

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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01. What legislation, guidance and/or policies govern a workplace investigation?

Finland

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Mainly, the Occupational Safety and Health Act (738/2002). In addition, the following also have relevance in connection to a workplace investigation: the Employment Contracts Act (55/2001), the Criminal Code (39/1889), the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006), the Act on Equality between Women and Men (609/1986) and the Non-discrimination Act (1325/2014). In addition, the employer's own policies must be taken into consideration while conducting a workplace investigation.

Last updated on 15/09/2022

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There is no legislation on this area in Poland. However, employers implement internal policies that provide for workplace investigation rules to fulfil certain legal obligations, including those arising directly from labour law.

Based on the currently binding provisions of labour law, an employer must counteract unwanted behaviour in the workplace (eg, bullying, discrimination and unequal treatment). To fulfil this obligation, employers implement internal policies that provide a framework for reporting misconduct and conducting internal investigations. They may freely design the rules of such investigations, within the constraints of their policy. Therefore, it is recommended they create the policy based on the following:

- it should be possible to effectively report the misconduct;
- there should be more than one way to report misconduct;
- anonymous reporting should be allowed;
- an investigation committee should be appointed and be objective;
- rules on excluding persons with a conflict of interest from conducting the investigation should be

provided; and

- the report from the investigation should be prepared and signed by all persons participating in the process.

However, work on a bill on whistleblower protections is in progress (the Draft Law). The Draft Law will not determine the rules of workplace investigations but it will force employers to implement a whistleblowing procedure and follow-up on recommendations in the case of a report, including initiating an internal investigation where appropriate. Whether an internal investigation is initiated depends on the assessment of a reported irregularity by the employer.

In addition, employers (especially those that are part of an international group) often already implement internal policies on whistleblowing management and internal investigations. Employers often base their policies on guidelines issued by relevant (usually international) organisations.

Last updated on 20/04/2023



Portugal

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Pursuant to article 98 of the Portuguese Labour Code, the employer has a disciplinary power over its employees during the employment period. This is enforced through the initiation of disciplinary procedures – which can include a preliminary workplace investigation as provided for in article 352(1) of the Portuguese Labour Code – and ultimately the application of sanctions laid down by law or in an applicable collective bargaining agreement.

The Portuguese Labour Code governs disciplinary procedures, which can include a preliminary workplace investigation, in two different sections. On the one hand, articles 328 to 332 establish general rules regarding the imposition of disciplinary sanctions; statutory deadlines and statutes of limitations involved; decision criteria; penalties; and disciplinary records. On the other hand, articles 351 to 358 lay down the rules applicable to dismissals with cause, which are also widely understood to be applicable concerning conservatory sanctions (i.e. those that enable the continuity of the employment relationship).

Additionally, collective bargaining agreements may provide for different disciplinary penalties, as long as the rights and guarantees of employees are not impaired.

Workplace investigations must also abide by the general rules laid down in the Portuguese Constitution, Portuguese Civil Code and Data Protection Laws (including guidelines issued by the Data Protection Agency), as regards the personal rights of the employees.

Last updated on 15/09/2022

02. How is a workplace investigation usually commenced?



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When the employer becomes aware of possible misconduct, the employer must commence an investigation immediately, in practice within about two weeks. The information may come to the employer's knowledge

via, for example, the employer's own observations, from the complainant or their colleagues or an employee representative.

Last updated on 15/09/2022



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There are no legal requirements in this respect – it depends on the internal policies or practices at a given working establishment. Based on our experience – an internal investigation usually commences with a preliminary assessment of a reported irregularity. If the preliminary assessment leads to a conclusion that a reported situation may be an irregularity, an investigation is launched by appointing a commission or team that conducts the investigation or selecting an investigator. Then, a plan of investigation is established. Depending on the circumstances, the investigation plan may involve a collection of documents or files, their analysis, and interviews with a victim, witnesses or a subject (although the procedure depends on the type of case, internal rules and practice). At the end of the process, the report is prepared by the commission or team with facts established during the process, recommendations, and other suggestions as to the investigated issue.

Last updated on 20/04/2023



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Having been informed of an alleged infraction committed by an employee, the employer must prepare a detailed written accusation and notify the employee.

Moreover, if the alleged infraction constitutes gross misconduct and the employer is considering dismissal, a formal statement of the employer's intention to dismiss the employee should accompany the accusation. If this is not expressly done, the employer will be unable to dismiss the employee and may only apply one of the conservatory sanctions. A copy of these documents must be sent to the works council, if any, and, should the employee be a union member, to the respective trade union.

Notwithstanding this, if before preparing the accusation the employer needs to further investigate the facts and circumstances, it may open a preliminary investigation aimed at collecting all the facts and circumstances and conclude if there are grounds to bring an accusation against the employee.

The preliminary investigation must start within 30 days of the employer becoming aware of the facts, be diligently carried out (but with no maximum period laid down by law) and concluded within 30 days of the last investigatory act. Furthermore, the preliminary investigation will suspend the relevant statutory deadlines and statutes of limitations (ie, 60 days from the date of acknowledgment, by the employer or a supervisor with disciplinary power, of the facts to enforce disciplinary action against the employee and one year from when the facts occurred, regardless of the employer's acknowledgment, unless the infraction also constitutes a criminal offence, in which case the longer statutes of limitation established in criminal law will apply).

Last updated on 15/09/2022

03. Can an employee be suspended during a

workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

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There is no legislation on temporary suspension in the event of a workplace investigation or similar. In some situations, the employer may relieve the employee from their working obligation with pay for a short period.

Last updated on 15/09/2022

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Polish law does not provide for the suspension of an employee. Instead, an employer may agree with an employee that he or she will be released from the obligation to perform work during a relevant period of investigation (with the right to remuneration). The employer may not do this unilaterally, unless the employee is in a notice period. As an alternative, which is more common in practice, the employer may force the employee to use outstanding holiday leave (subject to limitations provided by law) or the parties may mutually agree on the use of holiday leave or unpaid leave (if the employee has already used his or her holiday entitlement in full).

Last updated on 20/04/2023

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After the employee is notified of the accusation, the employer may decide on a preventive suspension of the employee if the employee's presence on company premises is deemed problematic. In this case, the employee's salary will continue to be paid.

As per article 330(5) of the Portuguese Labour Code, a preventive suspension may also be determined during the 30 days before the accusation is made, provided that the employer, in writing, justifies why is necessary (eg, for interfering with the inquiry) and why the accusation cannot be served at that moment.

Last updated on 15/09/2022

04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?

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The employer must conduct the investigation, but the actual work can be done either by the employer's personnel or by an external investigator, for example, a law firm. Either way, there are no formal criteria for the persons executing the investigation; however, impartiality is required from the person conducting the investigation

Last updated on 15/09/2022



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There are no legal requirements in this regard but it is good practice if the team of investigators or individuals who deal with the case consists of:

- a person who has specific knowledge in a given field (concerning the violation);
- a member of the HR team; and
- a lawyer (it is recommended to engage an independent, external lawyer who can maintain the objectivity of the investigation, especially in complex matters or where a conflict of interest arises or may arise).

It is crucial that the investigators are independent (and they must be allowed to act independently).

Also, certain personal features are useful (eg, the ability to objectively assess a situation, empathy, and managing skills).

Last updated on 20/04/2023



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According to article 356(1) of the Portuguese Labour Code, the employer can appoint an instructor, who shall be responsible for the probationary proceedings. Usually, workplace investigations are conducted by external advisors (eg, lawyers), appointed by the employer.

However, regarding disciplinary powers, there is a legal limitation in article 98 of the Portuguese Labour Code. As such, only the employer (or the immediate superior of the concerned employee, if the employer has delegated its powers, as per article 329(4) of the Portuguese Labour Code) has disciplinary powers.

Last updated on 15/09/2022

05. Can the employee under investigation bring legal action to stop the investigation?



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The employee does not have a legal right to stop the investigation. The employer must fulfil its obligation to investigate the alleged misconduct.

Last updated on 15/09/2022



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This is unlikely. Theoretically, an employee can file a claim against an employer concerning the infringement of personal rights in the course of an investigation and a motion to secure his or her claims, which would consist of an employer being forced to suspend the proceedings, but in practice we have not encountered such a situation.

Last updated on 20/04/2023



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The employee under investigation can only bring legal action after the investigation is finished and if the employer has applied a disciplinary sanction.

According to article 329(7) of the Portuguese Labour Code, the employee may submit a complaint to the immediate superior officer that applied the sanction or may resort to a dispute resolution procedure as provided for by the applicable collective bargaining agreements or the law (this is uncommon, however).

Furthermore, should a company dismiss an employee in breach of the legal requirements described above, the latter may take legal action against the company within 60 days of the date of termination of his or her employment agreement. The employee may also choose to file a preliminary injunction against the employer seeking immediate (albeit provisional) reinstatement.

Notwithstanding this, if the employee can prove that they suffered damages as a result of being subject to an abusive and illegal investigation, they may file a complaint with the Labour Authorities or bring a claim against the employer and demand the payment of compensation for the damages caused.

Last updated on 15/09/2022

06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?



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There is no legislation on a witness's role in investigations. However, the legislation on occupational safety requires that employees must report any irregularities they observe. Depending on the situation, participating in the investigation may also be part of the person's work duties, role or position, in which case the employer may require the employee to contribute to clarifying the situation. However, there is no formal obligation to act as a witness, and there is no legislation regarding the protection of witnesses. If a witness wishes, they may have, for example, an employee representative as a support person during the hearing.

Last updated on 15/09/2022



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In general, an employee may not be forced to act as a witness, but based on the provisions of the Polish Labour Code, an employee must act for the benefit of a working establishment or employer and perform work in line with the instructions of an employer. A lack of cooperation from an employee (eg, refusing to attend a hearing, hiding facts or even false testimony) may constitute a basis for the loss of an employer's trust in the employee and, as a consequence, may constitute a valid reason for termination (in some specific situations, even without notice).

There is no formal protection for employees who act as witnesses. However, participation in an investigation cannot result in negative consequences (eg, no retaliation is allowed). Also, during an investigation, employees who are bound by professional secrecy are not required to provide information that would imply a breach of such secrecy.

Last updated on 20/04/2023



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If the employer decides on an internal investigation to assess potential wrongful actions carried out within the company, employees must cooperate. However, employees are entitled to the privilege against self-incrimination established in the Portuguese Criminal Code, according to which individuals are not obliged to self-report.

An employee's refusal to cooperate with an internal investigation may be regarded as a breach of conduct by the employer and, ultimately, may lead to disciplinary sanctions.

Employees who act as witnesses in cases of harassment cannot be sanctioned unless they acted with wilful misconduct, and any sanction applied to an employee who acted as a witness in a harassment procedure will be presumed to be abusive.

Last updated on 15/09/2022

07. What data protection or other regulations apply when gathering physical evidence?

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Generally, the basic principles set out by the GDPR and the Finnish Data Protection Act apply to data processing in connection with investigations, including evidence gathering: there must be a legal basis for processing, personal data may only be processed and stored when and for as long as necessary considering the purposes of processing, etc.

Additionally, if physical evidence concerns the electronic communications (such as emails and online chats) of an employee, gathering evidence is subject to certain restrictions based on Finnish ePrivacy and employee privacy laws. As a general rule, an employee's electronic communications accounts, including those provided by the employer for work purposes, may not be accessed and electronic communications may not be searched or reviewed by the employer. In practice, the employer may access such electronic correspondence only in limited situations stipulated in the Act on Protection of Privacy in Working Life (759/2004), or by obtaining case-specific consent from the employee, which is typically not possible in internal investigations, particularly concerning the employee suspected of wrongdoing.

However, monitoring data flow strictly between the employee and the employer's information systems (eg, the employee saving data to USB sticks, using printers) is allowed under Finnish legislation, provided that employee emails, chats, etc, are not accessed and monitored. If documentation is unrelated to electronic communications, it also may be reviewed by the employer. Laptops, paper archives and other similar company documentation considered "physical evidence" may be investigated while gathering evidence on the condition that any private documentation, communications, pictures or other content of an employee are not accessed.

Last updated on 15/09/2022

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If personal data is involved – the rules and principles of the GDPR will apply. If the physical evidence includes e-mail correspondence, files, or an employee's equipment and possessions, the Labour Code will apply (ie, as a general rule, to monitor it, a monitoring policy must be implemented at that working establishment). Such a policy must strictly determine the aim of the surveillance and an employer must only apply surveillance in situations that reflect this aim. Also, when it comes to monitoring correspondence, it must not infringe on the secrecy of the correspondence, which in practice means that the employer should not check employees' private correspondence when checking their business mailboxes.

Last updated on 20/04/2023

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Whenever employers process personal data in the course of an investigation, they need to comply with Regulation (EU) 2016/679 (the GDPR) and Law 58/2019, which implements the GDPR in Portugal (jointly the Data Protection Regulations). If the gathering of physical evidence includes the collection and processing of sensitive data (eg, related to the employee's health or any other category outlined in article 9 of the GDPR),

additional safety measures should be in place to safeguard the adequate and confidential nature of such information.

Last updated on 15/09/2022

08. Can the employer search employees' possessions or files as part of an investigation?

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Only the police can search employees' possessions (assuming that the prerequisites outlined in the legislation are met).

Last updated on 15/09/2022

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It depends on whether the employer implemented rules of personal control at the workplace. If yes, such rules are applicable. If not, in our opinion if there is suspicion of a serious violation, it is possible to carry out an ad hoc inspection but its scope should be limited only to necessary activities and should not concern an employee's private files or correspondence, so as not to infringe on personal rights. If there is an ad hoc inspection, an employee should be informed in advance, and it should take place in the presence of the employee or employee's representative, observing the rules of fairness and equity.

Last updated on 20/04/2023

Portugal

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The employer is allowed to search an employee's possessions or files, provided that they are work instruments or of a professional nature.

When performing these searches, employers should consider the specific provisions of the Data Protection Regulations as well as Resolution No. 1638/2013 of the Portuguese Data Protection Authority (CNPd), which contains rules on monitoring phone calls, e-mail and internet usage by employees. The CNPD understands that for the employer to access the employees' professional data (e-mails, documents and other information stored on electronic devices), the latter should be present during the monitoring, to identify any information of a personal nature that should not be accessed by the employer (the employer must comply with these directions and should not access that email). In addition, review of the data should respect specific protocols to avoid potential access to personal data (eg, review of subject, recipients, data flow and type of files attached).

Body searches or the seizure of personal belongings or documents belonging to the employee are not

permitted within the scope of a disciplinary procedure.

Last updated on 15/09/2022

09. What additional considerations apply when the investigation involves whistleblowing?

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In respect of data protection, the processing of personal data in whistleblowing systems is considered by the Finnish Data Protection Ombudsman (DPO) as requiring a data protection impact assessment (DPIA).

Last updated on 15/09/2022

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In principle, an internal investigation should be conducted in the same way, regardless of whether it is initiated following a whistleblowing report, an audit, or a monitoring result. This includes anything related to confidentiality, fairness, data privacy protection, etc.

If an internal investigation is initiated following a whistleblower report, the main characteristic that is imposed by the EU Directive on the protection of persons who report breaches of EU Law (Whistleblowers Directive) and that will also be available under the Draft Law is for the organisation (employer) to communicate (if practicable) the report to the whistleblower. Furthermore, the whistleblower should receive feedback as to whether follow-up actions were undertaken following the report and, if yes – what actions were taken – and if not – why the follow-up actions were not taken.

Last updated on 20/04/2023

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The treatment of whistleblowers and their reports is laid down in various specific laws in Portugal.

Law 93/2021

Under Law 93/2021, a whistleblower of work-related offences must not be retaliated against. Furthermore, imposing disciplinary penalties on the whistleblower within two years after their disclosure is presumed to be abusive. The whistleblower is entitled to judicial protection and may benefit from the witness protection programme within criminal proceedings. Additionally, reports will be recorded for five years and, where applicable, personal data that is not relevant for the handling of a specific report will not be collected or, if accidentally collected, will be deleted immediately.

Corruption and Financial Crime Law (Law 19/2008)

Under Law 19/2008, a whistleblower must not be hampered. Furthermore, the imposition of disciplinary penalties on a whistleblower within one year following the communication of the infraction is presumed to be unfair.

Additionally, whistleblowers are entitled to:

- anonymity until the pressing of charges;
- be transferred following the pressing of charges; and
- benefit from the witness protection programme within criminal proceedings (remaining anonymous upon the verification of specific circumstances).

Money Laundering and Terrorism Financing Law (Law 83/2017)

Law 83/2017, which sets forth the legal framework to prevent, detect and effectively combat money laundering and terrorism financing, applies to financial entities and legal or natural persons acting in the exercise of their professional activities (eg, auditors and lawyers)(collectively, obliged entities).

According to article 20 of Law 83/2017, individuals who learn of any breach through their professional duties must report those breaches to the company's supervisory or management bodies. As a result, the obliged entities must refrain from threatening or taking hostile action against the whistleblower and, in particular, unfair treatment within the workplace. Specifically, the report cannot be used as grounds for disciplinary, civil or criminal action against the whistleblower (unless the communication is deliberately and clearly unjustified).

Legal Framework of Credit Institutions and Financial Companies (RGICSF)

Credit institutions must implement internal-reporting mechanisms that must guarantee the confidentiality of the information received and the protection of the personal data of the persons reporting the breaches and the persons charged. Under article 116-AA of RGICSF, persons who, while working in a credit institution, become aware of:

- any serious irregularities in the management, accounting procedures or internal control of the credit institution; or
- evidence of a breach of the duties set out in the RGICSF that may cause any financial imbalance, must communicate those circumstances to the company's supervisory body.

These communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower.

Moreover, article 116-AB of the RGICSF establishes that any person aware of compelling evidence of a breach of statutory duties may report it to the Bank of Portugal. Such communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower, unless the report is clearly unfounded.

The Bank of Portugal must ensure adequate protection of the person who has reported the breach and the person accused of breaching the applicable duties. It must also guarantee the confidentiality of the persons who have reported breaches at any given time.

Portuguese Securities Code (CVM)

Article 382 of the CVM states that financial intermediaries subject to the supervision of the Portuguese Securities Market Commission (CMVM), judicial authorities, police authorities, or respective employees must immediately inform the CMVM if they become aware of facts that qualify as crimes against the securities market or the market of other financial instruments, due to their performance, activity, or position.

Additionally, according to article 368-A of the CVM, any person aware of facts, evidence, or information regarding administrative offences under the CVM or its supplementary regulations may report them to the CMVM either anonymously or with the whistleblower's identity. The disclosure of the whistleblower's identity, as well as that of their employer, is optional. If the report identifies the whistleblower, their identity cannot be disclosed unless specifically authorised by the whistleblower, by an express provision of law or

by the determination of a court.

Such communications may not be used as grounds for disciplinary, criminal, or civil liability action brought against the whistleblower, and they may not be used to demote the employee.

According to article 368-E of the CVM, the CMVM must cooperate with other authorities within the scope of administrative or judicial proceedings to protect employees against employer discrimination, retaliation or any other form of unfair treatment by the employer that may be linked to the communication to the CMVM. The whistleblower may be entitled to benefit from the witness-protection programme if an individual is charged in criminal or administrative proceedings because of their communication to the CMVM.

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?

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Concerning a workplace investigation, there is no specific legislation in force at the moment regarding confidentiality obligations. All normal legal confidentiality obligations (eg, obligations outlined in the Trade Secrets Act (595/2018)), and if using an external investigator, the confidentiality obligations outlined in the agreement between the employer and the external investigator, apply. Attorneys-at-law always have strict confidentiality obligations as per the Advocates Act (496/1958).

Last updated on 15/09/2022

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The law does not cover this issue, apart from whistleblower regulations, as it should be regulated by the employer in their internal rules. The employer should ensure all participants of the investigation keep information related to it secret, as long as is necessary for the investigation (or even longer, if required by law concerning personal data or other specially protected information). Reputation, personal data and the personal rights of other people cannot be breached during the proceedings and this should be protected.

Moreover, according to the Draft Law – a whistleblower's personal data should be kept confidential. It can only be disclosed if law enforcement authorities require it. Also, confidentiality should be guaranteed for the subject and other interested persons.

Last updated on 20/04/2023

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The Portuguese Labour Code does not specifically provide for any confidentiality obligations concerning disciplinary procedures. On the contrary, it states that the employee should have access to any information included in the disciplinary procedure. Otherwise, the employee's defence rights could be jeopardised, which would make the disciplinary procedure (and possible disciplinary sanctions) null and void.

As for the witnesses, even though there is no specific provision on confidentiality, employees are generally bound by a duty of loyalty vis-a-vis the employer, which includes not disclosing information that should be kept reserved,

However, in the cases of whistleblowing, it is mandatory to ensure the confidentiality of the complainant, as per question 9.

Last updated on 15/09/2022

11. What information must the employee under investigation be given about the allegations against them?

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The process must be transparent and impartial, and therefore all the information that may influence the conclusions made during the investigation should be shared with the employee.

Last updated on 15/09/2022

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There is no specific mandatory information that should be given to an employee who is the subject of an internal investigation. However, it is common practice that he or she must know what the allegations against them are, on what grounds these allegations are formulated and be given a right to discuss these allegations and the evidence or grounds for these allegations.

Last updated on 20/04/2023

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If, before taking disciplinary action, the employer decides to open a preliminary investigation phase, the employee does not have to be informed.

Only when the preliminary investigation leads to a formal accusation will the employee be entitled to know that enquiries were carried out and the source of the facts (eg, witnesses, documents).

However, if an employer does not need to open a formal preliminary investigation phase, it only has to serve the accusation notice to the employee.

As a rule, employees will only know that they are being investigated if they are suspended or when they are notified of the accusation.

Last updated on 15/09/2022

12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

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See question 11, there is no protection of anonymity as the process must be transparent to the parties involved.

Last updated on 15/09/2022

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Yes.

Last updated on 20/04/2023

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An employee served a notice of accusation is entitled to assess all information that was gathered within the scope of the investigation and disciplinary procedure (notably the identity of the complainant, witnesses heard, other sources of information, etc), otherwise his right of defence may be jeopardised.

Where a preliminary investigation does not lead to an accusation against the employee, no disclosure has to be made by the employer.

Last updated on 15/09/2022

13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation

confidential?

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Yes, however, the need for an NDA is assessed always on a case-by-case basis.

Last updated on 15/09/2022

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Yes, but it may not stop the disclosure of information at the request of relevant law enforcement authorities.

Last updated on 20/04/2023

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Please see question 12 above. NDAs are not admissible.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?

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The privilege of investigation materials concerns a rather limited amount of cases. In practice, materials may be considered privileged in connection with the litigation process under the Procedural Code (4/1734). For example, communications between a client and an attorney may attract protection against forcible public disclosure.

Last updated on 15/09/2022

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In general, findings made and documents established during an internal investigation, including the report thereof, are not covered by privilege per se. It can be claimed that they are covered by the employer's commercial secrecy, but this secrecy is not very well protected from requests of law enforcement authorities. Hence, if prosecuting authorities find a report of an internal investigation or other documents established during an investigation relevant for criminal proceedings, they can ask for them. If they are not produced voluntarily, a search can be performed.

Legal privilege will, on the other hand, cover an internal investigation if it is entrusted to an independent lawyer. Specifically, client-attorney privilege will cover all documents that are established during the investigation by a lawyer.

Under Polish law there is no distinction between legal advice privilege and litigation privilege. Hence, legal privilege will cover the documentation of the internal investigation led by a lawyer regardless of whether the lawyer's involvement is for the purpose of obtaining legal advice or because of ongoing or contemplated litigation.

Last updated on 20/04/2023



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If any sources of information used within an investigation include privileged data, they may be redacted to safeguard third parties' rights. However, where disclosure of that data is necessary for the employee to understand why he or she is being accused, it may be necessary to reveal those elements. Otherwise, the employee may argue that their rights were affected and, for that reason, the disciplinary procedure – and any possible sanction – should be deemed null and void.

Last updated on 15/09/2022

15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



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The employee under investigation has a right to have a support person present (eg, a lawyer or an employee representative) during the hearings and a right to assistance in preparing written statements.

Last updated on 15/09/2022



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This is not regulated by law and it depends on internal procedures or practice at a given working establishment. As a rule, the participation of third parties or proxies is neither a recognised practice nor recommended (according to the principle that the fewer people participate in the investigation, the easier it is to determine the circumstances of the case, the so-called need-to-know rule). However, in certain situations it should be permissible for a proxy (eg, a lawyer) to participate in a meeting with a subject.

Last updated on 20/04/2023



Portugal

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Under the Portuguese Bar Association statutes, the assistance of a lawyer is allowed at all times and cannot be prevented by any jurisdiction or authority, public or private entity.

Nevertheless, the law does not provide any obligation to inform the employee that they are entitled to the assistance of a lawyer.

Last updated on 15/09/2022

16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



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A works council or a trade union does not have a role in the investigation.

Last updated on 15/09/2022



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There is no such obligation, unless it is provided for in an internal procedure or, for example, in the applicable collective bargaining agreement. It is neither a recognised practice nor recommended that such persons participate in the investigation.

However, in the event of violations that justify the termination of an employment contract with the employee, the employer should consult with that employee's union about their intention to immediately terminate any employment contract concluded with that person or to terminate, with notice, the employment contract agreed with him or her for an indefinite term, or apply for consent to terminate the employment contract with an employee who is protected by a union.



Portugal

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Employee representative bodies are not entitled to be informed about or to participate in the preliminary investigation. The works council is only entitled to participate in disciplinary proceedings after a formal accusation has been made against the employee.

A copy of the accusation should be sent to the works council (if any) and if the employee is a trade union member, to the respective trade union. After the instruction phase of the procedure has ended (where the employer has to hear the witnesses identified by the employee in his written defence and file any other sources of information that have been requested), the employer should provide a copy of the disciplinary procedure to the works council (if any) and the respective trade union, if the employee is a member. These employees' representatives will then have five business days to issue their opinion on the matter.

Finally, a copy of the final decision must also be sent to these bodies.

There is no legal right for the interviewee to be assisted by a representative from the works council.

Last updated on 15/09/2022

17. What other support can employees involved in the investigation be given?



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They can request assistance, for example, from an occupational health and safety representative, a shop steward or the occupational healthcare provider.

Last updated on 15/09/2022



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They may be supported by, for example, allowing an alternative work environment (eg, remote work to avoid direct contact with people involved in the case). Depending on circumstances of the case, this solution will be offered to the subject or the victim. However, it is important that such actions do not infringe the rights of other people (eg, the subject itself).

Employees may also be sent on leave (by a unilateral decision of the employer – if possible under currently binding law provisions) or the parties to an employment contract may mutually agree to use such leave. Moreover, if the employer thinks it is necessary, they may assign the employee to another job for a period not exceeding three months (only if it does not result in a reduction in the employee's remuneration and

corresponds to the employee's qualifications).

Also, depending on the employer's decision – psychological or even legal assistance can be provided by the employer to a whistleblower or a victim.

Last updated on 20/04/2023



Portugal

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Employees are usually assisted by lawyers when they are subject to an investigation or disciplinary procedure.

Last updated on 15/09/2022

18. What if unrelated matters are revealed as a result of the investigation?



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If they are related to the work or workplace, the employer will handle the emerging matters separately. In internal investigations, the employer is allowed to use any material legally available.

Last updated on 15/09/2022



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It depends on the circumstances of the revealed issue and the employer's compliance culture. Normally, if a new issue is revealed during the investigation, it should be analysed and investigated if appropriate.

Last updated on 20/04/2023



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If new facts arise as a result of the investigation and they are relevant, the employer may include them in the accusation. If, however, the new facts are revealed after the accusation has been served, the employer will have to prepare an addendum to the initial accusation and the employee will be able to use the same defence rights against that addendum.

19. What if the employee under investigation raises a grievance during the investigation?

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If the nature of the grievance relates to the employer's obligations to handle such matters in general, the grievance will be investigated either separately or as a part of the ongoing investigation.

Last updated on 15/09/2022

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It depends on the internal policies in force in the organisation. Most often, it constitutes the basis for separate proceedings.

Last updated on 20/04/2023

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Grievance procedures are not specifically provided for under Portuguese law. There is no formal procedure for an employee to raise a complaint against the employer. Nonetheless, a potential claim brought by the employee under investigation and subject to a disciplinary procedure should not have any impact.

Last updated on 15/09/2022

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

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As a general rule, sick leave does not prevent an investigation from progressing. Depending on the nature of the sickness, the employee can attend hearings and take part in the procedure. If the sickness prevents

the employee from participating, the employer can put the process on hold temporarily.

Last updated on 15/09/2022



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This may prolong the investigation, as the employee may be unable to participate for a time (if the employee is not able to work, in many cases he or she will not be able to participate in proceedings that requires some level of engagement and psychophysical ability). Also, an employee is protected against termination of an employment contract with notice during sick leave. During such a period, the employer may only terminate his or her employment contract without notice (with immediate effect).

Last updated on 20/04/2023



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The employer will be able to proceed with the investigation or disciplinary procedure regardless, although if it is necessary to hear the employee and they are unable to attend the interview, either the employer waits for their return or it could also send a written questionnaire for the employee to complete.

Last updated on 15/09/2022

21. How do you handle a parallel criminal and/or regulatory investigation?



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Regardless of a possible criminal investigation, the employer must run its internal workplace investigation without unnecessary delay. A workplace investigation and a criminal investigation are two separate processes and can be ongoing simultaneously, so the criminal process does not require the workplace investigation to be stayed. Thus, parallel investigations are to be considered as two separate matters. The police may only obtain evidence or material from the company or employer if strict requirements for equipment searches are met after a request for investigation has been submitted to the police.

Last updated on 15/09/2022



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They can be run in parallel. It is up to the company whether it informs the authority about the ongoing internal investigation.

Based on our experience in criminal matters, a report from an internal investigation may not necessarily be treated as evidence per se, but as a source of information about the evidence.

According to procedural rules stemming from, for example, the Criminal Procedure Code, the authorities can demand to see evidence and documents in the employer's possession that they consider relevant to the conducted proceedings and their subject matter.

Last updated on 20/04/2023



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These procedures are independent and autonomous, and the law does not provide any particular rules to ensure coordination. This raises particular concerns when an employee is subject to a criminal investigation in secret, as the employer will be unable to access any evidence from the criminal procedure to begin an internal investigation or disciplinary procedure against the employee.

On the other hand, considering the short statutes of limitation to enforce disciplinary action, it may prove impossible to wait for the outcome of the criminal or regulatory investigation to decide if a disciplinary procedure should also be enforced, because by the time the employer is fully aware of the facts, the statutes of limitation may have already expired.

However, both the judge in a criminal procedure and the regulator have the public authority to order the employer to share any findings within the scope of the investigation or disciplinary procedure.

Last updated on 15/09/2022

22. What must the employee under investigation be told about the outcome of an investigation?



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The employer's conclusions from the investigation.

Last updated on 15/09/2022



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He or she must be given feedback about follow-up actions that were undertaken, or reasons why the follow-up actions were not undertaken.

In any case – the feedback must be adapted to the circumstances of each case so as not to reveal too many details or infringe the other interested parties' rights.

Last updated on 20/04/2023



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If, further to the conclusion of the investigation, the employer concludes that there are no grounds to enforce disciplinary action against the employee, the employee does not even have to know that they were the subject of an investigation.

However, if the employer does decide to accuse the employee, the employee will be entitled to all the sources of information obtained during the preliminary investigation.

Last updated on 15/09/2022

23. Should the investigation report be shared in full, or just the findings?



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The employee under investigation may only be informed of the conclusions.

Last updated on 15/09/2022



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It does not need to be shared with the employees at all. It may be shared only to the extent such a disclosure will not violate any law, including personal data protection law or personal rights.

Last updated on 20/04/2023



Portugal

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If the employee is accused by the employer, they will be entitled to consult the entire investigation report and not just the findings, as well as the witnesses' depositions, which should be in writing, and any other sources of information that were used by the employer

Even though the law is silent in this respect, courts have ruled that if this is not complied with, the employee's right of defence would be deemed to be disrespected.

Last updated on 15/09/2022

24. What next steps are available to the employer?

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The employer decides whether misconduct has taken place or not. Depending on the case, the employer may recommend a workplace conciliation in which the parties try to find a solution that can be accepted by both sides. The employer may choose to give an oral reprimand or a written warning. If the legal conditions are met, the employer may also terminate the employment agreement.

Last updated on 15/09/2022

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It depends on the outcome of the investigation: imposing penalties; reporting to a regulator; notifying a suspected offence or civil claim; termination of an employment contract with or without notice; and changes to the work organisation. Following the investigation, the employer must make some legal, business or HR corrective actions.

Last updated on 20/04/2023

Portugal

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Once the preliminary investigation ends, the employer must decide whether or not, in its view, there are grounds to bring an accusation against the employee and enforce disciplinary action or if it should be dismissed due to a lack of evidence.

When the employer decides to enforce disciplinary action, the following sanctions may be applied:

- verbal warning;
- written warning;
- financial penalty;
- loss of holiday;
- suspension with loss of pay and length of service;
- dismissal with cause and without compensation.

The first five penalties are usually called conservatory sanctions, enabling the continuity of the employment relationship, as opposed to dismissal, which is deemed a measure of last resort.

25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

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In general, investigation materials, including findings, that includes personal data should only be processed by the personnel of the organisation who are responsible for internal investigations. However, it may in some situations be required by applicable legislation that findings are disclosed to competent authorities for the performance of their duties, such as conducting investigations in connection with malpractice and violations of the law.

Last updated on 15/09/2022

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It depends on the matter. In general, there is no obligation to disclose the report. In some instances, there is an obligation to notify a suspected offence (for example, a terrorist attack or a political assassination). This, however, does not mean there is an obligation to file a report from the internal investigation, but to provide the law enforcement authority with the facts and evidence at the notifier's disposal. In other instances of criminal offences, for example corruption, there is no obligation to notify law enforcement authorities. Therefore, it is up to the organisation to decide whether it will file a notification for a suspected offence.

At the same time, presenting a report from an internal investigation can constitute an element of defence for an organisation if a regulatory authority initiates proceedings regarding a failure by the organisation to comply with regulatory obligations.

Records of interviews do not need to be produced for the case file provided the law enforcement authority does not ask for them.

Last updated on 20/04/2023

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The investigation findings must be disclosed to the employee when an accusation is brought against him or her and to the works council (if any) or trade union, if the employee is a member.

Regulators or police authorities may also notify the employer if any investigations were brought against a particular employee (as regards regulators, this could occur within the scope of fit and proper procedures), in which case the employer must cooperate and disclose any investigation findings.

Last updated on 15/09/2022

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

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Please see question 7. The outcome of the investigation involving personal data may be retained only for as long as is necessary considering the purposes of the processing. In general, the retention of investigation-related data may be necessary while the investigation is still ongoing and even then the requirements of data minimization and accuracy should be considered. The data concerning the outcome of an investigation should be registered to the employee's record merely to the extent necessary in light of the employment relationship or potential disciplinary measures. In this respect, the applicable retention time depends on labour law-related rights and limitations, considering eg, the applicable periods for filing a suit.

Last updated on 15/09/2022

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Neither Polish law nor the Draft Law specifically provide for a mandatory period during which the outcome of the investigation should be kept on the employee's record.

At the same time, the Draft Law indicates that the register of whistleblowing reports, which should also contain information about follow-up actions undertaken as a result of the report, should be kept for 15 months starting from the end of the calendar year in which the follow-up actions have been completed, or the proceedings initiated by those actions have been terminated.

Also, while determining how long the outcome of an internal investigation should be kept, additional legal considerations can be taken into account, especially data privacy.

The GDPR does not specify precise storage time for personal data. The employer must assess what will be an appropriate time for storage of the data, taking into consideration the necessity of keeping personal data concerning the purpose of the processing in question. Employees' personal data should be kept for the period necessary for the performance of the employment relationship and may be kept for a period appropriate for the statute of limitations for claims and criminal deeds. A longer retention period may result from applicable laws. Following the Regulation of the Minister of Family, Labour and Social Policy on employee documentation, the employer may keep a copy of the notice of punishment and other documents related to the employee's incurring of disciplinary responsibility in the employee record.

There are different retention periods for the data contained in employee files:

- 10 years if the employee was hired on or after 1 January 2019;
- if the employment relationship began between 1 January 1999 and 1 January 2019, the retention

period is 50 years, but may be reduced to 10 years if the employer provides the Polish Social Insurance Institution with certain mandatory information; and

- for 50 years if the employee was hired before 1 January 1999. It does not matter whether the person is still working or not.

Last updated on 20/04/2023



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There are no specific rules in the Portuguese Labour Code on this matter.

However, article 332 of the PLC states that the employer should keep an updated record of disciplinary sanctions, so the competent authorities can easily verify compliance with applicable provisions. Accordingly, it is advisable to maintain a record of disciplinary sanctions during the entire employment relationship.

Also, please note that some collective bargaining agreements state that the disciplinary register must be deleted from the employee's record periodically.

Last updated on 15/09/2022

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



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There are no regulations regarding the actual investigation process. Therefore, the employer cannot be accused of procedural errors as such. However, once the matter has been adequately investigated, the employer must decide whether or not misconduct has taken place. If the employer considers that misconduct has taken place, the employer must take adequate measures for remedying the situation. Failure to adequately conduct the investigation could result in criminal sanctions being imposed on the employer as an organisation or the employer's representative, or damages.

Last updated on 15/09/2022



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If any untrue allegations were made by an employer against an employee without checking them beforehand, there is a risk that such an employee would claim damages eg, for infringement of personal rights or even filing a private indictment for defamation or outrage.

Certainly, an employer must be aware that one must never behave in a way that, for example, in the

employee's opinion, could constitute a form of blackmailing or deprivation of liberty. A problem may also arise when accessing the employee's correspondence, especially when access is made to documents or private correspondence. The Draft Law provides for several criminal offences related to, for example, preventing reporting, using retaliatory measures against a whistleblower or disclosing personal data of a whistleblower).

Last updated on 20/04/2023



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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.

Last updated on 15/09/2022

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