

NEWS

VACATIONS PAY INCLUDED IN THE BASE SALARY IN CASE OF SHORT-TERM EMPLOYMENT, MULTIPLE EMPLOYERS OR IRREGULAR WORKING HOURS

In a soon-to-be-published decision 4A_357/2022 rendered on January 30, 2023, the Swiss Supreme Court clarifies its case law on the inclusion of vacation pay in the base salary and reiterates the strict conditions to be met for such an inclusion to be valid under Swiss law.

SUMMARY OF FACTS

An employee was hired as of September 1, 2003, as a packaging worker with a 100% employment rate. According to the employment contract concluded by the parties, the working hours were 45 hours per week. A gross hourly salary was agreed upon, plus a vacation allowance of 8.33% (corresponding to 4 weeks of vacation per year), respectively 10.64% (corresponding to 5 weeks of vacation per year) as of January 1, 2019. During the Covid-19 crisis, the employer ordered its employees to take forced vacation. Subsequently, the employer terminated the employee's employment contract due to an internal reorganization and reorientation of the services provided by the company.

At the end of the employment relationship, the employee claimed compensation for the untaken vacation time. In this regard, she won her case before the court of first instance whose decision was then confirmed by the court of second instance. The employer filed an appeal before the Swiss Supreme Court and asked for this decision to be annulled and the employee's claim for vacation pay to be dismissed.

SUMMARY OF LEGAL CONSIDERATIONS

In essence, the employer argued that the lower court violated art. 329d of the Swiss Code of Obligations ("SCO") by not qualifying the activity performed by the employee as irregular, even though her monthly working hours varied 49 times between 2016 and 2020, sometimes by more than 20%. According to the employer, the irregularity of the activity justified the inclusion of vacation pay in the employee's hourly salary.

According to art. 329d para. 1 SCO, the employer must pay the employee the full salary due for the holiday entitlement and fair compensation for any lost benefits in kind. During the employment re-

lationship, the holiday entitlement may not be replaced by monetary payments or other benefits (para. 2). This mandatory provision is intended to ensure that the employee is able to take the necessary rest without being prevented from doing so because of a loss of salary. According to the case law, this provision notably prohibits clauses stipulating that vacation pay is not paid at the time the vacation is taken but is included in the base salary. The payment of a vacation allowance included in the base salary presents the risk that an employee facing financial difficulties spends the vacation allowance immediately and consequently refrains from taking leave at a later stage, thus depriving himself/herself of the necessary rest.

In some cases, however, the Swiss Supreme Court has exceptionally admitted such inclusion of vacation pay in the base salary, provided that strict conditions are met, namely that the activity performed is irregular and that the portion of salary intended for vacation is clearly indicated in both the employment contract and on each monthly salary slip.

If these conditions are not met, the employer must pay the salary for the vacation at the end of the employment relationship, irrespective of the fact that the employee has taken vacation in kind or not.

After reviewing the general conditions, the Swiss Supreme Court examined the notion of irregular activity. Such irregular activity is generally accepted for part-time employees whose activity rate varies greatly. In certain decisions, the Swiss Supreme Court has admitted that a full-time activity could also be irregular when the work schedule varies from month to month. In such case, the inclusion of vacation pay in the base salary could be justified by the practical difficulties for the employer to calculate the vacation pay accordingly.

Revisiting its case law, the Swiss Supreme Court now holds that in case of a full-time activity performed for the same employer, there are no insurmountable practical difficulties relating to the monthly variation of working time that could justify the inclusion of vacation pay in the base salary. According to the Swiss Supreme Court, given the large offer of software and working time recording systems available on the market, the practical difficulties previously admitted by the case law no longer constitute a sufficient material justification to derogate from art. 329d CO.

The Swiss Supreme Court therefore confirmed the previous decision condemning the employer to pay the vacation compensation at the end of the employment relationship and dismissed the employer's appeal.

PRACTICAL CONSEQUENCES

This decision clarifies the question of whether a full-time employment with the same employer allows for a system of inclusion of vacation pay in the base salary. The answer is now clearly negative.

In view of the tightening of the case law, an employer wishing to implement - or maintain - such an exceptional system will have to ensure that the following conditions are cumulatively met:

a) The activity is carried out on a very part-time basis with strong fluctuations in the working

schedule; it is a very short-term employment (of the temporary type) or the employee works for several employers simultaneously;

b) The percentage of the base salary that the vacation pay represents as well as the amount of the said pay must be clearly and expressly mentioned in the employment contract when concluded in writing. The sole mention of the monthly salary with indication "including vacation pay" is not sufficient;

c) The amount of vacation pay must be clearly indicated on each monthly salary slip so that the employee knows what part of his or her salary is to be set aside for vacation periods.

An analysis of each situation, as well as clear and precise documentation, are thus necessary. More than ever, employers must be careful when using such inclusion systems as they run the risk of having to pay once again the vacation allowance at the end of the employment relationship, should the material and formal conditions for such inclusion not be met.

If you have any questions or need assistance, please do not hesitate to connect with your BianchiSchwald contact person.

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