

Employment Litigation and Timelines (Switzerland)

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Practice notes | Law stated as at 01-May-2023 | Switzerland

A Practice Note setting out the crucial steps and associated time frames that occur when running, managing, and defending an employment litigation matter in Switzerland. This Note describes the proper forum, the statute of limitations, the pre-litigation process, the litigation deadlines, the hearing types and formats, and the appeal process for employment litigation matters in Switzerland.

A dispute between an employee and an employer may result in employment-related legal proceedings. When bringing and defending an employment litigation matter in Switzerland, the parties must comply with certain mandatory procedural steps, including submitting pleadings within the required time frames.

This Note sets out the steps involved in an employee bringing and an employer defending employment litigation claims in Switzerland.

Forum of Employment Litigation

Territorial Jurisdiction

According to the Swiss Code of Civil Procedure (CCP), the courts with territorial jurisdiction to decide domestic disputes arising from private employment relationships are the courts in:

- The defendant's domicile or registered office.
- The employee's main place of work.

Such territorial jurisdiction is mandatory, which means that employees cannot validly waive it before the employment dispute arises (Article 34, CCP).

In international employment matters, territorial jurisdiction is determined by the Lugano Convention if the defendant is a member state of the Lugano Convention (Articles 19, 20 and 21, Lugano Convention). If this is not the case, jurisdiction is determined by the Swiss Private International Law Act (PILA) (Article 115, PILA). This means that:

- Swiss courts have jurisdiction to hear an employee's claim if either the employer's registered office or the employee's main place of work is in Switzerland.
- Under the Lugano Convention, an employer can only bring proceedings in the courts of the member state in which the employee is domiciled. Since the Lugano Convention rules of jurisdiction are considered mandatory, parties can only deviate from them after a dispute has arisen.

- Pursuant to the PILA, employees can also file a claim with the Swiss courts at their domicile or habitual residency. The Swiss rules of jurisdiction set out in the PILA are not mandatory. However, jurisdiction agreements have to meet certain conditions.

Subject Matter Jurisdiction

Switzerland is a federal state comprising 26 cantons. The subject matter jurisdiction of the cantonal courts dealing with employment claims is subject to the specific cantonal law. In most cantons, the courts of first instance have a specialised division handling employment matters (the labour court).

Limitation Date

Limitation Periods

An employee's claim against their employer becomes time-barred after either:

- Five years, if the claim relates to employee remuneration in a broader sense, such as salary, bonus payments, vacation entitlement, or overtime.
- Ten years for most other claims, such as claims for damages, abusive termination (that is, unfair or unlawful termination), or the issuance of a work certificate (Articles 127 and 128 of the Swiss Code of Obligations (SCO)).

The limitation period commences as soon as the claim is due. This means the date that gives the employee the right to bring a claim, for example, the date an employee did not receive a due salary payment (Article 130, SCO). In this respect, it is important to note that in any event all claims arising from the employment relationship fall due when the employment relationship ends (Article 339, SCO).

The employee can interrupt and pause the limitation period, for example by initiating debt enforcement proceedings, filing an application for conciliation, or a statement of claim (Article 135, SCO).

Forfeiture Periods

In addition to the statutory limitation periods, there are specific statutory deadlines that must be met in order to prevent claims from being forfeited. For example, employees seeking compensation for abusive or discriminatory termination must both:

- Submit their objection to the notice of termination in writing to the employer no later than the end of the notice period.
- Bring their claim for compensation before the courts within 180 days of the end of the employment relationship.

(Article 336(b), SCO; Article 9, Gender Equality Act (GEA).)

Pre-Litigation/Prior to Formal Employment Litigation Claim

Generally, a conciliation hearing before the conciliation authority is a mandatory prerequisite to bringing any employment litigation claim before the cantonal court of first instance (Article 197, CCP). However, the parties can mutually agree to waive a conciliation hearing if the value in dispute is CHF100,000 or more. In certain cases, a plaintiff can unilaterally waive the

holding of a conciliation hearing if, for example, the defendant is domiciled outside Switzerland or for disputes relating to gender discrimination (Article 199, CCP).

Proceedings are initiated by filing an application for conciliation (Article 202, CCP), which interrupts and pauses the limitation period (Article 135, SCO). The parties are usually required to attend the conciliation hearing in person because the conciliation authority attempts to reconcile the parties in an informal manner during a conciliation hearing (Article 201, CCP). They may, however, be accompanied by a legal representative (Article 204, CCP). In practice, conciliation hearings often prove to be successful, in particular in cases of low value disputes.

If no settlement is reached, the conciliation authority grants an "authorisation to proceed" allowing the plaintiff to file its claim with the competent first instance court within a time period of three months (Article 209, CCP). Should a plaintiff miss the deadline, it must file a new application for conciliation prior to starting proceedings again.

Litigation General Rules and Procedures

Main Phases of the Proceedings

As a matter of principle, ordinary court proceedings consist of three phases:

- The pleading phase, where the parties present and substantiate the factual allegations and offer evidence for the alleged facts (see *Pleading Phase: Written Submissions* and *Pleading Phase: Oral Submissions*).
- The evidentiary phase, where the court takes and evaluates the evidence (see *Evidentiary Phase: Oral Witness Hearings*).
- The closing-hearing phase, where the parties can comment on the outcome of the evidence proceedings and the merits of the case, and the court renders its judgment (see *Judgment*).

The court has wide discretion in directing the proceedings and can, for example, at any time, attempt to reach an agreement between the parties by scheduling additional hearings (instruction hearings) (Articles 124 and 226, CCP). Instruction hearings are often scheduled after the first exchange of written submissions.

Virtual Hearing

In Switzerland, the main hearing is an oral hearing in court with the parties and court members physically present. There is no legal basis for a court to summon parties to virtual hearings without their consent (Article 228, CCP). However, the CCP is currently being revised, and the use of videoconferencing in civil proceedings is being discussed, so a shift will likely occur in the near future.

Decision Maker

The organisation of the local court system is regulated by cantonal law and therefore differs from canton to canton. Typically, the panel consists of one to three judges, depending on the subject matter and the value in dispute. Some cantons also recognise lay judges.

Legal Representative

In principle, parties do not have to be represented by lawyers before Swiss courts. Any person who has the capacity to act has the capacity to take legal action and represent itself before court (Articles 67 and 68, CCP). However, it is common and advisable in employment litigation for both employees and employers to be represented by legal representatives specialised in litigation and employment matters.

Pleading Phase: Written Submissions

In the pleading phase, each party is entitled to two complete submissions, at least one of which will typically be in writing (see *Employee Submission of Claim* and *Defence Deadline*). In complex disputes or cases with a high value in dispute, the court usually orders a second exchange of written submissions (Article 225, CCP).

Employee Submission of Claim

Court proceedings are initiated by filing a written statement of claim with the court. In ordinary proceedings, employment law litigation in Switzerland is at the disposition of the parties, which means that it is up to the parties to decide to what extent they wish to submit claims as plaintiffs and to submit the factual allegations relevant to decide the dispute. Thus, the court can in principle not consider facts that have not been argued by the parties when deciding the matter.

Therefore, in ordinary proceedings, the statement of claim must contain:

- A statement of the grounds for the claim(s).
- The allegations of fact and the evidence offered for each allegation of fact (for example, available physical records, questioning of the parties, witness testimonies, expert opinions and inspections).
- Specific remedies for relief.

(Articles 220 and 221, CCP.)

The statement of claim usually also includes a statement of legal grounds, although this is not a requirement since the court must apply the law at its discretion. If the available physical records are in a foreign language, the plaintiff usually also has to provide translations, which often take time and generate substantial costs.

Submissions must be filed with the court in the form of paper documents or electronically via accredited, confidential platforms (Article 130, CCP). In practice, the electronic filing system is not yet widely used. However, it is expected that law offices and courts will switch to these new options in the near future.

In simplified proceedings, which apply, for example, in financial disputes with a value not exceeding CHF30,000 or in disputes relating to gender discrimination (regardless of the amount in dispute), the requirements of a statement of claim are less strict than in ordinary proceedings; the plaintiff can provide the statement of claim orally before the court (instead of providing a written statement of claim) and a statement of the grounds for the claim is not necessary (Articles 243 and 244, CCP). This is mainly due to the fact that in simplified proceedings, the court must establish the facts and appraise the evidence at its entire discretion (Article 247, CCP).

Employer Receipt of Claim

In Switzerland, the parties address all their submissions to the competent court, which serves the opposing party by registered mail or by another means which provides confirmation of receipt. There is an option of electronic service although this is not

used by the courts at the date of writing (Article 139, CCP). Service of court documents outside of Switzerland must generally occur by way of judicial assistance.

Defence Deadline

The court serves the defendant with the statement of claim (including all exhibits) and sets a deadline of typically 20 to 60 calendar days for filing a written statement of defence (Articles 222 and 245, CCP). Such deadline can be extended at the defendant's request, depending on the circumstances.

The statement of defence must, in principle, meet the same procedural requirements as the statement of claim (see *Employee Submission of Claim*). In addition, the defendant must state in detail which of the plaintiff's factual allegations are accepted and which are disputed (Article 222, CCP). Therefore, the defendant needs to specifically request that the claim(s) as presented by the plaintiff are dismissed and should also present its own factual narrative along with any relevant evidence. Subject to certain conditions, the defendant may also file a counterclaim in the statement of defence (Article 224, CCP).

Hearing

Pleading Phase: Oral Submissions

Irrespective of whether there is one or two rounds of written submissions (see *Pleading Phase: Written Submissions*), the parties are entitled to an oral main hearing before the court.

In such main hearing, the plaintiff is given the opportunity to plead its case, followed by the defendant's response, the plaintiff's reply, and the defendant's rejoinder (Article 228, CCP).

The parties can jointly agree to dispense with the main hearing (Article 233, CCP), which often happens if two rounds of extensive written submissions have previously been exchanged.

Evidentiary Phase: Oral Witness Hearings

After the pleading phase of the hearing, the court receives the evidence presented by the parties (Article 231, CCP), which may or may not take place at the same time as the oral hearing of the pleading phase.

In employment litigation, courts tend to rely mainly on written records. Thus, it is rather rare that extensive evidentiary proceedings are conducted.

With regard to witness testimonies, the court usually seeks to obtain a personal impression of witnesses in order to assess their credibility. Therefore, witness testimonies are generally given orally and during court hearings rather than in the form of written witness statements. In contrast to other jurisdictions, legal representatives in Switzerland are not permitted to influence witnesses in any way, for example by preparing a witness for their examination in court.

Closing-Hearing Phase: Closing Submissions

After the court has taken the evidence, but before it renders its final decision (see *Judgment*), the parties can comment on the result of the evidence and the merits of the case, either orally or, at the parties' request, by way of written submissions (Article 232, CCP).

Judgment

The court closes the proceedings by:

- Making a decision on the merits.
- Deciding not to consider the merits if certain procedural requirements (such as the jurisdiction of the court) are not met.
- Dismissing the proceedings without a review of the merits, if:
 - the plaintiff withdraws its claim;
 - the defendant acknowledges the claim; or
 - if the parties enter into a settlement agreement with regard to the pending proceedings.

(Articles 236 and 241, CCP).

The court can give its decision to the parties at the end of the main hearing, or at a later date, without providing a written statement of the grounds for such decision. However, the court must provide a written statement of the grounds for its decision if requested by one of the parties, which is a prerequisite to challenging the decision by appeal or objection (Article 239, CCP).

Civil law court hearings and the oral passing of judgment are conducted in public, except if the public interest or the legitimate interest of a person involved requires that the public is excluded (Article 54, CCP). Generally, while open to the public, court hearings are not attended by the public.

Copies of court decisions can be requested by anyone but are generally only made available in anonymised form. Further, many cantonal courts publish their decisions in anonymised form on their websites.

Ordinary proceedings in the first instance usually take between one and three years, depending on the complexity of the case and the court's organisation of the proceedings (in particular, whether the proceedings are conducted entirely in writing, and whether evidentiary proceedings take place).

Appeal Process

Who Can Appeal and How?

Swiss civil proceedings are based on the principle of double instance for the judiciary of the cantons, which means that each canton must establish a court of first instance as well as an appellate court. Decisions of the cantonal appellate court can be finally appealed to the Swiss Federal Supreme Court, which is the highest court of Switzerland.

There are two main appellate remedies to challenge the decisions of the cantonal courts of first instance:

- The appeal, which is available, principally, if the amount in dispute is at least CHF10,000 (Article 308, CCP). It allows for a full review of the decision on the grounds of both:
 - incorrect application of the law;

- incorrect establishment of the facts.

(Article 310, CCP.)

- The objection, which is available usually if the amount in dispute is less than CHF 10,000 (Article 319, CCP). It allows for a less extensive review of the decision. Besides the incorrect application of the law, only the obviously incorrect establishment of the facts is a valid ground for an objection (Article 320, CCP).

Both the appeal and the objection must:

- Contain a detailed statement of the grounds on which the decision is challenged.
- Be filed in writing with the appellate court within 30 calendar days from notification of the decision.

(Articles 311 and 321, CCP).

The appellate court serves the appeal or objection on the opposing party, and its written comments must be submitted within 30 calendar days of receipt (Articles 312 and 322, CCP).

Appeal Hearing

The appellate court has wide discretion in tailoring the proceedings to the specifics of the case. It may make a decision on the basis of the written case files or order a second exchange of written submissions, a main hearing, an oral hearing (for example, if witnesses are to be heard) or an instruction hearing (Articles 316 and 327, CCP). However, in general, appellate proceedings are conducted in writing and decided based on the documents on record.

The appellate court gives notice of its decision to the parties with a written statement of grounds. In its decision, the court can:

- Confirm the challenged decision.
- Make a new decision.
- Remit the case to the first instance.

(Articles 318 and 327, CCP).

Final Decision

In employment matters, a further civil appeal to the Swiss Federal Supreme Court against the decision of the cantonal appellate court is usually admissible if either:

- The value in dispute is at least CHF15,000.
- There is a fundamental legal question that needs to be clarified by the Swiss Federal Supreme Court

(Article 74, Swiss Federal Supreme Court Act (FSCA)).

According to the "principle of objection", the party filing the appeal must state in a stringent and detailed form to what extent the cantonal appellate court's decision is challenged. The grounds for a civil appeal are ordinarily limited to violations of federal and constitutional law, as well as obviously incorrect establishment of the facts (Articles 95 and 97, FSCA).

If the requirements for a civil appeal are not met, a "subsidiary constitutional appeal" can be brought in front of the Swiss Federal Supreme Court to challenge (only) violations of constitutional rights (Articles 113 and 116, FSCA).

The deadline to file an appeal with the Swiss Federal Supreme Court is 30 calendar days from notification of the cantonal appellate court's decision (Article 100, FSCA). At the Swiss Federal Supreme Court, the chance of being successful with an appeal is steadily decreasing. On average, only 10% to 20% of appeals are approved in full or in part. It is rare for employment law disputes to be appealed to the Swiss Federal Supreme Court.

Costs

Procedural costs include the court costs and the parties' costs (Article 95, CCP).

In certain disputes, no court costs are charged, for example, employment law disputes where the amount in dispute is less than CHF30,000 or the dispute relates to gender discrimination (Articles 114 and 116, CCP).

Switzerland usually follows the "loser pays" principle, which means that the losing party pays the procedural costs. If neither party is entirely successful, the costs are allocated in accordance with the outcome of the case (Article 106, CCP).

Procedural costs are calculated based on the laws of the canton where the litigation takes place (Articles 96 and 105, CCP). Generally, the procedural costs can be predicted quite accurately since they are calculated based on the value in dispute. The amount of costs recoverable from the losing party are usually substantially lower than the actual legal fees incurred by the winning party. However, parties, especially employees, often have insurance coverage for legal expenses incurred with respect to employment matters, which covers all or part of the legal costs.

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