

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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27. What legal exposure could the employer face for errors during the investigation?

Australia

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It is important for employers to conduct procedurally fair investigations that result in a fair outcome. Failure to do so may expose the employer to various claims by an employee. The most common type of claim following an investigation is an unfair dismissal claim. If a respondent's employment is terminated because of an investigation, they may be eligible to bring an unfair dismissal claim in the FWC alleging their dismissal was harsh, unjust or unreasonable.

An employee may also bring a bullying, discrimination or general protections claim. These claims may be made even where the investigation does not result in the employee's dismissal.

If an employer has departed from the procedures set out in their policies, or they have not followed the terms of an employee's employment contract or another applicable industrial instrument then an employee may bring a claim for breach of contract.

Australia has also recently introduced the "Respect@Work" legislation which places a positive obligation on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. Accordingly, an employer who is not perceived to have taken a proactive and fair approach to these workplace issues faces significant legal exposure.

Failure to conduct an investigation properly (or a failure to conduct an investigation in circumstances where it is needed) can also cause significant reputational and financial risk.

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France

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Within the context of an investigation following a whistleblower alert, any violation of the confidentiality obligation is punishable by two years' imprisonment and a €30,000 fine.

If the employer fails to comply with its obligation to protect its employees' safety, the employer will be liable for damages resulting from any failings during the investigation (eg, if sexual harassment is reported and no action is taken by the employer)

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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]

[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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