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## New case law of the Federal Supreme Court on the justification of employer terminations in the area of federal personnel law

In a recent judgement, the Federal Supreme Court dealt with the lawfulness of an employer's dismissal under the Federal Personnel Act. In its judgement, the Federal Supreme Court had to assess whether a dismissal by the SBB, which - at least according to the SBB - was based on untrue and incomplete information about health data in the job application procedure, was based on factually sufficient reasons. In addition, the Federal Supreme Court was faced with the question of whether the termination was even abusive in view of its connection with the employee's health status. The decision is worth reading for private employers as well, as it reminds them of the principles to which employers are bound when processing employees' health data and the conditions under which a dismissal based on a health impairment can be qualified as abusive.

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### Restriction on freedom of dismissal

In the private sector, the principle of freedom of dismissal applies. This means that, in principle, no specific reason is required to justify the termination of an employment relationship. In the public sector, however, freedom of dismissal is largely restricted by the Federal Personnel Act ("BPG"): In particular, "factually sufficient reasons" are required in order to justify the termination of an employment relationship. What private and public law have in common is that a dismissal may not be abusive (according to Art. 336 of the Swiss Code of Obligations ("CO")).

In the recent judgement 8C\_387/2022 of 21 August 2023<sup>1</sup>, the Federal Supreme Court was faced with the following situation: The Swiss Federal Railways ("SBB") had terminated the employment due to allegedly untrue and incomplete information provided by a job applicant during the application process. The untrue/incomplete information related to a proven health condition. The Federal Supreme Court had to decide whether this constituted a factually sufficient reason for the termination or whether the termination qualified as abusive.

### Scope of the extended protection against dismissal and privacy in the public law sector

The SBB are a public limited company whose employment relationships are primarily governed by the BPG and the applicable SBB Collective Labour Agreement ("CLA SBB"). The CO applies in a subsidiary manner (Art. 6 para. 2 BPG). With regard to the termination of employment relationships of indefinite duration, Art. 10 para. 3 BPG stipulates, in particular, that the employer may only terminate an employment relationship of indefinite duration for factually sufficient reasons, such as, in particular, a breach of material legal or contractual obligations (lit. a), deficiencies in performance or

conduct (lit. b) or a lack of aptitude, suitability or willingness to perform the work agreed in the employment contract (lit. c). If there are no such factually sufficient reasons for the dismissal, the dismissed person is entitled to compensation, which is to be determined in the light of all the circumstances and generally amounts to a minimum of six months' salary and a maximum of one year's salary (Art. 34b para. 1 and 2 BPG). In special cases, the employer must offer the terminated employee continued employment, namely if the termination is abusive in the sense of Art. 336 CO (Art. 34c para. 1 BPG). The CLA SBB contains similar provisions.

The BPG also severely restricts the processing of employees' health data: According to Art. 28 para. 1 BPG, the competent medical officer processes particularly sensitive personal health data that is necessary for assessing the suitability of the job applicant or employee in the job application procedure and during the subsequent employment relationship, as well as for assessing the job applicant's risk of invalidity and morbidity in the job application procedure for safety-related functions (Art. 28 para. 1 BPG). In addition, the collection and disclosure of health data is strictly limited; in particular, other bodies may only be informed of the result of medical examinations to the extent necessary to assess the job applicant's suitability for employment or work (Art. 28 para. 2 and 3 BPG). When processing personal data, federal bodies are also subject to the Data Protection Act ("DSG"), which only permits data processing by federal bodies under a legal basis (Art. 34 para. 1 DSG).

### Background to the Federal Supreme Court's judgement

As part of the job application procedure for a position as a customer adviser

<sup>1</sup> The Federal Supreme Court's judgement is scheduled for publication.

(secondary apprenticeship) with the SBB, the job applicant, later employee and complainant, had to undergo a medical aptitude test for admission to a safety-related function in the railway sector. During this examination, the job applicant had confirmed in a questionnaire that she did not suffer from any recurrent health impairments requiring regular medical check-ups and/or medication. At the end of the examination, the job applicant was found to be suitable for the position in question.

After several years of employment and the successful completion of her secondary apprenticeship as an SBB customer adviser, superiors noticed for the first time that the employee had a walking disability and was limping. This limp had gone unnoticed during the job interview and medical aptitude test. A medical officer who was subsequently consulted diagnosed the employee with a chronic impairment resulting from an accident that had occurred a few years ago, which did not affect the employee's ability to work and did not require medical treatment. However, the employee was at increased risk of morbidity and disability. After hearing the employee, the SBB terminated the employment relationship with due notice on the grounds of behavioral misconduct.

In its judgement of 3 May 2022 (A-1454/2021), the Federal Administrative Court rejected the appeal against the order terminating the employment relationship and upheld the termination of the employment relationship. The Federal Administrative Court based its judgement on the fact that the complainant had deliberately made false statements about her health status during the job application procedure and had thus breached her pre-contractual duty of loyalty. In view of the importance of the medical aptitude test, the complainant had been obliged to answer the questionnaire submitted to her truthfully and completely. In the view

of the Federal Administrative Court, the breach of pre-contractual obligations and the resulting irrevocable destruction of the relationship of trust constituted a factually sufficient reason for termination within the meaning of Art. 10 para. 3 BPG. Whether or not the walking impairment actually affected the complainant's ability to work was not decisive for the justification of the termination, since the termination was not based on the health impairment but on demonstrably false statements made during the job application procedure.

### Considerations of the Federal Supreme Court

The complainant appealed to the Federal Supreme Court against the judgement of the Federal Administrative Court. The question before the Federal Supreme Court was whether the termination of the employment relationship by the SBB was lawful in the sense of the lower court's decision. In its judgement, the Federal Supreme Court first stated that the employer has a legitimate interest in information about the job applicant in the context of the job application procedure, which concerns his or her suitability for the position in question. This need for information goes hand in hand with a corresponding duty of information and disclosure on the part of the job applicant. In the present case, the position in question as an SBB customer adviser was undoubtedly one of the safety-related functions in rail transport and was therefore subject to a medical aptitude test. The required direct link between the work as an SBB customer adviser and the question of existing health impairments was therefore given. The complainant could thus be accused of failing to disclose her health impairment during the medical aptitude test, in breach of her duties. However, since it could be shown that the walking impairment had no effect on her ability to work and did not require medical

treatment, the complainant could not be accused of violating material legal or contractual obligations within the meaning of Art. 10 para. 3 BPG.

Furthermore, the medical officer who examined the employee after her walking impairment had been detected was only allowed to inform the employer of the result of the examination on her suitability for the position in question. In view of medical secrecy and the protection of the job applicant's privacy, no medical diagnosis may be disclosed. The complainant's superiors were not entitled to ask her about her state of health during the employment relationship, since the specific legal requirements (Art. 28 et seq. BPG) had not been complied with. In the case of inadmissible questions, the employee concerned had the right to give an untruthful answer and the employer could not rely on such an untruthful answer to terminate the employment relationship. However, since the present dismissal had in any case been made without factually sufficient reasons, it was not necessary for the Court to assess if the evidence submitted by the SBB concerning the complainant's state of health had been obtained unlawfully and had to be excluded from the evidentiary procedure.

The Federal Supreme Court also left open the question of whether the complainant's demonstrable walking impairment and the associated risk of morbidity and invalidity could have justified the SBB's decision to terminate the employment, since the SBB itself did not base the termination on the state of health, but on untrue statements made during the job application procedure.

Having found that the termination was not based on factually sufficient reasons according to Art. 10 para. 3 BPG, the Federal Supreme Court had to decide whether the dismissal was abusive within the meaning of Art. 336 CO. The Federal Supreme Court held that a

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dismissal on the grounds of a health impairment is not abusive if the health impairment affects the employee's ability to work, unless the inability to work is due to a breach of duty on the part of the employer.

Since a threat of invalidity can, by definition, affect the ability to work, the Federal Supreme Court concluded that the termination was not abusive even if it was due to the complainant's state of health.

Overall, the Federal Supreme Court concluded that the complainant's termination, although not abusive, lacked a factually sufficient reason, and it therefore upheld the complaint in part, set aside the judgment under appeal, and referred the case back to the lower court to determine the statutory compensation payable to the complainant.

#### **Recommendations for private and public sector employers**

The Federal Supreme Court's judgement is a valuable reminder that employers should be very careful when processing employee-related health data, both under the federal personnel law and under private law: In principle, the processing of employee health data is only permissible to the extent that it is necessary to assess the suitability or ability of the person concerned to perform the job in question.

The risk of abusiveness of a termination issued on the grounds of the employee's state of health increases, in particular, if a possible health impairment does not affect the employee's ability to work or if the inability to work is due to a breach of duty by the employer.

In any case, all employers are advised to document the reasons for termination and the steps taken in writing at an early stage, so that evidence can be produced to justify the termination in the event of a legal dispute.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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