

Immediate dismissal

A bank manager tries to poach his team

Par Roxane Pedrazzini le 3 September 2024

The Swiss Federal Supreme Court has upheld the immediate dismissal of a Ticino bank manager, initially on the basis of mere suspicion, on the basis of formal procedural rules (ruling [4A_399/2022](#) of June 3, 2024).

The employee had been working since June 2008 as investment manager of a bank's Lugano branch, and then as manager of the branch from June 2013. On that date, the parties agreed, among other things, a salary of CHF 400,000 per annum with a minimum term of employment until June 30, 2016, and a bonus of CHF 400,000 subject to the condition that the manager remained in employment until the aforementioned date.

On November 5, 2015, a lawyer informs the bank that five members of the manager's team accuse him of trying to poach them for another bank by exerting financial pressure on them. The bank dismisses the manager with immediate effect on November 6, 2015. On May 30, 2016, he files a claim for payment against the bank, alleging unjustified immediate dismissal. The two Ticino courts ruled in favor of the manager.

In a first ruling [4A_365/2020](#) of April 5, 2022, the Federal Court partially accepted the bank's appeal. It reiterated the case law applicable to immediate dismissal based on suspicion. Such dismissal is justified (i) if it is subsequently proven that the employee committed the wrongful acts complained of (and insofar as these are likely to break the relationship of trust) (ruling [4A_251/2015](#) of January 6, 2016) or (ii) if the wrongful acts are never proven but (a) the suspicions are sufficiently serious and important to make it objectively impossible to continue the employment relationship or (b) the employer has reasonably verified the accuracy of his suspicions, for example by interviewing the employee (ruling [4A_419/2015](#) of February 19, 2016).

The Federal Court considers that the bank did not do all that was necessary to clarify the validity of its suspicions, in particular it did not interview the manager and did not seek to verify whether the latter had actually held discussions with competing banking establishments. On the other hand, according to the Federal Court, the Ticino Cantonal Court should have examined the bank's objections to the first-instance judgment, which denied the existence of the plan attributed to the manager to transfer some of his employees. In other words, the cantonal court should have ascertained whether the manager had actually attempted to poach part of his team, or at least whether the bank's suspicions in this respect were serious. The Federal Court therefore referred the case back to the Cantonal Court for a decision on this point.

In a new ruling dated July 21, 2022, the Cantonal Court found that the manager had indeed attempted to transfer part of his team to another bank, thereby breaking the relationship of trust. The immediate dismissal was therefore justified.

For the first time, therefore, the manager finds himself in the position of the appellant, and before the Federal Court. In his appeal, he invokes the tardiness of the immediate dismissal, in that the bank was already aware of the alleged facts on November 2, 2015 (and not November 5, 2015). The director therefore accused the cantonal court of a denial of justice for not having examined this question.

The Federal Court dismissed this complaint, holding that it was up to the Director to contest, in the appeal proceedings, if necessary, the late nature of the immediate dismissal, given that the first-instance judgment expressly stated that the dismissal had taken place within the required timeframe (" *tempestivamente* "). Accordingly, the Director should have set out his objections to the first-instance judgment in his response to the appeal, even if he did not intend to contest the outcome of the said judgment. Consequently, the Director did not exhaust the cantonal authorities on this point, and the grievance is therefore inadmissible.

The director also criticized the cantonal court for holding that his plan to transfer part of his team was concrete and serious. The Federal Court found that the Director's criticisms in this respect were of an appellatory nature and did not establish an arbitrary finding of fact. Indeed, his criticisms relate to facts that are irrelevant and are based on a personal assessment of the evidence. This complaint is therefore also declared inadmissible.

As a result, the bank's suspicions have now been proven and were likely to break the relationship of trust. The validity of the immediate dismissal is therefore confirmed.

This ruling highlights the formalism of procedural rules known to practitioners. Even in the event of a favorable judgment, the respondent must anticipate and criticize the legal considerations and findings of fact in the judgment contested by the opposing party, which could be prejudicial to him in the event of a divergent decision by the appeal authority. This is all the more the case when the respondent is the original plaintiff in the case.

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