



# BGer 4A\_396/2022 of 7 October 2023 (leading decision): Ordinary dismissal because of incapacity to work due to illness

20.12.2023

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## Key takeaways

- The Federal Supreme Court confirms the principle of freedom to dismiss after the end of the protected period, including dismissals due to incapacity to work because of an illness.
- Even if a conflict at the workplace leads to an employee's psychological illness, the dismissal issued after the end of the protected period is generally not deemed abusive. It may only be abusive in exceptional cases where the employer directly caused the employee's illness.
- With this leading decision, the Federal Supreme Court opposes the common practice of automatically criticizing as abusive a dismissal because of the employee's incapacity to work.

## What has happened?

The employer, a foundation, hired the employee as cook as of 1 December 2008. Following a promotion in September 2015, the employee assumed, in December 2016, sole responsibility for the kitchen and the kitchen team for just over a month. In February 2017, the employer hired a new head chef. The relationship between the new head chef and the employee was strained due to communication problems and conflicts. In March 2017, the employee was unable to work for a week; in April 2017, a meeting between the managing director, the employee and the new head chef took place. In this meeting, the employee stated that his inability to work was partly due to the work itself. He complained about a feeling of "weariness" and a loss of freedom when cooking, a cold atmosphere in the team, and a feeling of lack of trust from the head chef in the team.

According to an assessment at the end of 2017, the employee had not achieved his objectives. The employer thus demoted him from his position as sous-chef, as of 28 February 2018. In April 2018, and then in the annual review in February 2019, the employer also assessed the employee negatively.

The employee was on sick leave from 22 March 2019 to 31 January 2020. According to the doctor's certificates, the employee suffered from physical and psychological exhaustion due to the open conflict with the head chef. This manifested itself in severe insomnia with nightmares, excessive anxiety, weight loss and chronic diarrhea. The employer terminated the employment contract on 24 September 2019 with effect on 31 December 2019 (after expiry of the 180-day protected period). The employer later justified the termination with the employee's incapacity to work beyond the end of the protected period in terms of Art. 336c CO.

The employee sued for compensation of CHF 25,000 on the alleged grounds that his dismissal was abusive. The Labor Court of the Eastern Vaud District (Tribunal de prud'hommes de l'arrondissement de l'Est vaudois) dismissed the claim, while the High Court of the Canton of Vaud (Cour d'appel civile du Tribunal cantonal du canton de Vaud) upheld it. The employer lodged an appeal in civil matters against this judgment with the Federal Supreme Court.

### **What did the Federal Supreme Court consider and decide?**

The Federal Supreme Court had to decide whether the employer's ordinary termination of 24 September 2019, with effect on 31 December 2019, i.e., after the protected period had expired, was abusive within the meaning of Art. 336 CO.

#### Principle of freedom to dismiss

First, the Federal Supreme Court noted that Swiss employment law is based on both the principles of freedom to dismiss and freedom of contract. Consequently, both parties can terminate an open-ended employment relationship, provided they comply with the contractual or the statutory notice period and with the termination date.

#### In the event of illness of an employee

According to the Federal Supreme Court, the employer may terminate the employment contract after expiry of the protected period if the employee suffers from a persistent illness that prevents him/her from working. Only in extreme situations ("situations très graves") may a termination due to illness be considered abusive. This would be the case if the employer evidently directly caused the illness, e.g., if he failed to take measures to protect the employee and the employee became ill as a result. Incapacity to work due to psychological illness often does not reach this level of severity, which is why the dismissal is not considered abusive.

Difficulties at work often lead to depression or other psychological disorders. This does not mean, however, that the employer directly caused the illness. As a rule, the court does not need to take into account that a conflict with a new superior may lead to incapacity to work because these sorts of conflicts occur frequently and usually do not reach the level of severity required to affirm an abusive dismissal.

The Federal Supreme Court ruled that the dismissal at hand was, in principle, not abusive because the employer terminated the employment contract based on an incapacity to work due to illness that exceeded the protected period. Nevertheless, it examined whether this scenario qualifies as an extreme case as described above. It denied such a case, as the employer had not directly caused the employee's incapacity to work. In addition, there was no psychological

harassment or bullying involved. The conflict situation with the head chef did not reach the required severity to confirm an abusive dismissal. The employer, furthermore, did not have to prove that it had taken specific measures to resolve this conflict.

The Federal Supreme Court ruled that the dismissal was not abusive and therefore upheld the employer's appeal.

### **Why is this decision important?**

In practice, dismissals often occur after the end of the protected period, especially if the incapacity to work continues. In addition, psychological issues or illnesses are regularly the cause of long-term incapacities to work. Employees often associate these psychological issues with conflicts with superiors, discussions, or other problems in the workplace.

Regarding such cases, the leading decision of the Federal Supreme Court clarifies that a termination after the protected period expires may only be abusive in exceptional cases. Even in the case of a long-term incapacity to work, the freedom to dismiss applies in principle. The courts cannot assume an abusive dismissal even if a conflict at the workplace is in some way connected with the psychological illness and the employee becomes unable to work for this reason. The dismissal may only be abusive if the employer directly caused the illness.

With this leading decision, the Federal Supreme Court clearly opposes the common practice of automatically criticizing as abusive a dismissal due to incapacity to work.

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