CENTRE DE DROIT
BANCAIRE ET FINANCIER

Employment law

Foreclosing claims to vacation time not taken under a severance agreement

Par Aurélien Witzig le 19 February 2024

In a recent ruling, the managing director of a bank was unsuccessful in his claim for back pay for untaken vacation, even though he believed he was entitled to it, since the severance agreement he had signed with the bank did not specifically address this issue (TF 4A_496/2022 of November 6, 2023).

The facts were as follows : the managing director of a bank received an annual salary of 600,000 francs and was entitled to twenty-eight days' vacation per year. His employment contract could be terminated within six months. As the main shareholder was not satisfied with the financial results, he suggested that the Managing Director resign and, at the same time, draft a severance agreement.

An agreement was submitted by the resigning CEO. In his own words, it merely set out "the main terms and conditions" of the termination of the contract. In concrete terms, it stipulated that the employment relationship would end immediately, but that the director would receive the equivalent of six months' salary. This arrangement enabled him to look for a new position quickly, without losing the benefit of his long period of leave, while the bank was able to replace him quickly at the head of the company.

In addition to the 300,000 francs corresponding to the six months' salary for the unfulfilled notice period, the General Manager was paid, triggering the bank transfer proprio motu, an amount of 85,000 francs, corresponding to the vacation days he had not been able to enjoy before the effective end of the employment contract. On learning of this, the bank considered this to be gross misconduct, and put its ex-director on notice to repay the amount without further delay.

The two Geneva courts hearing the case ruled in the manager's favor (although the amount of compensation for untaken vacation was reduced to CHF 50,000). The cantonal judges ruled that the question of untaken vacation had not been settled by the agreement, and was therefore not covered by the exceptio rei transactae. It was therefore open to the director to claim the corresponding amount.

The Federal Court contested this interpretation. According to the High Court, the absence of any mention of untaken vacation in the agreement did not mean that this issue had not nevertheless been decided by the parties, at least indirectly. Accordingly, the director could not

legitimately believe that he would receive additional compensation for the vacation he had not yet been able to take. Indeed, the compensation equivalent to six months' salary for the unfulfilled leave period was not to be considered in abstracto, but as a concrete replacement for this six-month period, during which the manager would have had ample opportunity to take the twenty-three days' vacation he had been unable to enjoy up to that point. The Federal Supreme Court applied the general theory of imputation of vacation during the unused vacation period in a fictitious manner. In doing so, it interpreted the parties' agreement in a normative manner, disregarding the terms actually used, but determining its reasonable meaning in accordance with the rules of good faith.

From a legal point of view, the Federal Court's solution is partly questionable, given that the agreement itself stipulated that it only regulated the "principal modalities" of the termination of the contractual relationship. This clarification only made sense if other elements had to be dealt with separately. The Geneva courts therefore applied the law in a precise manner. This consideration, however, ignores the fact that it was the director who had stipulated the severance agreement. In this very rare case in labor law, where the employee has a contractual position that is, if not equal to, at least almost as strong as that of the employer, the High Court could no doubt afford to conduct its reasoning in equity and place the consequences of the lack of a specific vacation clause on the manager.
