

Workplace Investigations

Contributing Editors

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

Hong Kong

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It may be appropriate to suspend an employee during a workplace investigation, for instance, where the investigation has revealed misconduct on his or her part (even on a preliminary basis), or his or her continued presence in the business would hinder the progress of the investigation. However, the employer will have to consider the relevant legislative provisions and the terms of the employment contract before making any decision on suspension.

Under section 11 of the EO, an employer may suspend an employee without pay pending a decision as to whether the employee should be summarily dismissed (up to 14 days) or pending the outcome of any criminal proceedings against the employee arising out of his or her employment (up to the conclusion of the criminal proceedings). If an employee is suspended as above, however, the employee may terminate his or her employment without notice or payment in lieu of notice.

It is more common for an employer to suspend an employee with pay during an investigation concerning his or her conduct rather than exercising its statutory right as mentioned above. This could avoid an unnecessary dispute with the employee concerned. Indeed, it is common for employers to include in employment contracts specific provisions to give themselves the right to suspend an employee with pay in certain circumstances. The provisions normally set out the circumstances in which the employer may exercise the right, the maximum period of suspension and other arrangements during the suspension period (eg, how the employee's entitlements under the employment contract are to be dealt with).

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Switzerland

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



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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.[1] 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).[2] 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.

[1] *Chok Kin Ming v Equal Opportunities Commission* [2019] HKCFI 755

[2] EO sections 9 and 32K.

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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).[1]

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.[2] 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.[3] 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.[4]

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.[5] 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[6]).[7]

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

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

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

[5] 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.

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

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

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