Dear clients and business friends,

There is hardly any more drastic measure under Swiss labour law than termination without notice, since doing so creates a definitive legal situation and cannot be undone. The only remedies admissible in the case of unjustified termination without notice are those of a monetary nature. Lawmakers have not provided for the possibility of reinstatement. For this reason it is important to carefully verify beforehand whether all the prerequisites have been fulfilled, while still acting quickly in order to take into account the temporal requirements for terminating without notice. The case law on this is varied and not always free of contradictions.

In this edition of Legal News we summarise – from the employer’s perspective and with a view to the latest case law of the Swiss Federal Supreme Court – the most essential prerequisites as well as other relevant questions in connection with termination without notice.

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1. Introduction

Under Swiss labour law, the principle of freedom of termination prevails. In juxtaposition to this, there is the need to protect employees from arbitrary termination. This has resulted in the development of a rich jurisprudence, in particular in connection with termination without notice by the employer, which surely constitutes the hardest of all sanctions under labour law, for which reason it is rightly deemed to be an *ultima ratio* that can only be resorted to, despite the time pressure that exists in such situation, subject to prudent and reasoned action.

2. Requirements

Termination without notice by the employer is subject to different prerequisites that are discussed below with a particular emphasis on the existence of good cause.

2.1 Good cause

Pursuant to Art. 337 (1) Swiss Code of Obligations (SCO) termination without notice can only take place where there is good cause. Article 337 (2) SCO clarifies that good cause is constituted by any circumstance, the existence of which makes it unreasonable, in good faith, to demand that the terminating party continue the employment relationship (until the end of the orderly notice period). Whereas it is true that termination without notice can be given in the absence of good cause (see section 3 below), it is nevertheless the case that termination without notice is only legal and does not involve negative financial implications for the employer, where there is good cause. Everything stands and falls on whether or not there is good cause, something that repeatedly gives rise to discussions. Because the above cited provisions are absolutely mandatory and cannot be derogated from, their scope can be freely evaluated by the courts taking all the circumstances into account.

The range and number of cases is extensive, making a detailed discussion impossible within the confines of this article. For this reason, only a few examples are discussed where good cause was found to exist by the court.

- Acceptance of a bribe by the employee, who, by doing so, committed a criminal act (BGE 124 III 25).
- Breach of statutory secrecy obligations by means of an employee (secretly) recording a film inside of a home operated by his employer, and then passing on the film material to television (BGE 127 III 310).
- Where an employee arranged to have all of the director’s emails redirected, without the latter’s knowledge, to a personal electronic inbox of the employee (BGE 130 III 28).

To summarize, good cause is generally given in particular where the employee, in connection with his work activities, commits criminal acts or a serious breach of his duty of loyalty vis-à-vis his employer.

2.2 Unreasonableness

Good cause, in and of itself, is not sufficient grounds for terminating an open-ended employment relationship. Rather, what is also needed, is that it is no longer reasonable...
to expect the terminating employer to continue the employment relationship until the end of the orderly notice period for termination. Merely a diminution in the level of trust is not sufficient; rather trust itself must have been completely destroyed, which can occur for instance where an egregious breach of a contractual obligation vis-à-vis the employer has occurred (e.g. criminal act within the meaning of the above cited BGE 124 III 25).

2.3 Temporal urgency

As a rule, immediate dismissal must take place as soon as the employer becomes aware of the circumstances constituting good cause. From the essence of the concept of good cause, the case law of the Swiss Federal Supreme Court has derived that the employer, when opting to terminate the employment relationship without notice, cannot take an unreasonable amount of time. The Swiss Federal Supreme Court grants the party wishing to terminate a period of reflection that cannot exceed two to three days. Otherwise, one cannot assume that the (at least temporary) continuation of the employment relationship is not unreasonable and that the party wishing to terminate has waived his right to do so without notice. This period can only be extended where doing so appears justified in light of the practical needs of everyday and economic life (BGer 4A_238/2007, consid. 4.1., dated 1 October 2007). The burden of proof for the timeliness of the termination is born by the party exercising this right.

2.4 Formal requirements

Termination without notice is a unilateral declaration of will that is contingent on receipt by the recipient, and is not subject to any formal requirements. Accordingly, it can also take place orally, unless the employment contract in question explicitly requires the written form. As a rule, when terminating an employment relationship without notice, it is recommended this be done in writing, purely for evidentiary purposes. In any event, an unambiguous, clear and unmistakable manifestation of will on the part of the terminating party is required. In addition, the party on the receiving end of such termination can request that grounds therefore be provided in writing (Art. 337 (1) in fine SCO).

3. Consequences

The most important of all the consequences that ensue from termination without notice is the effective and legal rescission of the employment relationship. This means that the employment relationship is immediately rescinded, regardless of whether or not termination was justified or unjustified (i.e. without good cause). The date of cessation is that on which termination was declared.

3.1 In the case of justified termination

Where the employment contract was justifiably rescinded without notice, the employee immediately loses the right to be paid a salary. Moreover, in accordance with Art. 337b (1) SCO, he is fully liable for damages, namely any and all costs incurred by the employer by virtue of such termination without notice, such as the additional costs of hiring a temporary replacement (BG 97 II 142 consid. 5.a). It is often the case that the employer is satisfied where the termination without notice is not challenged and where he is thus not obligated to continue paying a salary.

3.2 In the case of unjustified termination

Where someone has suffered termination without notice that is not justified, he is entitled to claim damages and compensation pursuant to Art. 337c SCO. On the one hand, the employee is entitled to claim compensation for the salary that he would have earned up to such time as the next possible date for orderly termination (para. 1); from this sum one must deduct, in application of para. 2 of the aforementioned Article, whatever the employee has saved as a result of cessation of the employment relationship. On the other hand, he is entitled to special compensation, without having to prove he has suffered injury (para. 3), the amount of which is at the discretion of the judge, although it cannot be in excess of six months’ salary. At this point, reference is made to a recent case decided by the Swiss Federal Supreme Court, where the use of so-called spyware to constantly monitor the online activities of an employee was qualified as a violation of the ban on the use of monitoring and control systems in the workplace (Art. 26 3rd Labour Act Ordinance [ArGV3], resulting in termination without notice on the basis of knowledge obtained by the use of such monitoring being declared invalid (BGer 8C_448/2012 dated 17 January 2013).

4. Conclusion

There are always situations that could culminate in termination without notice. It is nevertheless worth carefully clarifying whether a more moderate measure, a warning or orderly termination are possible or reasonable, and whether good cause within the meaning of the law and the case law is effectively given.