BGer 4A_189/2023 of 4 October 2023: Termination of employment following a warning without a new breach

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Key takeaways

- **It is not uncommon for employers to issue warnings.**
- **An employer who intends to issue a warning, however, should not allow the employee to later argue that he/she can be dismissed only if another breach occurs. Thus, the employer should include an explicit reservation of rights in the warning, including its right to terminate the employment relationship, at any time, respecting the contractual notice period or with immediate effect.**
- **If the warning does not include such a reservation of rights, the Swiss Federal Supreme Court's ruling discussed in this update may help. According to this decision, a dismissal following a warning, without a new breach, while inappropriate is not necessarily abusive. The dismissal could only be abusive if the employee made investments (e.g., moved from abroad to Switzerland) trusting that his/her employment would continue, which was then made in vain due to the dismissal.**

What happened?

An employee of B Ltd. had serious issues with excessive alcohol consumption since the end of 2017 or the beginning of 2018. This behavior had an impact on her work and also became the subject of a discussion with the management. As of July 2018, she was in psychiatric treatment because of a depressive disorder and a harmful consumption of alcohol.

On 11 September 2018, the employer warned the employee in writing to no longer come to work intoxicated; otherwise, she would be dismissed. Immediately thereafter, namely in a conversation on 12 or 13 September 2018, the management informed the employee that B Ltd. wished to terminate the employment relationship. When the employee returned to work on 1

November 2018, the employer provided her with the written notice of termination with effect as of 28 February 2019.

On 25 August 2020, the employee filed a claim against the employer. Among other things, she sued for the payment of a compensation for abusive termination and a bonus. The regional court ordered the employer to pay her a bonus of CHF 13,285 (which the employer had acknowledged) and rejected all other claims. The employee appealed to the Federal Supreme Court.

What did the Federal Supreme Court consider?

The Federal Supreme Court decided that the employer's notice of termination of 1 November 2018 was valid and effective. Consequently, the legal dispute in question turned solely on the termination's alleged abusiveness.

Abusive termination – Legal basis

Either party may terminate an employment contract, concluded for an indefinite period, for any reason in accordance with art. 335 para. 1 CO. Such a dismissal is abusive, however, if the terminating party issued it for an abusive reason (Art. 336 para. 1 CO). The abusiveness need not follow from the reason for termination; it can also be due to the circumstances of the termination itself. The party wishing to terminate the employment contract must exercise its right with consideration and refrain from biased or misleading behavior. A behavior that is merely inappropriate or unworthy of an established business relationship, on the other hand, would not render the termination abusive.

The employee’s argument – Contradictory behavior of the employer

The employee claimed that the employer had acted inconsistently and therefore criticized the employer's actions (and not the reasons for its actions). The employee argued that she had relied on the content of the warning, dated 11 September 2018. The warning had, in a way, put an end to past events; with the warning, the employer had sanctioned the employee's actions, but at the same time also confirmed that it did not wish to terminate the employment relationship. The employer could only have revisited its decision if the employee had again showed-up for work intoxicated. However, such a relapse did not occur.

Non-abusive ordinary termination due to loss of trust

The employer, however, did not terminate the employment relationship with immediate effect because the employee had again appeared drunk at work. Instead, the employment was terminated respecting the notice period. Simply stated, the employer issued the termination because it had lost confidence in both the employee's ability and willingness to overcome her addiction. According to the employee, this decision was taken on 12 or 13 September 2018. The Federal Supreme Court found that, although the employer had announced its intention to terminate her employment on one of these two dates, it did not execute its intention until 1 November 2018, when it served the employee with the formal notice of termination. The Federal Supreme Court confirmed that the employer's actions were indeed conspicuous or even inappropriate. In particular, it seemed strange to send a warning only to announce the intention

to terminate the employment relationship soon thereafter. Nevertheless, the subsequent termination was, in principle, not abusive within the meaning of Art. 336 CO, provided that the employee did not make investments trusting on the continuation of the employment relationship (e.g., by moving from abroad to Switzerland). In the present case, the employee did not claim that she had made such investments after the warning of 11 September 2018. On the contrary, she immediately began looking for a new job. Accordingly, the employer's approach, albeit inappropriate, was not abusive.

Why is the decision important?

In practice, a warning is a crucial and commonly applied measure to not only discipline employees who have engaged in misconduct but also to document this misconduct. The employer should ensure, however, that the warning does not unduly restrict its own future options; most importantly, the warning should not provide the employee with a reason to challenge as abusive a subsequent dismissal. The employer can easily prevent this problem by including a corresponding reservation of rights in the warning.

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No legal or tax advice

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