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?

Australia

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It is not uncommon for respondents to an investigation to take personal or carer's leave (sick leave) claiming that they are suffering from stress or anxiety. If this occurs, employers need to act appropriately, but this does not necessarily involve stopping the investigation process.

Employers should:

- assess the medical evidence to ascertain the respondent's condition and determine how long they are likely to be unwell;
- avoid exacerbating the condition;
- determine whether the employee is unfit to attend the investigation meeting;
- take into consideration the evidence of other witnesses;
- consider delaying the investigation for a short period; and
- consider conducting the interviews in other ways, for example, in writing.

While all efforts should be made to accommodate an employee who has taken personal or carer's leave during an investigation, if the respondent does not participate in the investigation, the investigation report may be prepared based on the available evidence.

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Switzerland

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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).

[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

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26. How long should the outcome of the investigation remain on the employee’s record?

Australia

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There are legal requirements related to the time you must keep certain employee records in Australia, such as pay slips and time sheets. However, there are no laws concerning disciplinary records.

Employers can rely on previous misconduct to justify an employee’s termination of employment where it can be shown it is part of a course of conduct. Accordingly, if complaints have been substantiated, and disciplinary action has been taken, these records should be maintained. However, if a significant period has elapsed since the misconduct, an employer should carefully consider whether it is appropriate to rely on this past behaviour to justify future disciplinary action for similar conduct.

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From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).[1]

[1] Wolfgang Portmann/Isabelle Wildhaber, Schweizerisches Arbeitsrecht, 4. Edition, Zurich/St. Gallen 2020, N 473.

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