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# How does a criminal proceeding abroad affect the employment situation of a Swiss asset manager ?

## *Introduction*

A new tax transparency environment, coupled with a hunt for fraudulent tax debtors, instigated in particular by the US authorities, and more specifically by the Department of Justice (the "**DOJ"**), have led to an increased risk for asset managers to be involved in criminal proceedings outside of Switzerland. As a consequence of the above, numerous asset managers have had their employment contracts terminated, either because they could no longer legitimately fulfil their commercial duties, or as a punitive action, under the DOJ's initiative, or for alternative reasons.

The occurrence of this type of situation, which has dramatically increased as a result of the signature in Washington, on 29 August 2013, of the agreement relating to the tax dispute between Switzerland and the United States of America, has raised a number of issues which have not yet been ruled upon by the courts. Is the termination of the employment contract considered as unfair in this context, and does it justify the payment of an indemnity in favor of the employee? Should the employer assume liability towards its employee and, if so, what are the limits of such liability? Who should bear the costs of criminal proceedings instigated abroad against the asset manager whose employment contract has been terminated? To which documents can the employee have access in order to organize his/her defense abroad?

## *Unfair dismissal*

Article 336 of the Code of Obligations ("**CO**") draws a list of cases in which a dismissal will be deemed unfair. However, the list contained in this provision does not purport to be exhaustive and dismissal may be considered unfair under other circumstances. Thus, other cases of unfair dismissal may be admitted if it can be shown that they are, in their gravity, comparable to the situations referred to in article 336 CO. A dismissal may be deemed unfair by reason of the manner in which it has been notified, because the party notifying such dismissal has acted in breach of the good faith principle, when it is notified by an employer in breach of the rights of the employee's personality, when the interests at hand are obviously disproportionate or when a legal institution is used contrary to the purpose for which it was enacted. However, a behavior which would be merely inappropriate or not suited to commercial relations does not constitute a sufficient ground for unfair dismissal (judgment of the Federal Court of 23 November 2011 in case 4A_419/2011; judgment of the Federal Court of 29 June 2012 in case 4A_166/2012).

It goes without saying that each situation will have to be analyzed in the light of its own circumstances. At this stage however, it cannot be excluded that a dismissal may, in the future, be considered as unfair if, for instance, it has been notified after the employer has made his employee believe, for months on end, that another position would be offered to him/her within the company, or if the employer is not in a position to blame the employee for the breach of an internal rule or the employer's commercial policy. As the case may be, a compensation could be awarded to the employee, bearing in mind that such compensation will be limited to the equivalent of six months' salary (see article 336a CO).

## *The employer's liability*

The employer's liability may not only be tortious and find its foundation in the violation of personality rights (see article 41 al. 1 CO), but also contractual and find its foundation in the breach of article 328 of the Code of Obligations (article 97 CO). In particular, article 328 of the Code of Obligations governs the duty of the employer to protect the personality of its employees. This constitutes an "open" norm, which allows for a scalable materialization of the law in the world of labor and which takes into account technical transformations and behavioral changes, as shown in the ever-increasing case-law on this matter. Said provision protects values such as physical integrity, physical and psychological health, moral integrity, social standing, professional and personal honor, reputation, individual freedom as well as the private sphere of the individual. There are numerous applications for this provision, which include, notably, different forms of harassment (psychological or sexual), stress, burnout, etc.

In the future, the important question will be to determine whether the employer was in breach of its obligations, resulting from article 328 of the Code of Obligations, if it has requested the employee, whilst acting as asset manager, to engage in business development activities with clients associated with a criminal risk abroad, whether such risk be linked to the client's tax situation or not. In other words, the employer could be deemed to have jeopardized the employee's situation by exposing such employee to high-risk clients, such risk being increased when dealing with non compliant tax debtors. In this context, it is worth noting that the contractual liability (article 97 CO) is conditional upon the existence of a deemed fault. In order to fully exonerate itself from liability, the employer will have the burden to prove that it has committed no breach. The results linked to the assessment of its liability will no doubt depend on the measures taken to mitigate the risk of the employee being caught up in criminal proceedings abroad. Particular consideration will be given to the requirements relating to account opening procedures and to the various measures taken to comply with know-your-client (or "KYC") requirements, etc.

Should such liability be established, the next issue will be to determine the extent thereof. Prejudice is usually defined as "the involuntary reduction of a person's patrimony". Will the employer be indefinitely responsible for the employee's remuneration? Will the prejudice also apply to welfare benefits? These are only some of the questions which will arise and be resolved, in each individual case, in light of the general provisions of the Code of Obligations, and in particular of those relating to damages calculation principles (articles 43, 43 and 44 CO).

***The costs of a criminal procedure abroad***

The costs of a criminal procedure abroad may prove to be very high and, in many instances, will not be covered by legal protection insurance contracts. Such costs include not only legal expenses such as, for instance, translation costs, but also other expenses such as lawyers' fees, travel expenses, etc.

Article 327a al. 1 CO provides that "*the employer must reimburse the employee for all expenses necessarily incurred in the performance of the work and, in the case of work performed outside the employer's premises, for his necessary living expenses*". Although it is true that the courts have not, to this day, had the opportunity to deal with the extent of the coverage of the above mentioned expenses, the authors[1] generally admit that such expenses should be borne by the employer, even if they have been disbursed after the termination of the employment contract and provided that it is related to the activity of the employee and that he/ she has not acted in gross negligence. Moreover, the above mentioned rule has materialized in the Convention concluded on 29 May 2013 between the

[1] AUBERT Gabriel, « La communication aux autorités américaines, par des banques, de données personnelles, sur leurs employés: aspects de droit du travail » in RSDA 2013 p. 47.

Swiss Association of Bank Employees and the Employers Association of Banks in Switzerland, adopted in the context of the tax dispute between Swiss banks and the United States of America[2].

Although it is true that, today, the right of asset managers to have the above mentioned expenses covered does not seem questionable, it is possible that some employers show some reluctance to grant such right by reason of alleged breaches committed by their employees in the performance of their duties. From this point of view, compliance with internal rules and procedures takes a whole new dimension.

***The employee's right to access his/her file***

On 12 January 2015[3], the Swiss Federal Court rendered a judgment in relation to a request, introduced by an asset manager employed by a Swiss bank, to have access to the data communicated by his employer to the American authorities. The employee planned to travel to the United States of America for his summer holidays and wished to have certain documents at his disposal in order to defend himself, should he be interrogated, or even taken into custody. Our High Court confirmed the employee's right to have access to such documents, on the condition that these were blacked out and on the condition that such a right was not exercised in an unfair manner. In this context, it is important to note that the Federal Court would not have considered the exercise of the access right (as granted under article 8 of the Swiss Federal Law on Data Protection) as unfair, had it been exercised by the employee in view of a possible claim for damages against the file master.

That being said, such judgment of the Federal Court, rendered in a very specific context, should constitute a solid ground for actions introduced by asset managers involved in criminal proceedings abroad, with a view to obtaining, from their non-cooperative employers, all documents necessary for their defense. As stated above, such actions will no doubt be limited by the employee's objective, as well as, undoubtedly, by the extent of the exercise of the access right. Thus, a request which would be deemed too far-reaching or inaccurate will, in all likelihood, be rejected[4].

***Conclusion***

In light of the above, and with all the questions that remain open today in relation to the rights of asset managers dismissed by their employers in the wake of criminal proceedings abroad, one can easily conclude that such asset managers' troubles do not come to an end merely upon the official termination of their employment contract. This article sheds some light on the fragility of asset managers, previously considered as untouchable, as well as upon the necessity, on their part, to comply with their employer's instructions (at the risk of having such employer dispute some of the employee's rights). It also highlights the importance of employee protection, notably through the conclusion of adequate legal expense insurance.

[2] Art. 2 al. 2 Convention of 29 May 2013.
[3] Judgment of the Federal Court of 12 January 2015 in case ATF 4A_406/ 2014
[4] Judgment of the Court of Justice of Geneva of 19 January 2016 in case CAPH/11/2016