CENTRE DE DROIT
BANCAIRE ET FINANCIER

Dismissal of a senior manager

Whose fault is it ?

Par Célian Hirsch le 6 October 2022

On the one hand, the head of the US desk who encourages his employee, a senior manager, to prospect for US customers, despite internal rules to the contrary. On the other hand, this executive, who is trained and informed of the risks associated with US persons, continues to travel to the USA to meet potential customers.

Following an investigation that lasted almost four years, involving thousands of allegations and the hearing of almost forty witnesses, the Swiss Federal Court weighed up the failings of both sides and ruled in equity against the employee (4A_479/2020, five-judge decision).

In 1999, a Swiss bank began to take steps to bring its American clientele into line with the laws of that country. In particular, it enacted a series of regulations against tax evasion, and introduced a whistleblowing directive requiring employees to report inappropriate behavior anonymously and confidentially.

The employee, who heads up the Geneva section of the US desk under the supervision of the department head, receives several training sessions on the new US Person regulations. Despite internal guidelines prohibiting travel to the US to visit potential clients, the employee's direct superior encourages him to travel to the US to meet potential clients.

In September 2008, a few months after Bradley Birkenfeld's indictment in the USA, the bank tightened its rules even further, limiting its activity from Switzerland with regard to US clients. In 2011, the Geneva-based employee and his superior were also indicted in the United States. The bank then released him from his obligation to work, but maintained his salary and covered his legal costs in the United States until his dismissal in 2014, to which the employee objected.

The employee appealed to the Tribunal des prud'hommes in Geneva, seeking compensation for wrongful dismissal, moral damages and future litigation costs in the United States. The Tribunal recognized both wrongful dismissal and an attack on his personality. It ordered the bank to pay him CHF 4,383,305 and to cover all future costs relating to the US proceedings.

The bank lodged an appeal with the Court of Justice. The Court dismissed the employee's appeal in its entirety. It considered that the incitement to violate internal rules had not come from senior management, which had no knowledge of such behavior. On the contrary, the bank provided internal training and informed employees of the applicable rules. It therefore neither violated the employee's personality nor wrongfully dismissed him. The employee is appealing

this decision to the Swiss Federal Court.

According to art. 328 CO, the employer must protect the employee's personality. If the employer is a legal entity, it is liable either for the acts of its organs – whether formal, material or apparent (art. 55 al. 2 CC) – or for the acts of its auxiliaries (art. 101 al. 1 CO), such as a hierarchical superior.

In casu, the employee has failed to prove that the conduct complained of originated from the bank's organs. However, the FINMA report proved that the employee's superior had encouraged him to violate the applicable regulations. Moreover, the bank had neither set up an effective supervisory system, nor adapted the objectives of its managers to the new regulations. As a result, the bank may be held liable for the actions of its auxiliary staff.

However, the alleged violation must be the natural and proper cause of the damage claimed. The Federal Court emphasizes that, to determine adequate causality, "the judge must select, from the chain of causes (condiciones), the one(s) that have a predominant character, a certain typicality. He thus makes a value judgment and determines whether it is still fair (art. 4 CC) to make the defendant bear liability".

In the present case, the Federal Court accused the employee of having knowingly violated internal directives for the sake of gain. He was not "bound hand and foot to his post", but a senior manager "familiar with the system", who himself had responsibility for subordinates and had been informed of the specific problems in the United States. Even though the bank made substantial profits from these violations, it compensated the employee accordingly and also paid his defense costs and maintained his salary for some three and a half years after he was released from work.

The employee's fault was thus "clearly more important" than that of the bank, to the point of relegating the latter to the background. The Federal Supreme Court therefore found, in equity, a breach of adequate causality.

After denying that the dismissal was unfair, the Federal Court briefly considers that the employee is also not entitled to reimbursement of his future expenses in connection with the US proceedings. Indeed, the application of art. 327a CO presupposes that the employee's activity was in conformity with the contract. The Federal Court suggests that this was not the case.

The employee's appeal is therefore dismissed.

Although the ruling is relatively brief on this point, the practitioner will note that the bank can be held liable for the simple act of its auxiliary (vicarious liability, CO 101), even when the latter has violated the bank's instructions.

This being the case, the Federal Court also criticizes the bank (own liability within the meaning of 55 II CC ?) for having failed in casu to monitor the application of its new directives, and for having maintained a remuneration system that did not encourage compliance. This is a direct reproach against the bank's governing bodies, and not just against the hierarchical superior, who was the bank's auxiliary.