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The variable geometry medical certificate is still being talked about

In a previous article, the undersigned addressed the issue of incapacity for work limited to the workplace, which is a real headache for the employer but also for the employee. This incapacity is again the subject of a Federal Court Decision of 12 April 2021.

This decision (which has already been commented on, in particular Werner Gloor, Droit du travail, Newsletter June 2021, edited by Bohnet F., Dunand J.-P., Mahon P., Witzig A. with the participation of Gloor W) concerns a dispute between an employee and the loss of earnings insurance but not a dispute between an employee and an employer. It therefore leaves open the question of the employer's obligation and in particular the obligation to pay or not an employee who is subject to an incapacity limited to the workplace. It also leaves open the question of the protection of the employee against dismissal at an inopportune juncture, as, in this case, it was the employee who gave notice.

This Decision therefore concerns an employee who had given his notice for 19 November 2019. For several months, from 14 June 2019 to 30 November 2019, the employee was unable to work. This incapacity was limited to the workplace.

The employer's loss of earnings insurance took over and paid daily allowances until 31 August 2019. Thereafter, it stopped paying benefits because the incapacity was limited to the workplace and not medically based.

The employee contested this decision of the insurance company and brought an action before the competent judicial authorities of the canton of Bern to obtain the payment of compensation from the loss of earnings insurance for the months of September to November 2019. The insurance company was ordered to pay both by the first and the second instances.

The Federal Court confirmed those decisions. For the Federal Court, the fact that the first and the second instance judges held that an inability to work, even if limited to the workplace, constituted a real inability to work was not arbitrary. The insurance company should therefore continue to pay loss of earnings benefits in this case.

While Werner Gloor considers that this ruling "*seems to put an end to the uncertainty created by the unfortunate TF 4A_391/2016 of 8 November 2014*", (which the undersigned also mentioned in her previous article), it should be borne in mind that the Federal Court does not in principle review the facts and the assessment of evidence made by the previous court. It does so only if this assessment is arbitrary.

Arbitrariness does not exist if another solution should also be considered or would even be preferable, but only if the contested decision is manifestly untenable, clearly contradicts the state of affairs, blatantly violates an undisputed legal norm or principle, or is shockingly contrary to the concept of justice.

Thus, while in the case at hand the Federal Court considered that the decision was not arbitrary, it does not say that, in all situations, a work incapacity limited to the workplace is a real work incapacity. Each situation must therefore be examined separately, and caution is

always called for, whether for the employer, the employee or now also for the insurance company, when a medical certificate attests to an incapacity for work limited to the workplace.

Source : https://www.wg-avocats.ch/en/news/labour-law/medical-certificate-labour-law/