

# Workplace Investigations

## Contributing Editors

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

### Hong Kong

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If the employer failed to comply with a requirement that is expressly stipulated in the employment contract or employee handbook (such as a procedural requirement to hold a disciplinary hearing or to provide certain information to the employee), the employer could be liable for breaching an express term in the employment contract.

Even where the employment contract does not contain express provisions for the conduct of an internal investigation, the employer is under an implied obligation of trust and confidence under common law (as discussed in question 11), which requires it to conduct the investigation and reach its findings reasonably and rationally in accordance with the evidence available and in good faith.<sup>[1]</sup> If the employer reached a decision that no reasonable employer would have reached, the conduct of the investigation may be in breach of the employer's implied obligation of trust and confidence.

If the error in the investigation has led to a termination of employment (whether by way of summary dismissal or termination by notice), the employee may be able to bring a statutory claim for wrongful dismissal, unlawful dismissal or dismissal without a valid reason (as applicable).<sup>[2]</sup> If such a claim is successful, in addition to ordering the employer to pay monetary compensation, the court or tribunal may also make a reinstatement order (an order that the employee shall be treated as if he had not been dismissed) or re-engagement order (an order that the employee shall be re-engaged in employment on terms comparable to his or her original terms of employment) for the affected employee.

The employer may also be liable for unlawful discrimination under Hong Kong law if the investigation has been conducted in a discriminatory manner or the outcome of the investigation reflects differential and less favourable treatment of the employee concerned based on grounds of sex, marital status, disability, family status or race.

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<sup>[1]</sup> Chok Kin Ming v Equal Opportunities Commission [2019] HKCFI 755

<sup>[2]</sup> EO sections 9 and 32K.



## Sweden

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Errors resulting in terminations can be unlawful and, if they lead to employees terminating their employment as a result of the employer's missteps, could be seen as constructive dismissal. Constructive dismissal is generally equivalent to an unlawful dismissal. Unlawful terminations generally result in an obligation to pay financial and general damages to the affected employees.

Failure to fulfil the obligations under the Swedish Discrimination Act may lead to an obligation to pay financial and general damages.

If an employer does not fulfil its obligations according to work environment legislation, there is a risk that the Swedish Work Environment Authority will issue injunctions or prohibitions against the employer. If an employer omits to meet its work environment related obligations, and that in turn results in a work related accident, e.g. self-harm in connection with an internal investigation, it may also, in a worst case scenario, lead to criminal liability.

The Swedish Work Environment Authority is also responsible for monitoring compliance with the provisions of the Swedish Whistleblowing Act. The Swedish Work Environment Authority may, if necessary to ensure compliance with the Swedish Whistleblowing Act, order an operator to comply with the obligations and requirements of the Swedish Whistleblowing Act. Employers violating the Swedish Whistleblowing Act may also be liable to pay damages to the affected employees.

If personal data is processed in a way that violates the GDPR, the authorised supervisory authority may issue warnings or reprimands to the data controller, order the controller to comply with the GDPR, impose a ban on processing, or impose an administrative fine on the controller. Companies violating the GDPR may also be liable to pay damages to data subjects.

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## Switzerland

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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).<sup>[1]</sup>

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.<sup>[2]</sup> The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.<sup>[3]</sup> Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to

criminal proceedings, to examine whether the evidence could also have been obtained by legal means.<sup>[4]</sup>

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.<sup>[5]</sup> Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture<sup>[6]</sup>).<sup>[7]</sup>

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<sup>[1]</sup> Cf. ATF 139 II 7.

<sup>[2]</sup> ATF 140 III 6 E. 3

<sup>[3]</sup> Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

<sup>[4]</sup> Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

<sup>[5]</sup> Decision of the Swiss Federal Court 6B\_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B\_22/2012 dated 11 May 2012 consid. 2.4.4.

<sup>[6]</sup> Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

<sup>[7]</sup> Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

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