BGer 1C_595/2023 of March 26, 2024: No protection against dismissal in the event of workplace-related incapacity to work

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Key takeaways

- **In the event of a workplace-related incapacity to work, the protected periods under Art. 336c CO do not apply. The employer can therefore terminate the employment relationship even during the period of workplace-related incapacity to work. The Federal Supreme Court confirms this in a new judgement (not a leading judgement).**
- **A workplace-related incapacity to work means that the employee concerned is only incapacitated to work regarding his current position. The employee is fit for work for all other positions. The reason for a workplace-related incapacity to work may be, for example, a conflict or bullying at the workplace. But bullying does not per se lead to a workplace-related incapacity to work. The Federal Supreme Court, however, has a strict definition of bullying. It affirms bullying only in blatant conflict situations, those that go beyond a simple conflict at the workplace.**
- **In the event of a general incapacity to work, which is not limited to the current position, the protected periods always apply without restriction. This is the case, for example, if the employee is hospitalized or suffers a burnout that leads to depression. In this case, the employer cannot give notice.**
- **Thus, qualifying incapacity to work as workplace-related or general is of great relevance. In our opinion, the examining doctor must therefore state in the medical certificate whether the incapacity to work is workplace-related or general.**

What has happened?

A. (employee) had been an instructor with the Swiss Army since 1997, most recently as a lieutenant colonel on the staff of the training command (employer).

Since 2015, the employee had a secondary activity as a member of the board of the association for the support, administration, and promotion of the Patrouille des Glaciers, which he only reported to the employer in 2021.

The employee's false resp. incomplete information about his secondary activity and other misconduct worsened the relationship of trust. On September 1, 2021, the employer informed the employee that it wished to terminate the employment relationship with notice as of March 31, 2022. The employee was subsequently incapacitated to work with retroactive effect from August 25, 2021, initially 50% and from September 2, 2021, 100%.

Finally, the employer terminated the employment contract with effect as of November 30, 2022, by resolution dated May 25, 2022, and released the employee with immediate effect. The employer justified the termination primarily based on the employee's years of systematic and deliberately false information about his secondary employment and the considerable additional income he had earned from it.

The employee lodged an unsuccessful appeal against this dismissal with the Federal Administrative Court and then also unsuccessfully with the Federal Supreme Court. Among other things, he demanded continued payment of salary based on protection against dismissal from December 1, 2022.

What did the Federal Supreme Court consider?

The Federal Supreme Court now had to decide whether the employer terminated the employment relationship at an inopportune juncture within the meaning of Art. 31a para. 1 of the Federal Personnel Ordinance (BPV), because the employee was incapacitated to work at the time of termination.

The Federal Supreme Court applies the Federal Personnel Ordinance (BPV), because the employment relationship in question was under public law (employee of the Swiss Army, Confederation). At the same time, the Federal Supreme Court points out that these principles also apply to employment relationships under private law based on Art. 336c CO.

Art. 336c CO regulates the temporal protection against dismissal, the so-called protected periods. According to this, an employee is protected from the employer’s dismissal during certain periods of time. For example, if the employee is wholly or partially unable to work due to illness through no fault of their own (incapacity to work), they are protected from dismissal for 30 days in the first year of service, 90 days from the second year up to and including the fifth year of service, and 180 days from the sixth year of service (Art. 336c para. 1 lit. b CO).

Art. 336c para. 1 lit. b CO is inapplicable in the event of illness if the health impairment is so insignificant that the employee can nevertheless start a new job. According to case law, this holds true if the incapacity to work is limited to the workplace. This may be the case, for example, with a conflict situation at the workplace. Dismissal without applying the protected period is therefore possible in the case of workplace-related incapacity to work. However, in the case of general incapacity to work, where the employee is also unable to work at other workplaces, the protected periods apply without restriction.

In connection with a conflict at the workplace, the Federal Supreme Court also mentions the employer's duty of care under Art. 328 CO. This states that the employer must take measures to protect the employee's personality and health. Bullying, for example, constitutes a breach of this duty of care.

However, the Federal Supreme Court adopts a restrictive definition of bullying: bullying is defined as a series of hostile statements and/or actions that are frequently repeated over an extended period of time and with which one or more persons attempt to isolate or exclude another person in the workplace or even attempt to remove them from their workplace. The victim is often in a situation where each individual act may be considered acceptable, but the totality of the acts can destabilize the victim and even lead to their removal from the workplace. A workplace conflict, incompatible characters or a bad working atmosphere do not constitute bullying.

In the present case, the Federal Supreme Court considered that the incapacity to work was closely linked to the employee's job. The medical files referred to an anxiety and depression disorder triggered by problematic situations at the workplace. Accordingly, non-medical factors, i.e., difficulties at the workplace, influenced the state of health.

Isolation and exclusion, as claimed by the employee, can indeed be indicators of bullying. However, in this specific case, these did not reach the necessary level of conflict severity to be considered bullying. Thus, with no bullying in this case, the employer did not breach its duty of care to prevent bullying. Ultimately, there was a simple conflict at the workplace, which was workplace-related. Accordingly, the protected periods pursuant to Art. 31a para. 1 BPV (Art. 336c CO applies to the employment relationships under private law) did not apply, and the employer was permitted to terminate the employment relationship with due notice and without protected periods.

Why is this judgement important?

With this judgement, the Federal Supreme Court confirms for the first time that the protected periods under Art. 336c CO do not apply to workplace-related incapacity to work. The reason for this is that the employee can work for other employers without restriction. It can therefore not be assumed that the workplace-related incapacity to work reduces the employee's chances of finding a new job. The employee is fully capable of working for a new employer. In practice, it is thus important to qualify the incapacity to work as general or workplace related. According to the view expressed here, doctors must note on the medical certificates whether the incapacity to work is workplace-related or general. This is necessary for assessing the legal situation, as is the degree of incapacity to work and the cause of the incapacity to work due to illness or accident (which are already regularly stated in the medical certificates).

The Federal Supreme Court's judgement is in line with the practice of various courts in German-speaking Switzerland and the Federal Administrative Court but contradicts the practice of numerous courts in French-speaking Switzerland.

The Federal Supreme Court also adopts a strict definition of bullying. It should be borne in mind that bullying does not per se lead to a workplace-related incapacity to work. It is also conceivable that bullying may lead to depression rendering the employee generally

incapacitated to work.

In practice, the question of continued payment of wages may also arise. The Federal Supreme Court did not comment on this issue in the present judgement. An eventual extension of the notice period is not coordinated with the employer's obligation to continue to pay wages, and it must therefore be distinguished from this. The continued payment of wages is governed by Art. 324a CO. Even if the incapacity to work is workplace-related, the employee is generally still entitled to a salary.

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No legal or tax advice

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