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CONTENTS

Switzerland

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Introduction – general labour market and litigation trends

The state of the economy in Switzerland is generally good and stable. The unemployment rate is low at approximately 2.5% in December 2019. Swiss GDP increased by 0.4% in the third quarter of 2019, after increasing by 0.3% in the previous quarter. Exports of chemical and pharmaceutical products and energy have been key contributing factors. In other areas, the impact of the subdued international environment was felt more strongly.

Swiss employment law has not been considerably amended in recent years and remains relatively liberal. However, there have been significant developments regarding gender equality and work-life balance.

This chapter aims at covering significant recent developments in Swiss employment law and case law.

Legislative framework

The Swiss legal system is mostly based on statutory law. Employment matters are mainly regulated at a federal level, by the federal Constitution, federal laws and federal ordinances. Cantonal legislation (Switzerland consists of 26 cantons) covers limited employment law issues. Case law interprets and clarifies statutory provisions.

Swiss citizens may influence legislation through popular initiative (a way for citizens to amend the Constitution) or via referendum (decisions of the parliament submitted to the vote of citizens).

As Switzerland is not part of the European Union (hereinafter: "EU"), EU law is not binding in Swiss Courts and has no direct effect on Swiss law. However, European law and case law can be taken into account when interpreting Swiss law.

Recent laws, regulations and ordinances

Amendment of the Gender Equality Act

In December 2018, the Swiss Parliament adopted an amendment of the Gender Equality Act. As there was no referendum against this amendment, it will enter into force on 1 July, 2020.

The new provisions require employers with a workforce of at least 100 employees to conduct an equal pay analysis. This analysis must be verified by an independent auditor or an employee representation and its results should be communicated to the employees.

The concerned employers must have carried out their first equal pay analysis within one year after the entry into force of the new provisions. This analysis must therefore be completed by the end of June 2021 at the latest.

The Swiss Parliament limited the period of validity of the obligation to conduct a salary analysis to 12 years. The new provisions will therefore automatically cease to apply on 1 July, 2032.

Current bills, popular initiatives and referendum

Whistleblowing

In Switzerland, whistleblowing is not yet regulated by specific provisions. In labour law, the admissibility of whistleblowing is currently judged from case to case in the light of the general obligations of the employee, in particular the duties of loyalty and discretion.

In 2013, the Swiss Federal Council proposed issuing legal provisions, determining more precisely how and on what conditions an alert can be given by an employee. In 2015, the Federal Parliament requested the Swiss Federal Council to amend and clarify several points, as the provisions drafted by the Swiss Federal Council seemed too complicated.

On 21 September 2018, the Federal Council submitted a revised version of the initial draft to the parliament. In June 2019, one of the chambers of the parliament rejected the new draft that was still considered too complicated, but the other chamber still must state its position.

In a nutshell, the Swiss Federal Council proposes procedures and rules to regulate whistleblowing, so that employees actually report to their superiors and authorities the irregularities they would witness in their job. The draft that the Federal Council has sent to Federal Parliament defines precisely when a report to the employer, the authorities or the public is lawful.

Paternity leave

Under Swiss law, mothers benefit from paid maternity leave of at least 14 weeks (some cantons provide 16 weeks). However, Swiss federal legislation provides no paternity leave. Instead, new fathers may benefit from one or two days of leave based on general provisions of the law. Some employers grant a few more days on a contractual or discretionary basis. Many new fathers must utilise vacation days should they wish for days off following the birth of their children.

After a popular initiative proposing a four-week paid paternity leave (which has been withdrawn due to the Parliament's bill), the Swiss Parliament proposed in September 2019 to introduce a two-week paid paternity leave. While the employers' associations had given up on opposing that bill, some politicians decided to launch a referendum against the two-week paternity leave proposed by Parliament. The Swiss electorate will most likely have to vote on this bill in 2020.

Adoption leave

At the Swiss level, under federal law, there is currently no entitlement to leave or paid leave in the event of adoption of a child. Nevertheless, the Swiss Parliament has recently proposed to introduce a two-week adoption leave, which should come into force if there is no referendum against it.

Leaves to take care of relatives

In May 2019, the Federal Council submitted a bill regarding family caregivers to Parliament. The bill provides for salary continuance for short-term absences (an employee may be absent to care for a family member), creates a 14-week paid leave for caring for a seriously ill or injured child, extends the benefits of the old age insurance for assistance tasks and adapts the entitlement to the allowance for impotency. The Parliament approved the bill, which should come into force if there is no referendum against it.

Recent case law developments

Scope of the Gender Equality Act

The purpose of the Gender Equality Act is to promote equality between women and men. This Act prohibits, *inter alia*, discrimination against employees on the grounds of gender, either directly or indirectly, in particular on the basis of marital or family status or, in the case of women, pregnancy.

In April 2019, the Swiss Supreme Court was asked whether the Gender Equality Act could apply towards discriminations based on sexual orientation.

In the case at hand, after his fixed-term contract was not renewed, the potential employee complained of discrimination in hiring on the grounds of his homosexuality and based his claims on the Gender Equality Act.

Whether discrimination on grounds of sexual orientation could constitute direct discrimination within the meaning of the Gender Equality Act has been disputed.

The Swiss Supreme Court found that the Gender Equality Act does not apply towards (and does not prohibit) discrimination based on sexual orientation. It explained that discrimination on grounds of sexual orientation could only be considered as discrimination on grounds of sex within the meaning of the Gender Equality Act if it has the effect to disadvantage mainly representatives of one sex in relation with the other.

Sexual harassment

The Swiss Federal Act on Equality between Men and Women defines sexual harassment as "*any harassing behavior of a sexual nature or other behavior related to the person's gender that adversely affects the dignity of women or men in the workplace is discriminatory. Such behaviour includes in particular threats, the promise of advantages, the use of coercion and the exertion of pressure in order to obtain favour of a sexual nature*". Depending on the circumstances, embarrassing sexual comments, sexual insinuations and sexist remarks can qualify as sexual harassment.

Recent federal case law gave some guidance to determine when behaviour must be characterised as sexual harassment.

At the end of 2018, The Swiss Supreme Court was asked whether calling an employee "*mistinguett*" could be viewed as sexual harassment.

In the case at hand, the employee had been working for the employer as an accountant since 2008. In 2010, the company experienced significant financial difficulties. The employee was unable to close the 2010 accounts for the company's audit. She was also unable to close the monthly accounts despite the support of an external certified public accountant. Given the seriousness of the situation, the latter was asked to issue a diagnosis on the functioning of the accounting process and on the quality of the employee's work. His report concluded that the employee did not have the necessary skills. On May 27, 2011, the employee sent an email to the Chairman and CEO complaining about the behaviour of the new sales manager. She felt that he was behaving aggressively and that, from the very first days, he had shown her disrespect both professionally and personally. She also reported that he had referred to her, thinking that she did not hear him, by the name of "*mistinguett*", referring – according to her – to cabaret women. In May 2011, the employer terminated the employee's employment contract.

The employee complained that the termination was abusive and explained that the use of the term "*mistinguett*" constituted sexual harassment. The Swiss Supreme Court noted that Ms. Bourgeois, known as *Mistinguett* (1875–1956), does not have any negative connotations from reading her biography. It also noted that nowadays the term "*mistinguett*" is used in

everyday language to refer in a familiar, but generally affectionate, manner to a young girl (miss) or young woman and that there is therefore no reason to set the threshold for sexual harassment at such a low level. It also added that, if a person used the name in the sense of a modern-day cabaret artist – which "*mistinguett*" was not – this should just be viewed as a lack of culture. That would not make it sexual harassment. Finally, the Swiss Supreme Court noted that the employer had already decided to terminate the employee's contract before receiving the email of May 27, 2011, based on the results of the expert opinion highlighting her shortcomings. Therefore, the dismissal was concluded as not abusive.

On the other hand, in August 2019, the Swiss Supreme Court found that there was sexual harassment present in a case where none of the elements produced in court had a sexual connotation, but all of which nevertheless fell within such a context.

In this case, the manager (and hence the employer) claimed to be framed by the employee who complained of harassment. He noted that the elements of the procedure (which showed, in particular, several attempts of the manager to contact the employee, especially at night when she was on sick leave, requests to eat with him, an e-mail with the words "*[i]t's a shame the hostilities are really going to start*", the termination of the employee's loan contract, and the sending of an empty box of chocolates of the brand "thank you") did not have sexual connotations.

The Swiss Supreme Court found that it was one thing for the employer's Director to have admitted his feelings to the employee, but it was quite another for him to have put pressure on her to induce her to enter into an intimate relationship with him. Prior to the aforementioned exchanges, the employee had been explicit in rejecting the idea of an affair; in particular with messages such as "*I'm firm, yes I don't want to have an affair with you*" "*please please I'm so tired please*". Despite the employee's refusal, the Director was insistent and put pressure on her by using his position as her superior to achieve his ends throughout 2014. Exhausted by this pressure, the employee found herself unable to work as of mid-January 2015. Although the messages produced in the proceedings contained no sexual connotation, the context in which they were exchanged was sufficiently obvious. The conduct of the employer's Director therefore constituted a form of sexual harassment.

Error of the employee on the consequences of an amendment to the contract on her potential unemployment benefits

In September 2019, the Swiss Supreme Court examined a case in which the employee sought to set aside her agreement with her employer reducing her working time because of a fundamental error on the basis that she did not know that the agreement would affect her entitlement to unemployment insurance benefits.

The employee had been employed under several successive contracts since 2011, with varying rates of employment. The last of these contracts started on April 2013 and provided for full-time employment. In September 2014, the employer wrote to the employee about a proposal that he had made and which the employee agreed with. The employee was supposed to switch "for economic reasons, as of October 2014, to a 20% working time percentage instead of the current 100%". Two days later, the employer transmitted to the employee her new working hours corresponding to an activity of 20%. Shortly after, the employee complained, amongst other things, that she was subsequently penalised by unemployment insurance for the abrupt nature of the change in the employment contract.

The cantonal court found that the employee had committed a fundamental error. It was fundamental for her to be able to obtain without delay through unemployment insurance the difference between her full salary and the salary corresponding to her reduced rate of employment of 20% as of 1 October 2014. The employer disputed the cantonal judgment before the Swiss Supreme Court.

The Swiss Supreme Court recalled what constitutes a fundamental error: an error is fundamental when it relates to facts which commercial loyalty would allow the person who relies on his or her error to regard as necessary elements of the contract. The fundamental error must first of all relate to a subjectively essential fact: from the point of view of the mistaken party, it must be possible to admit that, subjectively, his error actually determined him to conclude the contract or to conclude it on the agreed terms. It must then be justifiable to regard the fact to which the mistake relates as objectively a fundamental element of the contract: the other party must be able to realise, in good faith, that the mistake of the victim relates to a fact which was objectively such as to determine him to conclude the contract or to conclude it on the agreed terms.

The Swiss Supreme Court then explained that the Cantonal Court erred in holding that the employee's mistake regarding her entitlement to unemployment insurance benefits should objectively be considered fundamental according to commercial fairness. This condition was lacking. When a reduction in an employee's rate of employment is agreed, the employee's expectations with regard to unemployment insurance are not among the elements that commercial loyalty requires the employer to consider fundamental. The employer does not have to infer from a question asked of him on this subject that this is a fundamental element which could put into question the principle of the agreed reduction in working time. In principle, when an employee reduces his professional activity, it is to dispose of his time differently, and not in order to obtain financial compensation from a public insurance company. Depending on the situation, this element may of course be taken into account in the weighing of interests, but it is objectively not a fundamental element in accordance with the principle of good faith in business. Therefore, in the present case, there was no fundamental error. The employee had erred in its assessment of the impact of the agreement on its rights to unemployment insurance; this was an error as to the reasons for the contract, which was not essential.

Termination of an employment contract of minimum duration

In December 2019, the Swiss Supreme Court examined a case where the parties disagreed, in particular, on the date of the end of their employment contract.

The parties had included the following clause in the employment contract: "*after a probationary period of two months, the employment contract is concluded for a period of one year, renewable by tacit agreement (this contract is therefore of indefinite duration).*" The employment relationship started on 1 December, 2013. In May 2014, the employer terminated the employee's contract with effect on 30 June, 2014. Subsequently, the employee opposed her termination. She also pointed out that the contract was for a minimum period of one year and offered her services. However, the employer confirmed the end of the employment relationship on 30 June, 2014. It justified the dismissal by a loss of mutual trust and released the employee from her obligation to work until 30 June, 2014. At the end of July 2014, the employer finally acknowledged that the employment contract should end on January 31, 2015, and asked the employee to return to work. The employer explained that a significant extension of the notice period allowed him to reconsider garden leave. The employee made various arguments against the employer's position, including that she was unable to come back to work. In October 2014, the employer informed the employee that her absence constituted an unjustified failure to come back to work and that no further wages would be paid to her as the contract had ended.

The employee then raised claims against her employer and the case was ultimately submitted to the Swiss Supreme Court. The Supreme Court found that a contract of a minimum duration had been concluded between the parties and explained that this type of contract has the effects of a fixed-term contract during the minimum agreed duration and that employment relationships

could not be terminated by ordinary notice for a term prior to the expiry of the minimum duration fixed by agreement. For the employer, the only possibility of unilaterally terminating the employment contract during this period was a termination with immediate effect for just cause (extraordinary termination). The Swiss Supreme Court explained then that termination is in principle irrevocable. Exceptions are possible: the party who terminated the contract may withdraw the termination if the other party agrees with the revocation or if he has opposed to the validity of the termination and, in so doing, has expressed his will to maintain the contract.

In the case at hand, by confirming the end of the contract for the end of the current month, despite the employee's proposal to maintain the contractual relationship, the employer definitively terminated the relationship. A possible revocation of the termination was then no longer relevant, since the contract had already ended. Subsequent attempts by the employer to have the employee return could only constitute offers to conclude a new employment contract. However, there is nothing in the employee's behaviour which allows considering that she would have agreed to conclude a new contract. In this case, the employer's reason for the termination was a loss of mutual trust, with no evidence of any particular failure on the part of the employee or other circumstances justifying extraordinary termination. The Swiss Supreme Court therefore found that the employer did not have just grounds for terminating the employment contract with immediate effect.

In case of unjustified termination with immediate effect, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration. The employee's income from another job during the considered period is deducted from the amount of damages. In the case at hand, the employer was therefore condemned to pay the employee her salary between July 2014 and January 2015, minus a small amount of income she earned during that period.

In addition, the employer may also be ordered to pay the employee an amount of compensation (up to six months' salary) determined at the court's discretion taking due account of all circumstances. On this basis, the employer was condemned to pay an indemnity corresponding to one month's salary, taking into account the short duration of the employment relationship.

Termination with immediate effect

Swiss private law provides for two types of termination of employment contracts: (i) termination with effect at the end of the notice period; and (ii) termination with immediate effect for good cause. Notice of termination with immediate effect can be given by the employer or the employee at any time for good cause, i.e. circumstances which render the continuation of the employment relationship in good faith unconscionable for the party giving notice. Such termination must be pronounced without delay after discovering the facts justifying it.

In December 2019, the Swiss Supreme Court had to examine the case of an employee which had been dismissed with immediate effect by her employer.

The employer operating in the watch industry hired the employee as a production operator in 2006. The employee's husband was active in the import-export of watch products. In November 2015, at a sale intended for the company's staff, the employee purchased two watches, one of which, in gold, was sold to her at the preferential price of CHF 11,578 – and the other at the preferential price of CHF 1,447. The terms of purchase of these watches specified that they could not be re-sold. The couple's savings were almost totally used for the purchase of these two watches. According to the employee, the gold watch was to be given to her husband as a gift to celebrate their wedding anniversary. However, the husband stated that there were no special circumstances associated with this gift.

This watch, identified with the guarantee certificate, was offered for re-sale in May 2016 on the internet on the black market for CHF 30,000. According to partially divergent explanations given by the employee and her husband, a third party would have taken photos of the watch and would be responsible for the attempted re-sale.

In May 2016, following two interviews, the employer terminated the employment contract with immediate effect for just cause. The employer confirmed its decision to terminate on the grounds of the serious offence committed by the employee, which had clearly and irretrievably broken the relationship of trust. The employee claimed that she had not committed a serious misconduct and subsequently brought an action against the employer.

In November 2018, the Cantonal Court rejected this request. It considered that the high-end watchmaking sector in which the employee worked was a sensitive area and that the degree of trust towards the employees had to be high, which was reflected in the employment contract with its clauses on professional secrecy and confidentiality. Thus, the slightest action behind her employer's back was likely to destroy the bond of trust, *a fortiori* when the employee had someone close to him who was active in the watchmaking industry, which was the case of the employee's husband. The court therefore held that the employee's conduct was objectively likely to justify a termination with immediate effect. It then considered that this serious breach of duty was attributable to her fault; in fact, her modest financial means and the couple's differing statements as to the reason for the gift and the place where it was to be given lent credence to the argument that the purchase was a cold investment and not a matter of sentiment. The court refused to consider that a third party was responsible for the attempted re-sale of the watch. The court was convinced that the employee knew, or at least could very strongly suspect, that her husband intended this watch for his business and not for his wrist. Immediate dismissal was thus justified.

The employee disputed the judgment before the cantonal appeal body and then before the Federal Court. Both courts confirmed that the judgment was correct.

Post termination restrictions/non-competition clause

The Swiss Code of Obligations provides that the prohibition to compete must be appropriately restricted with regard to place, time and scope so that it does not unfairly compromise the employee's future economic activity.

In April 2019, the Swiss Supreme Court examined the validity of a non-competition clause that did not describe in detail the prohibited activities after the end of the contract.

In the case at hand, a marketing assistant had been hired by a coffee roasting company in 2007. She signed a clause prohibiting her from carrying out any competing activities on Swiss territory for three years after the end of the contract. Seven years later, in 2014, shortly after terminating her contract, the employee started working for a company selling beverages and coffee. After the conciliation failed, the former employer took legal action. The former employee, who had been ordered by the second instance to pay a contractual penalty, challenged the validity of the prohibition of competition clause before the Swiss Supreme Court, explaining that the clause was too inaccurate, as it did not describe the type of business that was prohibited.

According to some authors, a non-competition clause that is not limited as to place, time and type of business is not void but may be subject to reduction. Other authors are of the opinion that a non-competition clause is void if it does not contain, cumulatively, all three limitations. A minority of these authors argue that a non-competition clause is void if one or other of the limitations is not indicated with sufficient precision.

The Swiss Supreme Court recalled that in an old judgment (criticised by several legal

scholars), it had considered that a non-competition clause unlimited in time was not null and void. On the other hand, the Swiss Court explained that a clause prohibiting competition which has no limitation at all or which is too inaccurate (which scope could only be determined by using an interpretation of the clause based on the principle of trust) has no effect.

The Federal Court considered that it was not justified to change the case law by imposing an accurate description of the prohibited activities. In conclusion, a non-competition clause prohibiting "any competing activity" meets the formal requirements provided by law. It is sufficiently precise and its scope can be determined by general methods of interpretation.

Place of jurisdiction

According to the Swiss Code of Civil procedure, amongst other forum, labour law actions may be brought before the court of the place where the employee usually carries out his work.

In September 2019, the Swiss Supreme Court had to examine whether this forum could apply in a case where the employee's work was almost identically divided between two different cantons.

In the disputed decision, the Cantonal Court found that the employee, whose activity consisted mainly in travelling abroad, worked (when not travelling) on average three working days per month in Geneva (headquarters of the employer's group) and two days in Zug (in an office leased for the employee), the employee taking part in management meetings and meeting with clients in Geneva. The Cantonal Court had therefore held that the activity carried out in Geneva was more important than the activity carried out in Zug, and that the usual place of work was therefore in Geneva.

The Swiss Supreme Court recalled its case law according to which the employee's usual place of work is the place where the centre of the relevant activity is actually located. In accordance with unanimous doctrine, it is admitted that when an employee carries out activities simultaneously in several places, where one of those places is manifestly central, from the point of view of the activity provided, determines the forum to the exclusion of the others. This qualitative criterion determines a predominant geographical connection, suitable for establishing the jurisdiction of the corresponding forum, to the place where the employee plans and organises his travels and carries out his administrative tasks; where appropriate, that place coincides with his personal domicile. If none of the places are predominant, no forum at "the place where the employee usually carries out his work" is available; this special situation should however be considered only with restraint.

In the case at hand, the Swiss Supreme Court held that the employee was predominantly employed for travelling abroad. However, a geographical connection could be established at the place where the employee worked when he was not travelling, i.e. either in Geneva or in Zug. From a quantitative point of view, there was no significant difference in the activities carried out in each of these locations. There was no need to clarify whether the employee worked an average of three working days per month in Geneva and two in Zug, or two days per month in Geneva and three in Zug. In this situation, the Swiss Supreme Court notes that it would be permissible to assume that there is no place of habitual activity, and therefore no corresponding place of jurisdiction. That being said, the Supreme Court also noted that in Geneva (the headquarters of the group into which the employer was integrated) the employee took part in management meetings and met with clients. In view of these admittedly tenuous qualitative elements, the Supreme Court stated that it could accept that the Geneva courts had jurisdiction on the basis of "the place where the employee usually carries out his work".

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