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DROIT DU TRAVAIL

Les travailleurs âgés en Suisse et la protection contre le licenciement



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Older workers in Switzerland and protection against dismissal

A decision of the Swiss Federal Supreme Court rendered on 15 May 2023 (4A_117/2023) provides an opportunity to revisit the issue of the protection of older workers against dismissal under [Swiss law](#).

This issue has been the subject of a number of court decisions, which might suggest that it is no longer possible to dismiss an older employee and that there is now a new category of employee to be protected against dismissal, namely older employees (as is the case, for example, with pregnant employees). But is this really the case?

For the undersigned, the answer is currently no, or at least needs to be restrained, for the following (non-exhaustive) reasons:

1. The prevailing principle in Swiss contract law is always the principle of freedom of contract.

This means that the parties are free to enter into a contract but are also free (under certain conditions, of course) to terminate the contract. This principle applies to private employment law relationships that are based on an employment contract, and it is expressly stated in article 335 of the Code of Obligations that *“an employment contract of indefinite duration may be terminated by either party”*.

2. There is no provision in the Code of Obligations protecting this category of employees against dismissal, as is the case for sick or injured employees or pregnant women.

3. The notion of elderly employee is not clearly defined. In its case law, the Federal Court does not set an age limit for being considered an elderly employee. In the light of the decisions handed down, however, it would appear that the minimum age is 55. Moreover, age must also be considered in the light of years of seniority. On this point too, the Federal Court does not set a limit on the number of years, but it seems that seniority should be considered significant from 10 to 11 years of service with the same employer.

4. For the time being, the cases in which the Federal Court has confirmed that the dismissal of an older employee was unfair and has awarded significant compensation for unfair dismissal are quite extreme and exceptional. These were cases where the employee was very close to retirement and had a very long service record.

In the Federal Court's decision of 15 May 2023 (4A_117/2023), the employee was dismissed when he was 64 years old and 11 months from retirement. He also had around 30 years' seniority. In a 2005 ruling (ATF 132 III 115), the employee was also a few months away from retirement at the time of dismissal and had more than 44 years' seniority.

5. In its decision of 15 May 2023, the Federal Court reiterated that each case must be examined separately. For the Federal Court, *"when assessing whether dismissals of long-serving older workers are unfair, all the circumstances of the case must always be taken into account"* (free translation of ATF 4A_117/2023. c. 3.4.4).

6. While there is therefore no "absolute" protection against dismissal for older employees, the case law does point to a greater duty of assistance and protection on the part of the employer, who must show special consideration for this "category" of employees.

This means that, before dismissing an employee in this category, the employer must examine whether other solutions are possible.

In its decision of 15 May 2023, the Federal Court speaks of *"socially more acceptable alternatives"* (free translation of ATF 4A_117/2023. c. 3.4.4).

These solutions or alternatives may be diverse. Each case must be examined separately and it is not only the employee's situation but also the company's situation that will make it possible to establish which measures are possible and can be put in place.

Examples of such measures include a reduction in the number of hours worked, a transfer to another position or, of course, early retirement.

Where appropriate, the employer must also inform the employee in advance of his intention to terminate the contract and give him the opportunity to be heard, to express his views and to propose solutions.

But of course, in order to consider dismissal and/or the implementation of these measures, the employer must have an objective reason (as is the case for any dismissal, regardless of the employee). These may be objective reasons relating to the employee himself, such as inadequate performance or failure to adapt despite support having been put in place. But there may also be objective reasons relating to the company, i.e. economic reasons, such as poor performance, lack of work or the company's strategic imperatives, etc. (<https://droitdutravailensuisse.com/2022/03/06/le-licenciement-des-travailleurs-ages-etat-des-lieux/>).

In conclusion, while there is currently no "absolute" protection against dismissal for older employees, there is a *"heightened duty of assistance on the part of the employer, which is certainly not opposed to dismissal, but which requires the right to be exercised with care"* (free translation of ATF 4A_117/2023. c. 3.4.4).

The advice to be given to employers is therefore as follows: if the dismissal of an older employee, i.e. an employee aged over 55 with more than 10 years' seniority, is envisaged, the employer must ensure that there is a genuine objective reason and must examine,

before proceeding with the dismissal, whether there are other possible alternatives that are socially acceptable. The closer the employee is to retirement, the greater the protection.

As for employees who fall into the category of older employees, the advice is to think about possible alternatives and make proposals to the employer if there is a fear of dismissal or if the intention to dismiss is announced.

Source :

<https://www.wg-avocats.ch/en/actualites/labour-law/older-workers-in-switzerland-and-protection-against-dismissal/>