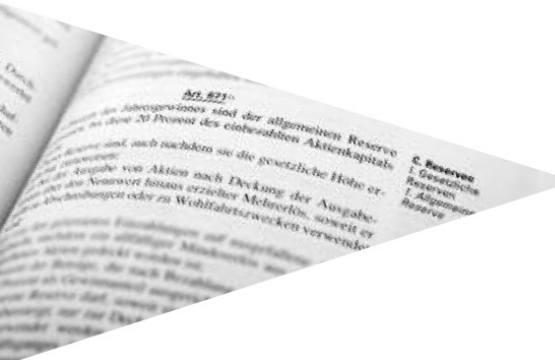


Legal News



Dismissal with the option of altered conditions of employment

Helga Mesaros, Attorney-at-law, Legal Services, helga.mesaros@ch.ey.com

Andrea Kaiser, Attorney-at-law, Senior Manager, Legal Services, andrea.kaiser@ch.ey.com

Dear clients and business friends

In the current economic circumstances, employers are increasingly finding themselves confronted by the question as to whether and to what extent the employment arrangements of their employees (particularly the salary) can be changed in favour of the employer.

From a legal point of view, a change of that kind represents an amendment of the employment contract. An amendment is basically only possible if both parties agree to it. If the employee rejects any such amendment, the only way the employer can force it through is by means of the so-called "dismissal with the option of altered conditions of employment".

This article introduces the instrument of the "dismissal with the option of altered conditions of employment" which, for the purposes of easier reading, will be referred to as the "conditional dismissal". Particular attention is devoted to the question of admissibility and the procedure that must be observed in order to avoid a situation in which a conditional dismissal is qualified as abusive or null and void.

Daniel Bachmann
Partner, Legal
daniel.bachmann@ch.ey.com

1. Introduction

With a conditional dismissal ("conditional dismissal"), the employment relationship remains intact, but at new, amended contractual conditions. If the amendment improves the situation of the employee (e.g. by means of an increase in salary), it can take effect immediately because the assumption is that the employee will automatically accept an improvement in his or her employment arrangements. If, on the other hand, the employee is presented with poorer working conditions, such as i. e. a reduction of salary with unchanged working hours, one cannot assume automatic agreement of the employee and therefore has to force the amendment through by means of conditional dismissal if no agreement can be reached. In an ideal case, the conditional dismissal contains not only factual termination of the employment relationship but also an offer from the employer to amend the employment contract with effect from the date on which the applicable period of notice comes to an end. If the offer is accepted, termination of the employment no longer applies. If, on the other hand, the offer is rejected, notice of termination is considered to have been given.

2. Legal admissibility

Although the conditional dismissal often applies a certain amount of pressure, it is basically admissible (according to the Swiss Federal Court in its decision 123 III 249 et seq.).

For the conditional dismissal, the same rules need to be followed as those that apply for "normal" terminations of employment. As a general rule, the conditional dismissal can only be issued as an "ordinary" termination, by complying with the contractual period of notice, whereby the period of notice begins when the counterparty receives the conditional dismissal. A conditional dismissal without a notice period is practically unthinkable because in contrast to the dismissal, without a notice period the conditional dismissal does not aim to terminate the employment relationship but to continue it with amended rights and obligations. Moreover, a dismissal without notice period is in any case only possible for just cause. Especially, the continuation of the employment relationship must seem to be unbearable.

Since a dismissal is a unilateral declaration of will which depends solely on the will of the party tendering it, that party must ensure that the conditional dismissal is clearly formulated. In particular, it must be made unmistakably clear that the employment relationship is going to end if the suggested amendments will not be accepted.

If the (conditional) dismissal is qualified as abusive, it nevertheless remains valid, but the party issuing it is then subject to a penalty payment totalling a maximum of six monthly salaries (article 336a CO).

A conditional dismissal is qualified as abusive if the amendment generates

pressure which is objectively not justified as is the rule, according to the Federal Court, for inequitable deteriorations which are attributable neither to operational nor market-based reasons. For a deterioration to be deemed 'inequitable', it must be a case of major changes which are not the fault of the employee and which cannot be justified by any of the mentioned operational or market-based reasons. Adaptations to the current situation on the employment market can be regarded as permissible in individual cases if the changes that are decided appear plausible.

The way the terminating party proceeds in the case of a conditional dismissal can also be qualified as abusive, depending on the circumstances. Particularly a conditional dismissal with too little time for it to be considered must be described as abusive or if the amendment should become effective before the end date of the contractual notice period. To summarise, conditional dismissals are abusive if they attempt to lead to an inappropriate change or are forced through with too little time for the employee to consider the situation.

If a certain number of conditional dismissals are issued, the rules regarding mass redundancies must be observed too (article 335d et seq. CO; see Legal News, March 2009, Reduced working times / mass redundancies).

3. Effects of the conditional dismissal

If the offered amendments are accepted, the employment relationship continues under the amended terms and termination of the contract lapses (if it has already been declared).

If the offer is rejected, the existing employment relationship continues at first without any changes, but it ends automatically on the last day of the period of notice if notice of termination and the offer of amended conditions were issued together. If, however, the offer of changed conditions was accompanied merely by the "threat" of termination, without notice of termination being formally declared, the employer still has to declare termination of the employment

contract. The existing contract remains in force and unchanged until the end of the period of notice. It is therefore decisive whether or not the offer of amendments was simultaneously accompanied by notice of termination. The declaration addressed to the employee must be clearly formulated in this point so that the employee knows whether the employment relationship is terminated or not. If the statement that the employer wishes to terminate the employment contract is not unmistakably expressed, the notice of termination is invalid. The party giving notice has to prove it and bears the risk of ambiguity.

If the employee affected by the conditional dismissal neither explicitly accepts nor rejects the offer amend the employment terms, it is once again a question of how the conditional dismissal is formulated. Furthermore, the silence of the employee has to be interpreted. If the employment arrangements continue without rejection or acceptance of the amendment, this is usually regarded as rejection of the new offer and the employment relationship then remains valid without any changes.

In order to avoid any lack of clarity, the employer should give the employee a period of time to consider his or her decision. If no period for consideration has been set, the notice period applies as such. It is advisable to have the employee confirm the changed terms of employment in writing before he or she starts work on the first day after expiry of the period of notice. This avoids a situation in which the employee regards the continued employment as an implied withdrawal of the offer of amendment.

If the conditional dismissal is declared during an improper time or if it cannot be understood as a notice of termination because of the way it is worded, the employment relationship usually continues without change if the offer has not been accepted by the employee.

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Contacts Legal

Basel: **Thomas Bauer**
thomas.bauer@ch.ey.com

Berne: **Daniel Bachmann**
daniel.bachmann@ch.ey.com

Geneva: **Olivier Dunant**
olivier.dunant@ch.ey.com

Zurich: **René Schwarzenbach**
rene.schwarzenbach@ch.ey.com