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PERSPECTIVES

INVESTIGATING HARASSMENT CHARGES: WHICH RULES APPLY?

BY URS FELLER, RETO JENNY AND MARCEL FREY

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In-house legal counsel and human resource department heads invariably have to deal with sexual harassment complaints. Heightened awareness of gender-based violence and related social ills, as well as employee rights, have made it challenging to professionally and sensitively manage such occurrences.

A recent Federal Tribunal decision sheds some light on the rules applicable in such internal investigations.

On 29 August 2018, a company's internal ombudsman for behaviour and ethics received a report of sexual harassment by a male employee at the workplace, whereupon the employer initiated

an internal investigation. On 23 October 2018, the employment contract of the accused male employee was terminated in keeping with the normal three months' notice to the end of January 2019.

After an unsuccessful attempt at conciliation, the accused employee filed a lawsuit against the employer with the Zurich Labour Court on 13 July 2020. Apart from an amendment to his work reference letter, he sought compensation for unlawful dismissal.

The Zurich Labour Court dismissed the claim for compensation in its ruling of 26 March 2021. Upon appeal, the Zurich High Court on 23 May 2023 obliged the defendant company to pay the plaintiff

a compensation amount of CHF70,000 (plus default interest of 5 percent). The employer appealed this decision to the Federal Tribunal which had to decide on the lawfulness of the termination.

On 19 January 2024, the Federal Tribunal found that there was no unlawful termination.

Formal requirements for an internal investigation

The Zurich Labour Court had noted that, when determining whether the termination was lawful, it did not matter whether the allegations of sexual harassment were true or not; what mattered was that the company adequately investigated the allegations. The report of the internal investigation showed that the team had carefully analysed both

incriminating and alleviating circumstances and had proceeded according to internal company guidelines, reaching the conclusion that the allegations were more likely true than not.

The purported violations concerning internal regulations raised by the plaintiff (e.g., the right to have a person of trust present during the internal hearing) were, in the view of the Labour Court, not severe enough to negate the entire internal investigation. As such, the company had rightfully held a grounded suspicion of sexual harassment which made continuation of the employment contract unbearable.

On appeal, the High Court found that the company's internal processes had not been followed (thus finding in favour of the plaintiff's plea



for compensation). The employee had criticised the internal investigation as unfair: he had not been afforded the right to have a person of trust accompany him to the internal hearing where he was confronted with the allegation of sexual harassment of which he had also not been informed in advance.

As such, the employee had not had any time to prepare his defence (i.e., checking dates of the alleged actions or seeking out persons to act as witnesses in his favour). He had never been confronted with the identity of the complainant and the description of the incident was vague, thus making it impossible for him to adequately defend himself. The treatment received did not constitute fair proceedings given the seriousness of the accusation (which could have constituted a criminal offence).

The High Court considered the gravity of the allegations and likened these and the internal proceedings to a criminal investigation. As such, the High Court held that the employee was entitled to a complete investigation with similar guarantees and a clear understanding of the allegations levelled against him.

The Federal Tribunal disagreed with the line of argument

The issue of applying criminal procedure guarantees in an internal investigation had not

previously been dealt with by the Federal Tribunal. In its decision the highest court clarified that procedural guarantees under the Criminal Procedure Code did not apply to internal investigations and – save for few exceptions – did not extend their scope to relations between private parties. According to the Federal Tribunal, internal investigations followed their own procedure and rules.

In its analysis, the Federal Tribunal pointed out that the legal basis for an internal investigation and a criminal investigation were significantly different. While in private law relations parties are at liberty to conclude or terminate a contract, in criminal proceedings the accused is subject to the full might of the state. In criminal proceedings, the state may impose fines, monetary penalties, as well as custodial sentences or lifelong imprisonment.

On the other hand, in the private law sphere, the worst consequence an employee may face is termination of contract. Private law relations are based on voluntary relationships between individuals. Legal issues are handled based on the individual agreement or the underlying legal framework. This allows for each party to voluntarily terminate a contract within a notice period.

The Federal Tribunal did not turn a blind eye to obviously abusive terminations which could give rise to compensation. A terminating party clearly had to act in good faith. In general, deceitful and contradictory behaviour by the terminating

party could render a dismissal abusive. Unlawful termination occurs where an employer accuses an employee without reasonable cause.

This underlines the importance of conducting an internal investigation with a focus on safeguarding individual rights.

The lawfulness of a dismissal had to be assessed in each individual case according to its circumstances and underlying reasons. The legality of a termination based on a suspicion may only be determined by the courts.

The Federal Tribunal summarised that after the complaint had been lodged with the internal ombudswoman, the complainant and other persons were questioned. The reported employee's internal email account was reviewed (in part) to identify any statements about the complainant. Lastly, the reported employee was invited to a hearing and questioned, after which he had the opportunity to review the minutes of the hearing.

According to the Federal Tribunal, the company concluded that the reported employee's defence was not credible and contradicted the statements of other employees questioned. The report concluded that the alleged behaviour had very likely occurred and recommended initiating a disciplinary procedure. The disciplinary panel issued a formal termination after reviewing the report.

The Federal Tribunal concurred with the appealing company that the fact that the reported employee

“The judgment specifies the extent to which reported employees can claim procedural guarantees and the level at which employers must regulate internal processes.”

was not advised as to the charges ahead of the hearing was not detrimental. Requiring such advance notice would be farther-reaching than what the Criminal Procedure Code would require.

The Federal Tribunal further held that the absence of a 'person of trust' at the interview did not constitute a grave mistake giving rise to abusive termination. The 'accusation principle', a fundamental rule of criminal court procedures, did not apply to internal investigations. Therefore, it was not necessary for the employee to be fully informed about the alleged behaviour in all detail. Doing so would also create an untenable tension between the legitimate self-protection interests of the accused and the complainant: a complainant may

remain anonymous and their identity should not be communicated to the reported person.

The Federal Tribunal concluded that the allegations had been sufficiently detailed, and the internal investigation had found no evidence of a conspiracy as alleged by the reported employee. As terminating an employee based solely on suspicion is not unlawful in Switzerland, even if – after the termination – it comes to light that the suspicion was unfounded, it was obvious that the employer was not obliged to prove the suspicions.

The Federal Tribunal concluded that the termination had not been issued frivolously. Freedom to terminate a contract should not be constrained by overarching principles borrowed from criminal law. It found that there was no abusive termination and no compensation was due.

Conclusion

This decision of the Federal Tribunal provides guidance to internal counsel on organising internal investigations. It clarifies that, while protecting employees' rights and promoting transparency are key points, procedural guarantees in criminal proceedings do not directly apply in internal company matters.

The judgment specifies the extent to which reported employees can claim procedural guarantees and the level at which employers must regulate internal processes.

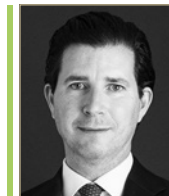
HR departments and in-house counsel have discretion when recommending termination, but they should document correspondence and interviews in written form for evidentiary purposes. Termination decisions should be based on reasonable suspicion rather than mere allegations, which may not justify an ordinary termination given the boundaries drawn by abuse.

The ruling grants in-house legal departments more flexibility in managing internal investigations. Not having to adhere to criminal procedure rules limits the risk of unlawful termination claims. **CD**



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