

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

20. What if the employee under investigation goes off sick during the investigation?

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Although there are no specific rules stating an investigation must be suspended if the employee under investigation goes off sick, practically speaking, this may slow down the process. Indeed, the employer would not be in the position to “force” the employee, while he or she is absent from work, to physically attend meetings, although they may ask for the employee’s availability to attend remote interviews (eg, via videoconference).

There is case law regarding an employee’s sickness during a disciplinary procedure (i.e. the procedure described above in point 3): according to certain rulings, if an employee, as per his or her rights, asks to submit an oral defence, but then falls sick, this does not prevent the employer from completing the procedure (and taking disciplinary action), unless the employee proves that his or her sickness prevents him or her from physically attending the meeting (being said that, above all if the procedure ends with a dismissal, a case-by-case analysis on how to manage such situations is highly recommended).

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The time spent on the internal investigation by the employee should be counted as working time^[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

Last updated on 15/09/2022

27. What legal exposure could the employer face for errors during the investigation?



Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

It depends on the kind of error or breach. For example:

- a breach of privacy laws (eg, acquiring data from working instruments in lack of due requirements) would lead to the application of privacy law sanctions (including monetary fines); and
- breach of provisions regarding “remote” control of employees would lead to criminal sanctions and to the inadmissibility, for disciplinary purposes, of the data collected (and thus potentially to the unlawfulness of a dismissal based on such data).

Furthermore, if the employee has suffered damages as a result of the employer’s errors or breaches (and can specifically prove such damages and their amount), the employer may be held liable in court.

Last updated on 15/09/2022



Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual’s interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the

employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.^[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture^[6]).^[7]

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

Last updated on 15/09/2022

Contributors



Italy

Giovanni Muzina
Arianna Colombo
BonelliErede



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer