

Workplace Investigations

Contributing Editors

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

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

Austria

Author: *Michaela Gerlach, Sonia Ben Brahim*
at GERLACH

Yes. An employer may always, and without legal restrictions, temporarily suspend an employee during an internal investigation, provided he or she continues to be paid.

However, suspending the employee does not release the employer from an obligation to terminate employment without notice. It must be clear to the employee that the suspension is a temporary measure in preparation for dismissal. A suspension does not entitle the employer to postpone the reasons for dismissal for any length of time. The longer the suspension lasts, the more likely it is that the employer intends to keep the employee.

Last updated on 29/09/2023

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Workplace suspensions in Ireland are a contentious issue and can result in an employer defending injunction proceedings in the High Court before an investigation has started.

In the case of *Governor and Company of the Bank of Ireland v Reilly*, the judge stated: "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing."

In the 2023 case of *O'Sullivan v HSE*, the Supreme Court held that the Health Service Executive acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on patients without their consent. This ruling overturned the Court of Appeal's earlier decision that previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

The Supreme Court considered whether the employer's decision to place the consultant on administrative leave met the test set out in the English case of *Braganza v BP Shipping Limited & Anor*. In that case, the court held that the decisionmaker's discretion would be limited "by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality."

In relying on the principles set out in the *Braganza* case, the Irish courts have reinforced the right of a decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so must be made honestly and in good faith. Employers should obtain legal advice when considering whether to suspend an employee in any circumstance.

Last updated on 11/10/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

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?



Austria

Author: *Michaela Gerlach, Sonia Ben Brahim*
at GERLACH

An essential part of an internal investigation is the questioning of employees. Their statements contribute significantly to clarifying possible violations. In particular, the legal principles that apply to criminal proceedings, including the right to refuse to testify, do not apply directly to internal investigations.

Employees do not legally have to participate in such interviews. Their duty to cooperate arises indirectly from other legal provisions, in particular from employees' duties of loyalty and service under labour law.

Austrian law suggests there is a general principle of loyalty, which triggers a "duty to inform" under some circumstances; in principle, the employee and any witnesses are expected to provide information in the context of internal investigations. While the employee is not compelled to incriminate him or herself, he or she also may not withhold work-related information that the employer legitimately wishes to protect, for the sole reason that it might incriminate him or her. The decision as to whether the employee must disclose information depends on a balancing of interests in the specific case.

Investigators and employers must strictly adhere to the permissible limits. This requires compliance with labour law, criminal law and data protection law.

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

Yes, but a qualified yes. To deny an employee who is the respondent to the complaint the right to cross-examine the complainant during a workplace investigation may amount to a breach of fair procedures. This does not mean in practice that a complainant or witness will have to physically or virtually attend a meeting to be subjected to cross-examination. What usually happens, in practice, is that specific questions of the respondent are put to the witness by the investigator for them to respond. On occasion and depending on the circumstances, the witnesses may respond in writing.

Generally, if witnesses do not wish to participate in workplace investigations and they are not the witnesses from whom the complaint originated, there is little that can be done. An employee may not want to be seen as going against a colleague, which impacts the wider issue of staff morale. An employer cannot force them to participate. Also an employee who is the respondent should be careful about seeking to compel witnesses to attend. While the respondent may request support from a colleague to act as a witness, that colleague may view things differently, which can lead to further issues.

In any event, employees cannot be victimised or suffer any adverse treatment for having acted as a witness.

Last updated on 11/10/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.^[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

^[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

Last updated on 15/09/2022

Contributors



Austria

Michaela Gerlach
Sonia Ben Brahim
GERLACH



Ireland

Bláthnaid Evans
Mary Gavin
Ogier



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

www.internationalemploymentlawyer.com