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FORUM, JURISDICTION OF THE COURTS AND TELEWORK

A decision of the Federal Court of March 22, 2022 (ATF 4A_548/2021) is an opportunity to remind that the place of jurisdiction in matters of labor law, i.e. the place where the employee may file a claim against his employer (and vice versa), is not necessarily the place mentioned in the employment contract or the employer's head office, but may be, in some cases, the employee's home.

As a reminder, according to article 34 of the Swiss Code of Civil Procedure (CCP), "*the court of the defendant's domicile or registered office or the court of the place where the employee usually carries out his professional activity has jurisdiction to rule on actions relating to labor law*". In other words, if an employee files a claim against his/her employer, he/she can choose to act before the courts of his/her employer's place of business or before the courts of the place where he/she usually carries out his activity.

The case that the Federal Court had to decide concerned an employer based in Bern and an employee responsible for the international market, in particular France, who was domiciled in the canton of Geneva. The employment contract designated Berne as the place of work, but specified that, in the context of his duties and functions, the employee could be required to work elsewhere in Switzerland or abroad. The parties had also "*concluded a telecommuting agreement providing for the installation of a workplace at the employee's home in... (GE) (art. 2), while leaving at his disposal a workplace at the company's headquarters (art. 4). However, the place of work remained determined by the individual employment contract (art. 5)".*

Following his dismissal, the employee brought an action against his employer before the courts of the canton of Geneva. The employer invoked, in an incidental motion, the lack of jurisdiction due to the location of the Geneva courts. According to the employer, the action should have been brought in Berne.

The Court of First Instance of Geneva, and then the Cantonal Court of the Canton of Geneva, both rejected the employer's incidental motion and thus accepted the jurisdiction of the Geneva courts.

This has also been confirmed by the Federal Court, which reminds the following principles regarding the forum in labour law disputes:

- The alternative forum provided for in Article 34 CPC "*protects the employee as the socially weaker party [...].*
- *Case law has specified how to determine the "place where the employee habitually carries out his professional activity" [...].*
- *The focus is on the place where the centre of the activity is actually located.*
  The place theoretically designated as the place of work is not taken into consideration, if the intention expressed by the parties has not materialized and no activity has been undertaken there. The circumstances of the specific case are

decisive. Both quantitative and qualitative aspects must be taken into account.

- ***If the employee is simultaneously employed at several locations, the one that is clearly central in terms of the activity performed shall prevail**.*

- ***Commercial travellers or other workers assigned to the foreign service of a company sometimes have no predominant geographical connection. However, such a connection may be the place where the employee plans and organizes his or her travel and performs administrative tasks. This may be his personal residence.***

- ***The place of jurisdiction may therefore be where the employer has no establishment or fixed installation.***

- ***The singular situation where no forum of the usual place of work is available should be considered with caution".***

- The search for the place where the employee habitually carries on business "*must be based on the employee's actual ties to a certain place".*

- It is therefore necessary to find out "*with which place the employee has actually had the most ties*".

In the above-mentioned case (ATF 4A_548/2021), it was held by the courts of first instance and the courts of second instance (and this was not considered arbitrary by the Federal Court) that Geneva was the usual place of work because, "*as a member of the management, the plaintiff [the employee] went to Berne about two days a month, sometimes four, to attend the meetings of the management committee and to meet with his superior.*

He did not have an individual office there, but shared an office with his subordinate, or even with all the representatives of A._____ France.

– However, he did not only take decisions when he was in Bern, but also performed a management function from his home in Geneva, where a teleworking station had been installed. He even carried out his activity mainly there when he was not travelling abroad, and this from a quantitative and qualitative point of view.

From... (GE), he was in permanent contact with his direct collaborators at A._____ France and even organized meetings there with the managers of this entity.

He did not necessarily travel to Bern to meet his superior, but also discussed with him by telephone. From his home, he was in constant communication with the company's headquarters.

In addition, he organized his travels and performed all his administrative tasks there".

This case is an opportunity to remind Swiss employers, but also employees, that the place of jurisdiction in matters of

labour law is not necessarily the place mentioned in the employment contract and is not necessarily the employer's head office. It may be located where the employer has no place of business or fixed establishment. It may also, in certain situations, be at the employee's home. This is worth keeping in mind as telework agreements are becoming increasingly common and as the employer's headquarters and the employee's usual place of work are often in different cities, but also in different cantons and even in different countries.

Source : https://www.wg-avocats.ch/en/actualites/labour-law/forum-jurisdiction-of-the-courts-and-telework/