

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?

Netherlands

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Dutch employment law does not provide for a timeframe within which an internal investigation must be launched. However, it is important for an employer who suspects abuse or irregularities, to start an internal investigation without delay. In essence, that means that as soon as management, or – depending on the specific circumstances – the person who is authorised to decide on disciplinary sanctions against a certain employee, becomes aware of a potential abuse or irregularity, all measures to initiate an internal investigation should be taken promptly. If this is not done, the employer may lose the opportunity to take certain disciplinary actions.

The legal framework relating to an investigation by an employer into the acts and omissions of an employee are determined by, among other things, section 7:611 of the Dutch Civil Code (DCC) that stipulates good employer practices; Section 7:660 DCC (right to give instructions to the employee); the European Convention on Human Rights; the Dutch Constitution; the General Data Processing Regulation; and, if the employer uses a private investigation agency, the Private Security Organisations and Detective Agencies Act and the Privacy Code of Conduct for Private Investigation Agencies.

The legal basis from which the employer derives the authority to investigate can be based on the employer's right to give instructions (section 7:660 DCC). Pursuant to this section, the employer has – to a certain extent – the right to give instructions to the employee “which are intended to promote good order in the undertaking of the employer”. In many cases, an investigation of a work-related incident will aim to promote good order within the company. As such, the investigation is trying to:

- find the truth;
- sanction the perpetrator; and
- prevent repetition.

Instructing an employee to cooperate with an internal investigation falls within the scope of the right to instruct.

Subsequently, the employer must behave as a good employer during the investigation, pursuant to section 7:611 DCC. This is coloured by the classic principles of careful investigation: the principle of justification, the principle of trust, the principle of proportionality, the principle of subsidiarity and the principle of equality. Furthermore, the principle of hearing both sides of the argument applies and there must be a

concrete suspicion of wrongdoing.

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Singapore

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A workplace investigation is usually governed by the employer's internal grievance policy or contractual guidelines found in the employment contract or employee handbook. In the absence of the same, the default governing regime is as set out by the Ministry of Manpower (MOM) and the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) in its guidelines and advisories, which include:

- the Tripartite Advisory on Managing Workplace Harassment;
- the TAFEP Grievance Handling Handbook; and
- the Tripartite Guidelines on Fair Employment Practices.

In addition, section 14(1) of the Employment Act 1968 provides that an employer is required to conduct "due inquiry" before dismissing an employee covered under the Employment Act 1968 without notice for misconduct. The Singapore Courts take the view that "due inquiry" suggests some sort of process in which the employee concerned is informed about the allegations and the evidence against him or her so that he or she has an opportunity to defend him or herself with or without evidence during the investigation process.

Further, there are numerous cases where the Singapore High Court has alluded to or implicitly accepted the application of the implied term of mutual trust and confidence in employment contracts that would oblige the employer to act reasonably and fairly during the investigation, even though it is worth noting that the Singapore Court of Appeal has stated that the status of the implied term of mutual trust and confidence has not been settled in Singapore and that the Appellate Division of the Singapore High Court has stated that "[i]t remains an open question for the Court of Appeal to resolve in a more appropriate case, ideally with facts capable of bearing out a claim based directly on the existence of the implied term" (see [81]-[82] of *Dong Wei v Shell Eastern Trading (Pte) Ltd* and another [2022] SGHC(A) 8).

Hence, any references to the application of the implied term of mutual trust and confidence in Singapore in this article must be read in light of the above.

The current position is expected to change in the second half of 2024, with the passing of Singapore's first workplace fairness law, the Workplace Fairness Legislation. On 4 August 2023, the Singapore government announced that it has accepted the final set of recommendations by the Tripartite Committee on Workplace Fairness in respect of the upcoming Workplace Fairness Legislation. The Tripartite Committee on Workplace Fairness recommended, among other things, that employers are required to put grievance-handling processes in place. It is therefore expected that the Workplace Fairness Legislation may contain requirements on how and when a workplace investigation should be conducted.

This article sets out the current position, before the Workplace Fairness Legislation was enacted, and will be updated when appropriate.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is

derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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