

Workplace Investigations

Contributing Editors

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

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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03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

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Yes. Section 14(1) read with 14(8) of the Employment Act 1968 provides that an employee can be suspended during a workplace investigation

However, pursuant to section 14(8) of the Employment Act 1968, the employer:

- may suspend the employee from work for:
 - a period not exceeding one week; or
 - such longer period as the Commissioner for Labour may determine on an application by the employer; but
- must pay the employee at least half the employee's salary during the period the employee is suspended from work.

Section 14(9) of the Employment Act 1968 further states that if the inquiry does not disclose any misconduct on the employee's part, the employer must immediately restore to the employee the full amount of the withheld salary.

In addition to the above legislative requirements, the company is required to also comply with its policies relating to such suspensions.

In terms of the threshold to be crossed before a suspension can take place, the Singapore Courts have highlighted that suspending an employee quickly as part of a "knee-jerk" reaction to an unclear or unspecific allegation with dubious credibility is arguably a breach of the implied term of mutual trust and

confidence that exists in all employment relationships ([56] of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123). The employer would need to have proper and reasonable cause to suspend an employee for disciplinary purposes ([56(d)] of *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577; [2013] SGHC 32), for example, where multiple credible sources claimed that they had been sexually harassed by an employee, and the employer had strong grounds to believe that if the employee was not suspended, the safety and wellbeing of the other employees in the organisation would be threatened.

In contrast, an employer is not entitled to suspend an employee during a workplace investigation where the employer has only received one complaint that has not been properly described or substantiated with sufficient details from an unverified or unreliable source against an employee who has a good track record with the organisation. This is especially so if the complaint is so unclear that further inquiries should be made before the allegation can be properly ascertained and characterised (see also [51] of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123).

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It is possible to suspend an employee during a workplace investigation.^[1] While there are no limits on duration, the employee will remain entitled to full pay during this time.

[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 181.

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