

BGer 4A_486/2024 of 15 January 2025: Termination with immediate effect due to failure to submit medical certificates

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Key takeaways

- **The Federal Supreme Court emphasises the duty of employees to provide prompt, continuous and complete information regarding absences, particularly in the case of incapacity to work due to illness.**
- **If an employee repeatedly violates this duty to provide information and the employer has already threatened consequences under labour law, termination with immediate effect may be justified. This is because the employer has a legitimate interest in being informed about any absences and their duration as quickly as possible, in order to take corresponding measures and avert damages as a result of the absence.**
- **However, the circumstances of the individual case must always be considered. A repeated violation of the employee's duty to provide information may not justify termination with immediate effect in all cases.**

What has happened?

A. (employee) had been employed at B. Ltd. (employer) as head brewer for the production of beer since 1 August 2020. On 27 October 2021, the employer terminated the employment relationship as per 31 January 2022.

On Tuesday, 2 November 2021, the employee reported sick. She informed the employer on Friday, 5 November 2021 that she would only be able to see a doctor on Monday, 8 November 2021, at the earliest.

On Monday, 8 November 2021, the chairman of the employer's board of directors instructed the employee to appear at the workplace on the next day at 11:00 with a medical certificate or

to inform him accordingly if this was not possible and to send him a medical certificate. The employee responded that she would not appear at the workplace and that she would provide a medical certificate. On the same day, the chairman of the board of directors asked the employee once again to provide a reason for her absence and inability to appear at 11:00 and requested her to cooperate in the ordinary termination of her employment and comply with her contractual duties.

On Tuesday, 9 November 2021, the chairman of the board of directors again urged the employee to duly report to work or to provide a medical reason for her absence and again requested a medical certificate. At the same time, he warned the employee of further measures, such as the suspension of salary payments for the days of absence and termination with immediate effect.

On Wednesday, 10 November 2021, the employee submitted a medical certificate, which she had already received on Monday, 8 November 2021. This medical certificate confirmed her incapacity to work until Thursday, 11 November 2021. The employer subsequently asked the employee whether she would be fit for work again on Friday, 12 November 2021. The employee answered that she would know after her doctor's appointment on 12 November 2021. However, she failed to contact her employer up to and including Monday, 15 November 2021.

Late in the evening on Monday, 15 November 2021, the employer therefore terminated the employment relationship with the employee with immediate effect. On Thursday, 18 November 2021, the employee submitted an undated medical certificate, which stated that she would be 100% incapacitated to work from Friday, 12 November 2021.

The employee unsuccessfully brought an action before the District Court seeking, among other things, compensation for unjustified termination with immediate effect. The appeals to both the cantonal High Court and the Federal Supreme Court were likewise unsuccessful.

What did the Federal Supreme Court consider?

The Federal Supreme Court had to determine whether or not the requirements for termination with immediate effect were met and thus whether or not it was justified.

Termination with immediate effect under Art. 337 of the Swiss Code of Obligations (CO)

The Federal Supreme Court initially clarified the statutory basis for termination with immediate effect and the associated case-law.

According to Art. 337 CO, both the employer and the employee may terminate the employment relationship with immediate effect at any time for important reasons (para. 1). In particular, important reasons are any circumstance which render the continuation of the employment relationship in good faith unconscionable for the party giving notice (para. 2). The court determines at its discretion whether there are important reasons. However, the court may not recognise the employee's incapacity to work without fault (e.g. due to illness) as an important reason (cf. para. 3).

In accordance with case-law, termination with immediate effect by the employer is only justified for particularly severe breaches of duty on the part of the employee, which either destroy the essential basis of trust for the employment relationship or fundamentally damage it to the extent that the employer can no longer be reasonably expected to maintain the contract. Less severe transgressions may only justify termination with immediate effect if they occurred repeatedly despite warning. Whether or not the transgressions of the employee justify termination with immediate effect always depends on the specific circumstances of the individual case. However, the statutory and contractual duties of the employee must be considered.

Duties of the employee

The employee's statutory duty of loyalty includes the so-called duty to inform, according to which the employee is obligated to notify the employer of foreseeable absences as early as possible and of unforeseeable absences promptly upon their occurrence. This also applies to absences due to illness or accident. In these cases, the employee is obligated to promptly inform the employer about the expected duration and extent of the incapacity to work, without being asked to do so, as soon as their health condition permits. This not only applies to the beginning of the absence but for the entire duration. The employee must always notify the employer promptly, continuously and completely about their incapacity to work, their prognosis and any changes to the situation. This applies in particular to employees with a key function in the company. Only when these obligations are met is the employer able to take organisational measures to prevent damages as a result of absences.

Significance in the case in question

Apart from the employee in question (i.e. the head brewer), only one other permanently employed beer brewer worked at the employer's company. The employer's business was in a particularly busy phase at the beginning of November due to the upcoming Christmas season. The employer therefore had a legitimate interest in finding out as soon as possible when the employee would be fit for work again.

Nevertheless, the employee breached her duty to inform twice. On Monday, 8 November 2021, the employee received a medical certificate which she did not promptly pass on to her employer. Instead, she merely informed her employer that she would submit such a document, without providing specific information about the duration of her incapacity to work. She thus left her employer in the dark and hampered operational planning. Following another doctor's appointment on Friday, 12 November 2021, she once again neglected to inform the employer about the continued incapacity to work. She failed to contact her employer for four days until she was terminated with immediate effect on Monday, 15 November 2021. Furthermore, she was unable to explain why she had been unable to contact the employer during this time due to the illness or other reasons.

As a result, the employee neglected her duty to provide prompt, continuous and complete information. This conduct constituted an important reason for termination with immediate effect.

It was also sufficient that the employer warned the employee only once, namely on Tuesday, 9 November 2021, about a possible termination with immediate effect. This warning applied for the remaining duration of the employment relationship and the employee was thus aware of the severe consequences under labour law that would result from a further breach of her duty to inform.

Ultimately, the Federal Supreme Court came to the conclusion that the termination with immediate effect was not objectionable and was therefore justified.

Why is this judgement important?

In practice, employees often do not (fully) comply with their duty to inform the employer about the reasons for their absence. The judgement by the Federal Supreme Court clearly illustrates this duty and stresses its relevance particularly in the case of absences due to illness. It shows that the employee has a duty to provide his/her employer with prompt, continuous and complete information, without being requested to do so. The judgement can thus be consulted when assessing an employee's duty to inform.

If an employee repeatedly fails to comply with his/her duty to inform and he/she has already been warned of consequences under labour law, this may justify termination with immediate effect. Therefore, under certain circumstances, failure to submit medical certificates may justify termination with immediate effect.

However, the Federal Supreme Court's judgement is not a leading judgement and in certain respects represents a special case as it involved a small company in a busy phase at the time of the termination with immediate effect. In other words, failure to submit medical certificates may not always justify a termination with immediate effect. Rather, the specific circumstances of the individual case must always be considered.

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No legal or tax advice

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