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Newsletter

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EMPLOYMENT LAW

Termination of employment based on suspicions

Recent federal case law clarified the preliminary duties of an employer before terminating employment agreements based on suspicions, with a notice period or with immediate effect.

1 INTRODUCTION

The three recent cases discussed hereunder showed interesting developments about the rights and obligations of employers relating to **terminations based on suspicions**.

2 ATF 4A_251/2015 OF 6TH JANUARY 2016

2.1 FACTS

In this particular case, the employee was hired in 1998 as a manager by a bank. He was an executive.

On 10 October 2012, the employee was arrested in Geneva and was placed in pre-trial custody. He was suspected of **participating in a money laundering network**. Over the course of the criminal investigation, the employee's office was searched. The press recounted the matter mentioning that one of the suspected persons was an employee of the bank.

On 15 November 2012, the bank terminated the employment agreement of the employee with **immediate effect**. The bank paid the salary up to that date. The bank later motivated the termination insisting on the following elements: the arrest of the employee for his alleged participation in a large-scale money laundering operation,

the fact that the press recounted the matter and was still doing it, the fact that the bank had to send to the Public Prosecutor documents pertaining to several clients' accounts, as well as the seizure of several clients' bank accounts, all these elements leading to a loss of the trust relationship.

In December 2012, the employee recognized the charges that were brought against him. The pre-trial custody ended on 20 December 2012; in January 2013, the employee was sentenced to a suspended custodial **sentence for aggravated money laundering**.

2.2 IN LAW

Generally, a **termination with immediate effect must be pronounced without delay after discovering** the facts justifying it. Otherwise, the employer is deprived of his right to terminate with immediate effect and the termination is considered as unjustified because of its belatedness, even if it would have been entirely justified from a motives perspective. By not acting immediately, the employer is deemed to have accepted the continuation of the employment relationship, at least until the termination date under the employment agreement.

The employee argued that, even if he was put on remand on 10 October 2012, the employer had **not acted in due time** while waiting until 15 November 2012 to terminate him with immediate effect.

The employer no longer has the right to terminate with immediate effect if it can be inferred from his behavior that he waived it. The question raised with the Federal Tribunal was not to determine whether the termination with immediate effect was justified on the motives, but if it was admissible timing-wise.

The Federal Tribunal reminded the following principles:

- > In general, a **2 or 3 business-day period to assess** the case suffices,
- > An additional amount of time is tolerated if justified by practical requirements of daily and economic life. Thus, **an extension of a few days** is admissible when the decision must be made by a multi-head corporate body or when the representative of the employee must be heard.
- > An extension is also admissible when the facts require **clarification**. In the latter case, one must take into account the time needed to shed light on the facts. The employer must then immediately and without delay take all measures that can reasonably be expected from him to clarify the situation. The employer must sometimes investigate secretly and act cautiously in order to avoid condemning the employee in advance. Therefore, the employer must be able to carefully establish the facts, or at least in a way which withstands a judicial procedure examination, taking care of not breaching the employee's reputation with a hasty condemnation.
- > The employer also has an interest in clarifying the facts. Indeed, if suspicions are later proven to be unfounded, the termination with immediate effect will generally be ruled unjustified, save particular circumstances, notably when the employee unfairly prevented establishing the truth.

In this case, the Federal Tribunal insisted on the fact that **the decisive point was to determine whether, by his behavior, the employer showed that he waived his right to termination with immediate effect, more specifically that the continuation of the employment relationship was possible until the end of the ordinary notice period.**

In this case, considering the gravity of the charges, the employee could not have imagined being able to remain employed until the end of the ordinary notice period should facts be established. Moreover, there was no concrete emergency to act upon it, as the employee was neutralized during his pre-trial custody. Furthermore, had the employer condemned his employee based on suspicions which could later be unfounded, his actions could have risked ruining the employee's future professional opportunities. Eventually, the duration of the pre-trial custody, which was extended, further increased the suspicions against the employee. **The termination with immediate effect was therefore not belated** when it was notified, the employee not being able to infer from the employer's behavior that he waived his right to it.

One could have asked whether the termination with immediate effect, notified during a period over which there were only suspicions, was not, on the contrary, pronounced too early, the employer taking a risk if the suspicions were finally proven unfounded. This issue was not relevant as the employee later recognized the charges brought against him.

Consequently, determining the right moment to serve notice of termination with immediate effect is not always easy for an employer. As demonstrated by this case, the employer needed to avoid, on one hand, terminating his employee with immediate effect too early based on suspicions which could be later proven unfounded, and, on the other hand, making such a decision too late.

3 ATF 4A_419/2015 OF 19 FEBRUARY 2016

3.1 FACTS

The employer was a company providing logistic services. It had a hazardous product storage zone (Z zone) subject to specific security instructions. In particular, it was **forbidden to take pictures**.

An Employee (B) told his reporting line that, during an informal out of office conversation with Employee (A) held on 9 October, he explained to the latter piling up barrels containing hazardous material. Employee (A) then allegedly answered that such process was forbidden and asked him to take pictures. Employee (B) allegedly refused, stating that the taking of pictures was not authorized.

Employee (B) put in writing the entire conversation in a formal statement that he signed on 13 October to the care of his reporting line.

Based on this information, Employee (A) was **terminated** on 15 October **with immediate effect**. He contested his termination.

Heard as a witness during the proceedings, Employee (B) confirmed his statement and specified that, on 16 October, Employee (A) had asked him again whether he took the requested pictures. Employee (A) disputed using these words.

3.2 IN LAW

As a preliminary statement, the Federal Tribunal ruled that:

- > A **suspicion of serious offence or serious breach** could justify a termination with immediate effect, even if the accusation was later proven unfounded or remained unproven. Depending on the circumstances, such suspicions could indeed make the continuation of the employment relationship impossible. With this statement, the Federal Tribunal went a bit further than the assertions in the above-mentioned case of 6 January 2016.
- > However, generally, other elements exclude the validity of a termination based on suspicions, either because the alleged breach, even if proven, would **not be serious enough** to justify a termination with immediate effect without previous warning, or because the employer did not undertake all that was expected of him in order to **verify the suspicions**.

In this case, the Cantonal Court ruled that the employer, who bore the burden of proof, did not prove during the

judicial proceedings that the suspicions were founded. The Court judged that the sole allegations of Employee (B) were insufficient to prove the facts because they were not corroborated and because Employee (B) was still employed by the employer. This assessment was not criticized by the Federal Tribunal. Therefore, one had to determine whether the **suspicion as such, which could not be confirmed**, justified per se the termination with immediate effect.

"Before serving a termination based on suspicions, the employer must undertake reasonable steps to clarify the suspicions."

The issue raised by the case was that the termination was solely based on the assertions of Employee (B), neither with any verification, nor any discussion with the concerned employee.

The Federal Tribunal ruled that in this case, the sole suspicion that Employee (A) had requested the taking of pictures of a sensitive zone did not justify a termination with immediate effect, and that one had at least to collect the statement of the concerned employee. The Federal Tribunal therefore confirmed the position of the Cantonal Court which ruled that the employer could only assess the gravity of the potential fault of the employee after verifying if he was aware of the prohibition to take pictures, and after enquiring about the reasons for such a request.

The Federal Tribunal seems here to institute a **right to be heard** of the employee before any suspicion-termination. The employer must grant the employee an opportunity to express his opinion about the allegations made against him or that could lead to his termination before a decision is made. For lack of hearing the employee, the termination with immediate effect could be considered as unjustified, inasmuch as the employer, in the subsequent judicial proceeding, would not be able to prove that the employee well and truly committed the offences raised against him.

4 ATF 4A_694/2015 OF 4 MAY 2016

4.1 FACTS

In this case, the employee had worked for a medico-welfare establishment since 2002, first as an assistant nurse, then as a full-time medical auxiliary.

A patient informed the director of the establishment that he accused the employee of **stealing CHF 9.-** from the purse stored in his bedroom; the employee had brought a bottle of water in there when the patient was out for about twenty minutes. The employer heard the employee in the presence of two executive nurses. The employee stated the accusations against her were ill-founded.

On the same day, the medico-welfare establishment **terminated the employee within her notice period** and released her from her obligation to work. The termination was based on the theft denounced by the patient, the employer indicating that he had formed his opinion and that the trust relationship was irrevocably broken.

Later, the criminal investigation opened upon complaint by the patient was closed notably because several persons

were around when the theft took place and no investigative measure would be apt to direct the inquiry. The employee considered her termination to be abusive.

4.2 IN LAW

Deciding on the appeal of the employee, the Federal Tribunal noted that some scholars upheld the opinion that in case of denunciation against an employee, the employer had to accomplish or have accomplished, possibly by an external attorney should the accusation prove serious, a **complete investigation** including, for the employee, guarantees equivalent to the ones he would benefit from in the course of a criminal investigation, such as the right to prepare his own defense, to be assisted by a lawyer and to have means of evidence administered.

Without clearly stating that it followed this view, the Federal Tribunal rules that:

- > The employer must **strive to verify the facts risen against the employee**.
- > Considering Art. 328 CO, protecting the employee's personality rights (which include reputational rights), **the employee must equitably be able to defend his position when his honor is compromised**.
- > The steps to be undertaken should not be contemplated in an abstract and absolute way; **on the contrary, they depend on the concrete circumstances of each case**.

The Federal Tribunal ruled that persons other than the employee could have entered the bedroom, the patient being away for about twenty minutes. Moreover, the patient shared his bedroom with another patient, whose whereabouts were unknown during those twenty minutes. It was even possible that the other patient was present with another person visiting him. The patient also made contradictory statements in regards to the location of the purse, and the fact that he indicated counting the money in the purse before leaving the bedroom and again upon his return showed a peculiar state of mind.

Going further than in the here-above commented case of 19 February 2017, which insisted on the hearing of the concerned employee, the Federal Tribunal judges that the employer should have at least interrogated the other patient, notably to ask him whether he was present in the bedroom or whether he entered it and whether he had observed the employee.

"The clarification steps of an employer must be determined depending on the concrete circumstances of each case."

Furthermore, the Federal Tribunal ruled that the modalities of the interview with the employee were debatable because it took place bluntly and because the employee could not be assisted before and during the interview, as opposed to the director who was accompanied by two members of the personnel. The employee was **taken by surprise by the accusation**, then by the termination, **without really being able to defend her honor**.

Consequently, the Federal Tribunal ruled that the termination of the employee based on a serious accusation of theft, in turn based on a debatable statement, without undertaking all necessary verifications and without allowing the employee to effectively defend her position and her honor constituted an **abusive termination**. As compensation, the employee received an indemnity equivalent to four months of salary.

5 SUMMARY

A termination based on suspicions, be it with a notice period or with immediate effect, must be **exercised with caution**. It is likely to tarnish the professional future of the employee in the long term.

If the situation does generally not cause a problem when the employer is able, at least during the judicial proceedings, to prove his suspicions were finally founded, the employer risks **terminating** the employment agreement **in an abusive or unjustified way**, if he did not undertake, prior to the termination, all necessary **clarification steps**. The nature of these steps is not defined in an absolute manner, but must be determined on a case-by-case basis, depending on the concrete circumstances.

It is therefore advisable for employers, before deciding on a termination based on suspicions, to carefully determine the necessary preliminary steps to such a termination and/or to evaluate the risks linked to an omission. Equally, every employer should keep in mind that in case of termination with immediate effect, he must be able to justify in a convincing way that he acted without delay.

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The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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