An Introduction to Swiss Employment Law

Law Europe EEIG

Swiss Code of Obligations (OR)

Contract Law

Employment Contract, Articles 319-362

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INTRODUCTION

Compared to other national legislation Swiss employment law is of a very liberal nature. Any employment contact can be terminated on whatever grounds there may be. Although a few examples of the abusive terminations are listed in the employment law, the employment will nevertheless be terminated. Abusive terminations may however open a window to penalties and possible damages. As an exception, notices to terminate the employment remain ineffective if they are handed down during a time (military service, illness or accident, pregnancy etc.) when the loss of work may be particularly critical for the employee. In such cases the employer can give notice to terminate the contract only after a period of protection as fixed in art. 336c OR has ended.

The Swiss employment law shows its liberal character by proposing numerous legal dispositions that are not mandatory and therefore give the parties to the contract the freedom to resort to other solutions. Art. 361 OR (Swiss Code of Obligations) lists a number of inalterable provisions; Art. 362 refers to provisions in the Code that cannot be altered to the detriment of the employee.

Among others inalterable for both parties are provisions with regard to the notice of termination in general, of the abusive notice of termination, with regard to the compensation in case of abusive, i.e. unfair notice of termination, provisions about the proceeding following the abusive notice, the termination without notice etc. Examples of inalterability to the detriment of the employee, i.e. provisions which can not be altered if not in favour of the employee, are provisions concerning liability in case of transfer of the employment relationship, notice of termination at an improper time by the employer, the termination without notice in case of wage impairment, consequences of unjustified dismissal etc.

With this in mind, we would like to answer the following questions which may arise to any foreign lawyer looking for information about Swiss employment law. In general the answer will be related to a specific provision in the Code of Obligations and therefore it will be clearer and more expedient to refer to the text of the Code in a English version issued by the Swiss American Chamber of Commerce.

Answers to the questions of the Employment Law Practice Group:

Question 1: What are the minimum periods of notice that must be given by their employer to terminate an employment contract?

Answer: The parties are free to set the length of the notice period. Subsidiarily, should the contract not mention any notice period, its length is fixed by provisions in the Swiss Code of Obligations (OR):

OR Art. 335b: (During the probation period)

During the probation period, the employment relationship may be terminated at any time with a notice period of seven days; the first month of the employment relationship is deemed to be the probation period.

Deviating provisions may be agreed upon by written agreement, standard employment contract or collective employment contract; however, the probation period may be extended only to a maximum of three months.

In the case that a probation period is interrupted due to illness, accident, or the performance of a legal duty which is not voluntarily assumed, the probation period shall be prolonged correspondingly.

OR Art. 335c: (After the probation period)

The employment relationship may be terminated at the end of a month, during the first year of service with a notice period of one month, in the second and up to and including the ninth year of service with a notice period of two months, and thereafter with a notice period of three months.

These periods may be altered by written agreement, standard employment contract or collective employment contract. They shall, however, be reduced to less than one month only by collective employment contract and only for the first year of service.

Question 2: Does the reason for termination affect this?

Answer: No. The only exception is a termination without notice.

OR Art. 337: (Termination without notice)

For valid reasons, the employer, as well as the employee, may at any time terminate the employment relationship without notice. He shall justify the termination of the contract in writing if so requested by the other party.

A valid reason is considered to be, in particular, any circumstance under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship.

The judge shall decide in his own discretion (Art. 343) on the existence of such circumstances. In no event shall he consider the fact that the employee is prevented from performing work (Art. 324a) without his own fault to be a valid reason.

Question 3: What remedies does an employee have both as to unfair dismissal and otherwise?

Answer: There are three different possibility to dissolve the contract:

a) Unfair dismissal

The Code contains a list of reasons that may render a notice of termination unfair.

OR 336: (Protection from termination by notice)

The notice of termination of an employment relationship is abusive if a party gives it:

a) because of a quality inherent in the personality of the other party, unless such quality relates to the employment relationship or significantly impairs cooperation within the enterprise;

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

c) to solely frustrate the formation of claims of the other party arising out of the employment relationship;

d) because the other party asserts in good faith claims arising out of the employment relationship;

e) because the other party performs compulsory Swiss military service, civil defence service, military women's service, or Red Cross service, or a legal duty not voluntarily assumed.

The notice of termination of the employment relationship by the employer is, moreover, abusive, if it is given:

a) because the employee belongs or does not belong to an employee association, or because he lawfully exercises a union activity;

b) during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto, and, if the employer cannot prove that he had a justified motive for the termination;

c) in connection with a mass dismissal without prior consultation with the employees' representative body or, if there is none, the employees (Art. 335f).

Unfair dismissal calls for indemnity payment up to employee's wages for six months, leaving room for additional claims for damages based on other legal grounds.

OR 336a: (Sanctions)

The party which abusively gives notice of termination of the employment relationship shall pay an indemnity to the other party.

The indemnity shall be determined by the judge considering all circumstances. It shall, however, not exceed the employee's wages for six months. Claims for damages based on other legal grounds are unaffected.

If the termination according to Article 336, paragraph 2, subparagraph c is abusive, the indemnity may not exceed two months' wage of the employee.

All remedies are subject to a written protest against the notice within the notice period.

b) Termination at an improper time

Reasons that may let the notice of termination be deemed improper with regard to the timing vary according to who hands in the notice.

*OR 336c, paragraph. 1: (Notice of termination a an improper time: By **the employer**)*

Upon expiration of a probation period, the employer shall not terminate the employment relationship:

a) during the other party's performance of compulsory Swiss military service, civil defence service, military women's service or Red Cross service and, in case such service lasts more than twelve days, during the four weeks prior to and after the service;

b) during the period that the employee is prevented from performing his work fully or partially by no fault of his won due to illness or accident for 30 days in the first year of service, for 90 days as fo the second year of service until and with the fifth year of service, and for 180 days as of the sixth year of service;

c) during pregnancy and during the 16 weeks following lying-in of an employee;

d) during the employee's participation with the agreement of the employer at a foreign aid service assignment abroad ordered by the competent federal authority.

*OR 336d: (By **the employee**)*

Upon expiration of a probation period, the employee must not terminate the employment relationship if a supervisor, whose functions he is able to perform, or if the employer himself under the reasons determined by Article 336c, paragraph 1, subparagraph a, is prevented from exercising his activity, and the employee must perform this activity during such period.

A notice of termination rendered at an improper time shows no effect: the notice is null and void

OR 336c, Abs. 2:

Notice given during one of the forbidden periods in paragraph 1 shall be null and void. If the notice is given prior to the beginning of such period, however, and if the notice period has not expired prior to such period, the expiration shall be suspended and shall continue only after termination of the forbidden period.

If, for the termination of the employment relationship, a final date is fixed, such as the end of a month or of a working week, and if such date does not coincide with the end of the continued notice period, the notice period shall be extended until the next following final date.

c) Dismissal without notice

In case of unjustified dismissal the employee is entitled to his compensation for as long as the relationship would exist, had the contract been terminated upon a proper notice. In addition to that the employee may be awarded an indemnity not exceeding a six months' wage. The employee who does not appear with a valid reason is subject to a claim of one quarter of a one months' wage and may face further claim for damages.

OR Art 337c (In case of unjustified dismissal).

If the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period.

The employee must permit a set-off against this amount for what h3e saved because of the termination of the employment relationship, or what he earned from other work, or what he intentionally failed to earn.

The judge may obligate the employer to pay an indemnity to the employee which he may determine in his discretion taking into account all circumstances. Such indemnity may not, however, exceed the employee's wage for six months.

OR Art. 337d (In case of unjustified non-appearance at or leaving the working place)

If the employee, without reason (Art 337), does not appear at the working place, or if he leaves it without notice, the employer shall have a claim for compensation equal to one quarter of the wage of one month, and moreover he shall be entitled to compensation for additional damages.

The judge may reduce the compensation in his discretion if no damage was caused, or if the damage was less than the compensation provided for in the foregoing paragraph.

If the claim for compensation is not extinguished by set-off, it shall be asserted by legal action or debt enforcement within thirty days from the failure to appear at or leaving the working place; otherwise the claim is forfeited.

Question 4: In what courts do these remedies arise?

Answer: The Swiss cantons being responsible for the legislation with regard to procedural rules, it is not possible to give a general answer. However, in most cantons the jurisdiction would with lower courts, sometimes in specific employment courts.

Question 5: What compensation, beyond pay in lieu of notice, could be awarded?

Answer: None, apart from what has been shown in the answer to question 3.

Question 6: How is this calculated?

Answer: **-**

Question 7: Can the courts order reinstatement?

Answer: No, as long as the notice has not been timed improperly without effect, the court will not order reinstatement; not even in the case of an unjustified dismissal without notice.

Question 8: If so, in what circumstances?

Answer: **-**

Question 9: Are there obligatory or voluntary mediation arrangements and if so what form do these take?

Answer: No.

Question 10: If the employee has no written contract of employment, are minimum terms implied by law?

Answer: A written contract is not a prerequisite for the existence of an employment relationship. The minimum periods of notice are mentioned in article 335c OR, (see answer to question 1).

Question 11: If dismissal was found to be by reason of discrimination, is the basis/amount of compensation increased?

Answer: This is a case of abusive notice of termination; compensation will be awarded within the frame of article 336 paragraph 1 lit a; (see answer to question 3).

Question 12: If so, are there upper limits to the amount?

Answer: See answer 3a above; up to six wages of the employer**.**

Question 13: Is there a statutory requirement for contracts of employment to be in writing? If this is not done, what is the consequence for an employer?

Answer: No.

OR Art. 320
Unless otherwise provided for by law, an Individual Employment Contract requires no special form in order to be valid.

Question 14: Are the rights of an employee fully preserved in the event of the transfer of the business in which he is employed?

Answer: Generally speaking, the transfer does not affect the existing employment contract.

OR Art. 333: (Transfer of the employment relationship)

If the employer transfers the enterprise or a part thereof to a third party, the employment relationship, is transferred to the acquiring party including all rights and obligations as of the date of transfer, unless the employee declines the transfer.

If a collective employment contract applies to the employment relationship transferred, the acquiring party shall comply with it for one year unless it expires earlier or is terminated by notice.

Wit the decline of a transfer, the employment relationship shall be terminated upon the expiration of the legal term of notice (Art. 334). The acquiring party and the employee shall be bound to perform their contractual duties until such date.

The previous employer and the acquiring party shall be jointly and severally liable (Arts. 143-149) for an employee's claims which have become due prior (Art. 75) to the transfer, and which later will become due until the date upon which the employment relationship could have validly been terminated, or is terminated at the decline of the transfer by the employee.

Moreover, the employer is not entitled to transfer the rights from an employment relationship to a third party (Art. 164, paragraph. 1) unless otherwise agreed upon or is evident from the circumstances.