BGer 8C_176/2022 of 21.09.2022: Termination Agreement with Employee

10.08.2023

What was this case about?

A was employed by the Central Compensation Office ("CCO") as system and network administrator since 1 September 2014. His notice period was three months to the end of a month.

On 25 November 2020, A's division head approached A and asked him to follow him to a conference room where A's direct superior and two members of human resources were waiting for him. A's direct superior and the division head then explained to A that collaboration with him had become very difficult. To amicably end the employment relationship, CCO offered A a mutual termination agreement. At the same time, they handed over a letter in which CCO described the facts and his shortcomings and granted A a deadline of two days, i.e., until 27 November 2020, to assess the offered agreement and to return a signed copy thereof.

At the meeting, A asked for some further information about his shortcomings. He then re-read the agreement and requested an amendment, namely that CCO pay him his salary until June 2021. One of the members of human resources told A that the offer already included one additional month's salary, but that CCO was willing to pay A one additional month on top. A accepted this offer. He signed the agreement, after having asked one of the attending individuals to lend him a pen.

Pursuant to the signed termination agreement, A's employment with CCO ended on 30 April 2021. CCO would pay A his salary until that date but would put him on garden leave with immediate effect. Moreover, CCO would provide A with a work certificate by 30 April 2021. Finally, CCO would pay him an outplacement of six months or CHF 10'000.

A later claimed that the termination agreement was invalid, among other reasons because CCO failed to grant him a sufficient reflection period as required pursuant to the Swiss Federal Supreme Court's case law.

How did the Swiss Federal Supreme Court decide?

The Swiss Federal Supreme Court rejected A's appeal and objections. CCO had actually granted A a deadline of two days, as evidenced by the letter handed over to A at the meeting of 25 November 2020. Moreover, CCO and A had entered into negotiations about the termination agreement, which resulted in some changes in A's favor. The Swiss Federal Supreme Court thus decided that CCO had granted A the required reflection period and that the termination agreement was indeed valid and binding.

Why is this case important?

The employment relationship between CCO and A was governed by Swiss public employment law. However, pursuant to legal doctrine as well as the Swiss Federal Supreme Court, the respective principles resulting from Swiss private employment law applied nonetheless. The decision is thus also important for private law employment relationships governed by the Swiss Code of Obligations.

Pursuant to Swiss case law, a termination agreement is invalid and ineffective if the employer did not provide the employee with an appropriate reflection period before signing the agreement. In practice, the minimum duration of this reflection period is uncertain, especially because of insufficient guidelines. Furthermore, it is not entirely clear whether the employee may voluntarily waive this reflection period.

In this case, the Swiss Federal Supreme Court accepted a reflection period of two days as sufficient. Moreover, and perhaps even more importantly, the court accepted that A signed the termination agreement on the same day that the agreement was offered to him and thus A effectively waived the reflection period that CCO had offered. The case thus casts a new light on the employer's formal duties when offering a termination agreement to an employee.

Of course, the appropriateness of and compliance with the reflection period must be assessed in each individual case. In the case at hand, CCO and A did indeed negotiate the termination agreement; moreover, CCO made some additional concessions to A because of these negotiations. These two particularities of the case likely affected the assessment of the reflection period's appropriateness in CCO's favor. Still, given that Swiss public employment law is more employee friendly than Swiss private employment law, this case provides hope that the Swiss Federal Supreme Court may also be open to pragmatic solutions regarding the reflection period in private law employment relationships.

Contributors: Andreas Lienhard (Partner), Martina Herzog (Associate)

No legal or tax advice

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Andreas Lienhard



Partner
Attorney at Law, Dr. iur., CAS in Arbitration

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 93 51
andreas.lienhard@pestalozzilaw.com