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La lettre de licenciement et la lettre expliquant les motifs du licenciement, peuvent-elles être un faux dans les titres ?



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Can the letter of termination and the letter explaining the reasons for the termination be a forgery of title?

A Decision of the Federal Court of 26 November 2024 (ATF 6B_1315/2023, 6B_1318/2023) concerning a somewhat ‘anecdotal’ case involving the public service provides an opportunity to give a brief review about the letter of termination and the letter explaining the reasons for the termination, and above all to answer the following question: Can these letters be forged documents within the meaning of the Swiss Criminal Code? Fortunately, the answer is no!

Under Swiss law, an employment contract does not have to be in writing. In other words, an employment contract can be concluded orally, by conclusive act, or in writing, the latter of course being the more prudent form. This rule also applies to the dismissal or resignation of an employee. The termination of an employment contract – like its conclusion – is therefore not subject to any formality and may take place orally, by conclusive act or, of course, in writing.

As an ordinary termination of an employment contract must take place within a notice period (the length of which will depend on the employee’s seniority and/or the provisions of the employment contract), for the purposes of proving receipt and therefore the starting point of the notice period, it is obviously advisable to terminate an employment contract in writing. Very often, this is done by registered letter with acknowledgement of receipt. If an interview with the employee is scheduled to inform him/her of the termination of the contract, it is also advisable to confirm the termination in writing by having him/her sign the letter of dismissal at the interview or by sending him/her a letter after the interview.

Termination of the contract must be given by the party itself or by a representative of the party. If the employer is a company, in principle the notice is given by a representative of the legal entity registered in the commercial register. The power to terminate

employees' work contracts may also be given to a proxy or a person authorised to represent the employer. It is often an HR manager.

According to article 335 paragraph 1 of the Swiss Code of Obligations, '*a contract of indefinite duration may be terminated by either party*'. According to article 335 paragraph 2 CO, '*the party giving notice must give reasons for his decision in writing if the other party so requests*'. Paragraph 2 means *a contrario* that the termination of the employment contract does not need to be justified. Thus, the letter terminating the employment contract need not state the reasons for the employee's dismissal. Only if the employee so requests must the reasons for termination be provided in writing. This also applies if the employee resigns.

In other words, it is common – and perfectly legal – for an employer to state in the letter of dismissal only that the employee is being dismissed and the date on which the employment relationship will end. In the second stage – and provided that the employee so requests – the employer communicates the reasons for the dismissal in writing.

These reasons must correspond to the real reasons for the dismissal. Depending on the reasons given in the letter, the dismissal may be considered unfair within the meaning of Articles 336, 336a and 336b of the Swiss Code of Obligations, entitling the employee to compensation for unfair dismissal. Dismissal may also be unfair if the employee can demonstrate that the reason given by the employer for the dismissal is not the real reason and that the real reason is unfair.

The purpose of the present paper is not to explain the conditions for the application of articles 336, 336a and 336b of the Swiss Code of Obligations and the cases in which dismissal is considered unfair, as the subject is broad. The aim is to ask the following questions in the light of the above-mentioned Federal Court Decision of 26 November 2024:

- Can the letter of termination and the letter explaining the reasons for the termination be considered forgeries within the meaning of the Swiss Criminal Code?

- And can those who sign such letters be held criminally liable if the written reasons for dismissal are false?

The case examined by the Federal Supreme Court concerns the public service and can be summarised as follows:

By letter dated 25 February 2016, a Valais commune informed its employee, C, of the termination of his employment contract with effect from 30 April 2016. The employee was a commercial agent in the 'civil security' department. The letter of termination stated that the decision had been taken at a meeting of the municipal council on 22 February 2016. The reason for the termination was not stated in the letter. The letter of termination was signed by D, by order of A, municipal secretary, and by B, municipal councillor and chairman.

On 15 April 2016, the employee C filed an objection to his dismissal and asked the municipal council for the reasons for his dismissal. The chairman informed the municipal council of this on 19 April 2016. By letter dated 4 May 2016, signed by B and A, the municipality replied to the employee that the termination was due to an internal reorganisation of the administration, having led to the abolition of the post of commercial officer in the 'civil security' department.

The employee filed a criminal complaint against A and B and against an unknown person for abuse of authority, harm to his pecuniary interests, corruption and forgery of documents. In particular, the employee accused A and B of having lied about the real reasons for his dismissal and the date on which the decision to terminate the employment relationship had been taken.

A was convicted, at first instance and then at second instance, of forgery in a public office. B was convicted, at first instance and then at second instance, of forgery of documents.

Both appealed to the Federal Supreme Court, which accepted their appeal.

Insofar as the case concerned the public service, the Federal Court noted that the termination had to take place by way of an administrative decision. This point will not be developed in this paper, nor was it developed by the Federal Court in its Decision.

In the case in question, the Federal Court found that A and B had not *'forged a document of title or falsified a document of title by affixing a false signature or altering a document of title drawn up by a third party, so that there was no material forgery. However, the content of the letter of 25 February 2016, which gave an incorrect date, was misleading insofar as it gave the date as 22 February 2016, whereas the Local Council had taken the decision to dismiss on 10 November 2015, and the content of the letter of 4 May 2016 was also misleading insofar as it did not give the real reason for the dismissal'*.

For the Federal Court, the issue was therefore *'to determine whether the letters in question had an increased capacity to convince, justifying them being considered as intellectual forgeries'*.

In this respect, the Federal Court recalls that, *'in accordance with case law, a letter of dismissal whose content is false does not in principle constitute a document of title, for lack of increased probative value (decision 6S.618/2002 of 18 June 2002, recital 6). The letter of motivation, which forms part of the context of the dismissal, does not have a distinct scope and cannot be considered a document of title. In the present case, it is difficult to see what objective assurances – deriving from the law or commercial practice – would have guaranteed third parties the truthfulness of the content of a letter of termination, especially as a termination (cf. art. 335 para. 1 CO) is not subject to any particular form unless otherwise provided for in the contract and need not be based on a particular reason in accordance with the principle of freedom of termination (ATF 136 III 513 rec. 2.3)'*.

In this decision, the Federal Court therefore confirms – and this is rather reassuring – that a letter of termination and also the letter explaining the reasons for the termination do not constitute a document of title within the meaning of the Swiss Criminal Code, as these letters do not have any increased probative value.

Thus, if the dismissed employee considers that the content of these letters is false, i.e. if he/she considers, for example, that the reason for the termination, which is mentioned in the letter, is not the real reason for the termination and that the real reason is abusive, it is not by means of a criminal complaint that he/she must act but rather by the means available to him/her under the Swiss Code of Obligations, in particular articles 336, 336a and 336b CO.

For the undersigned author, even though the case dealt with by the Federal Court may be an isolated and perhaps 'anecdotal' case, the position of the Federal Court, which confirms previous case law, is reassuring!

Source :

<https://www.wg-avocats.ch/en/actualites/labour-law/can-the-letter-of-termination-and-the-letter-explaining-the-reasons-for-the-termination-be-a-forgery-of-title/>