Workplace Investigations

Contributing Editors

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

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

Germany

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Different consequences may result from mistakes made by the employer (or its advisors) in the course of the workplace investigation. For example, if the employer has violated the data protection provisions of the DSGVO or BDSG, this may result in fines. This may also result in claims for damages by the employee. The employee may also have a claim for damages if it turns out that the suspicion of misconduct on the part of the employee is not confirmed and the employer has arbitrarily conducted workplace investigations without sufficient cause.

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Portugal

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If the disciplinary procedure recommends an employee's dismissal

Should a company dismiss an employee that has breached legal requirements, the latter may take action against the company within 60 days of the date of termination of their employment agreement.

If this action results in a ruling of unfair dismissal, the employee will be entitled:

- to receive all the payments they should normally have earned (back pay, including salary, holidays, legal subsidies, etc), from the month preceding the commencement of the lawsuit and until the final ruling of the court, minus any amounts they may have received during the same period and they would otherwise not have received; and
- to be reinstated in their former position or at the employee’s choice, to receive an indemnity that the court will calculate as between 15 and 45 days of base salary (and service bonuses) for each full year of service or fraction thereof, with a minimum limit of three months’ compensation.

This graduation will depend on the amount of the base salary (the lower the base salary, the higher the

indemnity) and the severity of the company’s conduct. Additionally, the employee is entitled to claim an indemnity for further damages.

There are, however, two exceptions to the above: the first relates to high-ranking employees (ie employees carrying out management duties); the second refers to micro-companies (ie, a company that registered an average number of employees in the preceding calendar year below 10). In these two cases, the employer may oppose the employee’s option for reinstatement, arguing that it would be gravely harmful to the company's activity. From a practical perspective, opposition to reinstatement is not commonly decided by the courts.

Finally, should the court rule that the grounds for dismissal were valid, but the investigation was found to have been irregular, the dismissal will be deemed valid, but the employee will still be entitled to an indemnity of 7.5 to 22.5 days of base salary (plus service bonuses, if any) per year of service.

If the disciplinary procedure does not recommend dismissal, but the application of a conservatory sanction

In this event, the employee can challenge the application of the sanction through the filing of a lawsuit against the company. Although the law is not entirely clear, there are court rulings stating that the employee has one year to bring a lawsuit, but others consider that the statute of limitation to challenge a conservatory disciplinary sanction is also one year from the termination of the employment agreement when a pecuniary penalty or suspension was applied to the employee.

Moreover, according to article 331(3) of the Portuguese Labour Code, the employer who applies an unjustified conservatory penalty should compensate the worker under the terms set out in paragraphs 5 and 6 of said article. The imposition of an abusive penalty is also considered a very serious administrative offence as per article 331(7). Please note that the Portuguese Labour Code considers a penalty to be unjustified if its imposition is motivated by the following:

- the employee lawfully complaining about their labour conditions;
- the employee lawfully disobeying unlawful orders from a superior;
- the employee being a member of any employee representative structure or having been a candidate for such a position; and
- the employee exercising or invoking their rights and guarantees.

Furthermore, any penalty imposed within six months of any instance listed above (or within one year if the invoked rights are related to equality and non-discrimination) is presumed to be abusive.

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Switzerland

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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]

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[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.

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