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Incapacitated employees who no longer report to work? The latest case law of the Federal Supreme Court could open new doors for employers.

Termination without notice for breach of the duty to inform: After an employer had terminated the employment relationship with an employee on 27 October 2021 with ordinary notice as per 31 January 2022, the employer also issued a termination without notice on 15 November 2021 after the employee had twice failed to inform the employer of the duration of her absence due to illness as determined by a doctor. In its decision 4A_486/2024 of 15 January 2025, the Federal Supreme Court confirmed the lawfulness of this termination without notice and thus created case law that could make life easier for employers.

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Assessment of the ruling: The legal framework

Before examining the facts of the case in more detail and discussing the possible practical implications of the decision, the legal framework relevant to the issue will be briefly outlined:

Requirements for termination without notice

Both the employer and the employee may terminate the employment relationship at any time without notice for good cause in accordance with Art. 337 CO. Good cause is deemed to be any circumstance where the terminating party can no longer reasonably be expected to continue the employment relationship in good faith. According to case law, termination without notice by the employer is only justified in the event of particularly serious misconduct by the employee. On the one hand, this must be objectively suitable for destroying the basis of trust essential for the employment relationship or at least shaking it so profoundly that the employer can no longer reasonably be expected to continue the employment relationship, and on the other hand, it must have actually led to this. Less serious breaches of duty only justify termination without notice if they have occurred repeatedly despite warnings.

If an employment relationship has already been ordinarily terminated, the already high requirements for good cause for a justified termination without notice are even higher - this is due to the fact that the end of the employment relationship is already foreseeable due to the termination that has already taken place.

Employee's duty to provide information

Art. 321a para. 1 CO obliges the employee, among other things, to safeguard the legitimate interests of the employer in so-called "good faith". This employee's duty of loyalty also includes the duty to provide information:

The employee must notify the employer of foreseeable absences as soon as possible and unforeseeable absences immediately after they occur. This duty to provide information also applies to absences due to illness and accidents. As soon as the employee's state of health permits, the employee must contact the employer immediately and inform them of the expected duration and extent of their incapacity to work. During the entire period of the incapacity to work, the employee is obliged to inform the employer immediately, continuously and completely about their incapacity for work.

Facts of the Federal Supreme Court decision

The Swiss Federal Supreme Court, in its ruling 4A_486/2024, examined whether an employee in a senior position responsible for beer production had breached her duty to provide information, thereby giving good cause for termination without notice following an already issued ordinary termination.

The employer terminated the employment relationship on Wednesday, 27 October 2021 as per 31 January 2022 and initially released the employee from her duty to work for two days, i.e. Thursday, 28 October up to and including Friday, 29 October 2021. The notice of termination was given in compliance with the ordinary notice period of three months. On Monday, 1 November 2021, the employee appeared briefly at the workplace, cleared her locker and left the company early due to feeling unwell. She called in sick from Tuesday, 2 November and only informed the employer on Friday, 5 November that she would not be able to see a doctor before Monday, 8 November at the earliest.

The chairman of the board of the employer then sent an email to the employee on Monday, 8 November, instructing her to return to work on Tuesday, November 9, or, if unable to do so, to submit a corresponding report along with a medical cer-

tificate. That same evening, the employee responded, stating that she would not be able to return to work and that a medical certificate would follow. In response, the chairman set a final deadline for her on Tuesday, 9 November, giving her until Wednesday, 10 November, at 12:00 PM to either resume work or to submit a medical certificate, otherwise she would face a reduction in salary or termination without notice.

On Wednesday, 10 November, the employee submitted a medical certificate issued on 8 November 2021, confirming her incapacity to work from Monday, 8 November to Thursday, 11 November and indicating a possible return to work on Friday, 12 November 2021. The chairman of the board of directors then asked the employee whether she would actually be able to return to work on Friday, 12 November. Late in the evening on Thursday, 11 November, the employee informed the employer that she had a doctor's appointment on Friday, 12 November and would reassess the situation afterward.

As no further update was provided, the employer terminated the employment relationship without notice on Monday, 15 November at 11:35 pm. On Thursday, 18 November 2021, the employee submitted a further, undated medical certificate confirming complete incapacity to work from Friday, 12 November.

In summary, there was a medically certified incapacity for work at the time of the termination without notice. However, the employee had failed to promptly provide the employer with the corresponding medical certificate following the doctor's consultation.

Considerations of the Federal Supreme Court

In its assessment of whether the facts described above could justify termination without notice, the Federal Supreme Court stated that the employee breached her duty to provide information twice:

The employee first breached her duty to provide information on Monday, 8 November 2021, when she consulted a doctor via telemedicine, who certified that she was completely unable to work for the period from Monday, 8 to Thursday, 11 November. However, she did not immediately forward the medical certificate to the employer. Instead, she merely informed the employer that she would not be able to attend work on Tuesday, November 9, and that a medical certificate would follow—without specifying when. The employee thus left the employer in the dark about the known duration of her medically certified absence, making it difficult for the employer to plan her role in the brewery's operations. This was particularly significant given that her absence fell during the pre-Christmas season—a particularly busy period for the brewery.

The second time, the employee breached her duty to provide information was on Thursday, 11 November, when the employee merely informed the employer that she had another doctor's appointment on Friday, 12 November and would reassess the situation afterward. However, despite being in possession of a medical certificate, she failed to provide any further updates over the next four days. Subsequently, the employer terminated the employment relationship without notice on Monday 15 November.

During the legal proceedings, the employee was unable to demonstrate that she had been unable to contact her employer after her second doctor's visit on Friday, 12 November due to illness or any other compelling reason. According to the Federal Supreme Court, this second breach of her duty to provide information—without any objective justification—constituted a good cause for termination without notice. The employer had a legitimate interest in promptly knowing whether and when the employee would be fit to return to work. The employee should have proactively informed the employer immediately after her second doctor's appointment about her continued absence. By failing to do so in a timely and adequate manner, she violated her duty to provide swift, continuous, and complete information, which the Federal Supreme Court deemed a good cause for termination without notice.

Conclusion and significance for everyday HR work with employees who are unable to work

The decision of the Federal Supreme Court outlined above is of fundamental importance for employers who have to deal with sick employees who stop communicating and only submit medical certificates days or even weeks later: The Federal Supreme Court has reaffirmed the central importance of employees' duty to inform their employers, particularly in the event of illness. A breach of this duty - as in this case the delayed submission of medical certificates and insufficient communication about the duration of the incapacity for work - can constitute good cause for termination without notice.

For employers, it is advisable to clearly stipulate in the staff regulations or employment agreement that medical certificates must be submitted without delay and that disciplinary measures, including termination without notice, may be taken in the event of late submission. If an employee fails to submit a medical certificate on time despite such a provision, the employee should be given a written warning. The warning should outline the violation of the employee's duty to inform, and it must be pointed out that sanctions up to and including termination without notice may be imposed in the event of a repeat offence. If the obligation to for-

ward the medical certificate in a timely manner is breached again in the near future, termination without notice could be issued, provided there are no extraordinary circumstances.

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