CENTRE DE DROIT
BANCAIRE ET FINANCIER

Internal investigation

Criminal procedural guarantees do not apply

Par Roxane Pedrazzini le 29 February 2024

Employers are not obliged to implement the minimum guarantees of criminal procedure in the context of internal investigations, according to ruling 4A_368/2023 of 19 January 2024.

An employee had worked for a bank since 2010. In August 2018, a colleague reported the employee internally for sexual harassment, which led to the opening of an internal investigation. Following the investigation report, the Bank terminated the employment contract. The employee contested his dismissal on the grounds that it was unfair. The Zurich Arbeitsgericht dismissed the action, while the Obergericht found in favour of the employee and ordered the Bank to pay compensation of CHF 70,000. The Bank appealed to the Swiss Federal Supreme Court.

This case allows the Federal Court to clarify its ruling 4A_694/2015 of 4 May 2016. The latter implied that the guarantees of criminal procedure would be applicable to internal investigations conducted by an employer. In fact, the Federal Tribunal cited doctrinal opinions expressing that the employer must, in the event of a serious accusation, carry out “a full investigation including, for the denounced employee, guarantees equivalent to those of a criminal investigation […]”. The Federal Court now expressly states that it had not taken a position on the topical doctrinal opinions and that it did not intend to endorse them. An internal investigation conducted by an employer does not entail the same risk of sanctions as a criminal investigation, and the legal relationships in question are fundamentally different. There is therefore no justification for requiring a private employer to comply with the minimum guarantees of criminal procedure in the context of an internal investigation.

In labour law, the principle of freedom to terminate without any particular reason applies, with only abuse being penalised. However, termination is not unfair simply because the accusation made against an employee proves to be unfounded. On the other hand, dismissal is unfair if the employer makes a light-hearted accusation against the employee without reasonable justification. The accusation must be based on serious evidence, and the employer must carry out all the necessary checks.

An internal investigation is opened to clarify the facts with a view to possible dismissal (see also judgment 4A_245/2019, c. 4.2). The investigation must be conducted in compliance with the obligation to protect the privacy of the accused employee and the whistleblower (art. 328 of the Swiss Code of Obligations) and the right to be heard that may ensue. There is thus a de facto conflict of interest between the accused employee’s right to prepare an effective defence and the whistleblower’s right to testify in complete safety.

In this case, the employee was accused of several touchings during an internal event in November 2017 as well as on other occasions. The employee was also questioned about certain comments he had made to female employees, in particular about their private and sexual relationships and his expectations regarding their style of dress. The Federal Court found that the accusations were sufficiently concrete.

The Federal Court considers that the Bank carried out extensive investigations. The Bank interviewed the accused employee and some of his colleagues and examined some of the electronic exchanges between the accused employee and the employee who had made the accusation. The accused employee was also given the opportunity to amend the minutes after the hearing. The Bank drew up an investigation report on the basis of the incriminating and exculpatory evidence and presented it to an internal disciplinary committee. Thus, the dismissal was not carried out lightly.

Furthermore, according to the Federal Court, the violation of an internal directive providing for the right to be accompanied by a person of trust was not sufficient to justify unfair dismissal. This conclusion appears to be based on the circumstances of the case, in particular the fact that the employee was able to amend the minutes of his hearing and could, if necessary, have requested the advice of a third person in this context or a new hearing accompanied by a support person, which he did not do. This defect was therefore not considered serious by the Federal Court. Consequently, the dismissal was not unfair.

This ruling clarifies the process of an internal investigation, sometimes a contrario, the stages of which can be summarised as follows :

1. The employer opens an internal investigation and entrusts it to a specific group of people inside or outside the company.
2. The team in charge of the investigation summons the accused employee to a hearing. The team is not obliged to inform the accused employee in advance of the internal investigation or of the alleged misconduct.
3. At the beginning of the hearing with the accused employee, the investigation team will describe the alleged misconduct in broad terms, a summary of the events with specific examples being sufficient. The accused employee has no right to know the identity of the whistleblower. However, they do have the right to comment on the allegations at the hearing and to submit evidence to the investigation at a later date.
4. The employees involved have no right to direct confrontation, even in the event of contradictory statements.
5. The employee may not request to be accompanied by a person of trust during the hearing.
6. The team in charge of the investigation may undertake other investigative actions depending on the specific circumstances, in particular interviewing witnesses or obtaining documents (e.g. electronic correspondence) in compliance with art. 328b of the Swiss Code of Obligations and the Data Protection Act.
7. The team in charge of the investigation records the statements made by the employees interviewed. They can reread it and amend it at a later date, if necessary.
8. The investigation team will draw up an investigation report detailing the investigation, the facts established and the recommendations to the employer (disciplinary and/or reorganisation measures). In particular, the investigation report will aim to prove that the employer has carried out all the necessary checks and that the investigation was

conducted in compliance with art. 328 CO.

If the procedural framework for the internal investigation is set out in an internal directive, the rules should not be too rigid in the light of this new case law, also in order to avoid any avenue for challenging the dismissal in the event of non-compliance with these rules.
