

Wilhelm Gilliéron

AVOCATS

DROIT DU TRAVAIL

Arrêt du Tribunal fédéral du 30 août 2023 sur la fermeture des entreprises pour lutter contre le COVID-19 et la demeure de l'employeur : valeur juridique des recommandations, directives et FAQ du SECO.



Auteur: Sandra Gerber | Le : 5 March 2024

Federal Court ruling of 30 August 2023 on the closure of companies during the COVID-19 pandemic and employer's liability: legal value of SECO recommendations, directives and FAQs.

The Federal Court's ruling of 30 August 2023 (4A_53/2023) has already caused a stir and has been the subject of numerous comments by Swiss authors and lawyers. In this ruling, the Federal Court defines for the first time the notion of economic risk to be borne by the employer. It considers that the company closures ordered as part of the measures to combat COVID-19 do not constitute a risk to be borne by the employer. In his view, the impediment to operations resulting from this closure is an objective reason that prevents the employer from remaining in business within the meaning of art. 324 CO, and the employer is therefore not obliged to pay wages.

The undersigned author does not intend to return here to the notion of the employer's "demeure" or to the notion of economic risk to be borne by the employer. Rather, she wishes to emphasise another important element that emerges from this judgment and that is worth recalling. This concerns SECO and the legal value of its recommendations, directives and FAQ.

SECO, the State Secretariat for Economic Affairs, describes itself on its website (www.seco.admin.ch) as "the Confederation's centre of competence for economic policy issues. Its aim is to ensure sustainable economic growth, a high level of employment and fair working conditions. SECO therefore defines and implements the framework conditions for domestic and foreign economic policy".

SECO drafts and publishes studies, reports, analyses, forms, notices and FAQs on the various topics it deals with, all of which can be

easily consulted on the above-mentioned website.

During the COVID-19 pandemic, SECO published numerous recommendations and FAQs which were updated very frequently. These recommendations and FAQ dealt in particular with the obligations of employers and employees or with RHT, i.e. reduced working hours or short-time working.

In an article published on 9 March 2020, at the height of the pandemic, the author advised readers to consult the SECO website and follow its recommendations.

The case, which was the subject of the judgment of 30 August 2023, concerned teachers at a private school that had to close its boarding facilities following the emergency measures taken in response to the Coronavirus crisis. The teachers relied in particular on SECO's recommendations and opinion that employees should be entitled to payment of their salaries in the event of closure of the business by the authorities, since the operating and economic risks are the responsibility of the employers, even though they may bear a heavy burden (State Secretariat for Economic Affairs SECO, FAQ "Pandemics and businesses", question 19).

For the Federal Court, SECO's opinion is an "expression of opinion". The Federal Court points out that "SECO is the Confederation's centre of competence for key economic policy issues. Its objective is to ensure sustainable economic growth, a high level of employment and fair working conditions. Its Labour Directorate ensures that working conditions and labour market policy rules are clear. These rules cover, among other things, the protection of workers, unemployment insurance, job placement and the guarantee of the free movement of persons.

However, the Federal Court points out that only the First Court of Civil Law of the Federal Supreme Court is called upon to interpret private labour law. Nor are the cantonal civil courts bound by SECO's opinion" (judgment 4A_53/2023).

In other words, SECO's recommendations, guidelines, FAQs and other publications are merely an expression of SECO's opinion and are not binding on the courts in matters of private labour law.

On this basis, the undersigned nevertheless advises employers and employees to continue to consult SECO publications, bearing in mind that they are only recommendations which do not have the force of [law in private labour](#) law matters and are not binding on the courts in the event of a dispute.

Source :

<https://www.wg-avocats.ch/en/actualites/federal-court-ruling-of-30-august-2023-on-the-closure-of-companies-during-the-covid-19-pandemic-and-employers-liability-legal-value-of-seco-recommendations-directives-and-faqs/>