

Workplace Investigations

Contributing Editors

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

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

Switzerland

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

If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

Last updated on 15/09/2022

United Kingdom

Author: *Phil Linnard, Clare Fletcher*
at Slaughter and May

The employer should first identify which individuals may have protection as whistleblowers. This could be a current or former employee who raises the initial complaint, a co-worker who gives evidence as part of the investigation, or the accused employee.

In each case, consider whether a “protected disclosure” has been made (under Part IVA ERA 1996). This requires analysis of the subject matter of the disclosure, how it is made, and a reasonable belief that it is made in the public interest.

Employers must then ensure there is no detrimental treatment or dismissal of any worker on the grounds of their protected disclosure. Although the causation test for these purposes is not straightforward, as a general rule if the protected disclosure has a “material influence” on the decision to discipline or dismiss, there may be liability. Individual managers may be personally liable alongside the employer. Compensation for whistleblowing cases is uncapped, meaning businesses and individuals can face significant financial and reputational exposure.

What this means in practical terms is that the employer should promote a “speak-up” culture and, where protected disclosures are made, ensure they are handled by a team who are properly trained in how to do

so.

Last updated on 15/09/2022

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

Switzerland

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

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.

Last updated on 15/09/2022

United Kingdom

Author: *Phil Linnard, Clare Fletcher*
at Slaughter and May

This is a relatively common occurrence. It would usually be appropriate to suspend the investigation temporarily, to determine how serious the health issue is and when the employee may be fit to return. The investigator should consider what adjustments or allowances can be made to progress the investigation despite the employee's absence. If their evidence has not yet been gathered, the employee may be invited to provide a written statement instead of attending an investigation meeting, or the meeting could be held remotely or at a neutral location. If none of this is possible, it may be difficult to fully conclude the investigation.

Last updated on 15/09/2022

Contributors

Switzerland

Laura Widmer

Sandra Schaffner
Bär & Karrer



United Kingdom

Phil Linnard
Clare Fletcher
Slaughter and May

www.internationalemploymentlawyer.com