, although the parties had agreed on the principle of payment of a bonus and they intended to set the amount of the remuneration according to a predefined objective criterion (a percentage of the 'profit before tax'), they never had the opportunity to set this percentage during subsequent discussions. The cantonal judges found that the parties had understood each other, but their actual preferences did not coincide as to the quantum in dispute (further discussions were necessary for an agreement to be reached). Accordingly, the cantonal judges established the existence of a clear disagreement. The appellant himself acknowledged this in his pleading, which dealt with the issue of subjective interpretation, but he did not draw the necessary conclusions from this. He was of the opinion that the cantonal court was bound not to stop at the actual intention of the parties but should have applied the principle of mutual trust and confidence, which would have led it to hold that the variable part of the salary was well determined. According to the Federal Supreme Court, since the cantonal court had established the existence of a clear disagreement, it was up to the appellant to question the result of the subjective interpretation reached by the cantonal court, which he did not do. It followed that the remuneration provided for in the employment contract, and agreed in principle, was not determinable and could not be regarded as a component of the salary.

vi Home office

In another case judged by the Federal Supreme Court, among other things it was disputed whether an employee can claim compensation for using a room in his or her private home for work purposes.

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The employer in the case argued to no avail that the employment agreement did not provide for an obligation to pay compensation because no 'office or archive rent' had been agreed.

An employer is obliged to provide its employees with a suitable workplace. Irrespective of the absence of agreements, if the employer does not provide such a suitable workplace, it has to bear the costs of establishing the necessary work infrastructure at home in accordance with Article 327a CO. Pursuant to this rule, the employer has to reimburse the employee for all expenses necessarily incurred in the performance of the work. In the case in question, the Federal Supreme Court confirmed an obligation to pay compensation.

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, and home-office 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 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.

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Appendix 1

ABOUT THE AUTHORS

DAVIDE JERMINI

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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

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Alex Domeniconi is a senior 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, corporate and commercial law matters, as well as industry and commerce. 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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