

BGer 4A_368/2023 of 19 January 2024: Ordinary Termination following an Internal Investigation

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Key takeaways

- **According to the Swiss Federal Supreme Court, the guarantees provided by the Criminal Procedure Code ("CrimPC") do not apply to internal investigations an employer conducts. This means the following, in particular:**
 - (i) The employer, prior to the interview, need not inform the accused employee of either the purpose nor the content of his/her initial interrogation.**
 - (ii) Just because the accused employee could not be accompanied by a person of trust to the initial interrogation, the dismissal is not abusive. This notion applies even if the applicable internal regulations grant the employee a right to be accompanied by a person of trust. Although the Swiss Federal Supreme Court did not state this explicitly, this concept should apply all the more to the accused employee's representation by legal counsel.**
 - (iii) The employer must describe the allegations to the accused employee with sufficient exactitude. Unlike in criminal proceedings, however, the employer need not provide the employee with all the details (in particular, the personal details of the allegedly harassed individuals).**
- **The Swiss Federal Supreme Court once again emphasized the freedom of dismissal. Dismissals on suspicion are permissible as long as the employer sufficiently investigates the matter, and the investigation's outcome further reinforces its suspicion. Even if the suspicion later turns out to be unfounded, this holds. Before dismissing an employee, the employer is not obliged to prove the truth of the allegations against the employee.**
- **Hence, the employer may not dismiss the accused employee lightly and without reasonable cause. This is the basic principle with which the employer's internal investigation needs to comply. As mentioned above, however, this does not go as far as to require the employer to observe criminal procedural guarantees during the internal investigation.**

What has happened?

The employee has been working fulltime at a bank as a director since 1 November 2010. His most recent gross monthly salary was CHF 20,000. On 29 August 2019, the company's internal ombudswoman for conduct and ethics received a report from an employee regarding sexual harassment by the accused employee. As part of an internal investigation, the employer subsequently interviewed the affected employee and other individuals close to the accused employee. The employer also perused some of the employee's electronic communications with regard to his comments about the allegedly harassed other employee. The employer then interviewed the accused employee and sent him the minutes of the interview for his review. The employee made various changes thereto. After interviewing the accused employee, the employer concluded that his statements were not credible and contradicted the statements of the other employees. The employer was of the opinion that the accusations of inappropriate behavior described by the reporting employee and the other employees were most likely correct. The investigation report therefore recommended initiating disciplinary proceedings against the employee. The competent disciplinary body ultimately decided on the ordinary dismissal of the employee. The bank dismissed the employee on 23 October 2018 with effect from 31 January 2019, whereby the employment relationship was extended until 31 August 2019 due to the employee's illness.

The employee objected to his termination because he considered the manner of the termination to be abusive. The Zurich Labour Law Court denied the abusive nature of the termination. On the other hand, the Superior Court of the Canton of Zurich deemed the dismissal abusive and ordered the employer to pay a compensation for abusive dismissal in the amount of CHF 70,000. The employer successfully appealed against this judgment to the Swiss Federal Supreme Court.

What did the Swiss Federal Supreme Court consider and then decide?

In dispute was whether the employer's ordinary termination was abusive within the meaning of Art. 336 CO.

No applicability of the criminal procedural guarantees

The lower court, applying criminal procedural guarantees by analogy, concluded that the employer's dismissal was abusive.

The Swiss Federal Supreme Court, however, denied applying criminal procedural guarantees to an employer's internal investigation. The legal relationships under criminal law and private law are fundamentally different. Regarding private law, the parties to the employment contract voluntarily entered into a personal, continuing obligation. In criminal proceedings, on the other hand, the accused individual, regardless of its will, is subject to the state's power to issue criminal sanctions. The employee also is threatened with drastic restrictions on his/her fundamental rights because of the criminal proceedings, whereas the legal consequence of private law proceedings, relating to the employee's protection against dismissal, would, in the worst case, be his/her dismissal within the contractual notice period.

In particular, the lower court had accused the employer of not informing the employee about the allegations prior to the first meeting. According to the Swiss Federal Supreme Court, such prior information would even go beyond the requirements of criminal procedure law. According to Art. 158 para. 1 lit. a of the CrimPC, the accused individual must be made aware of the initiation of proceedings against him/her and the concerning subject matter only at the beginning of the interrogation. The lower court thus overstretched the requirements for the internal investigation by demanding that the employer should have informed the employee in advance of the purpose and content of the interview. In addition, the employee was able to correct the minutes of the interview and submit a separate written statement.

Also, the lower court criticized the employer because the employee was not accompanied by a person of trust during the interview. However, according to criminal procedural law (Art. 158 para. 1 lit. c CrimPC), the accused individual must be made aware only of his right to appoint a defense at the beginning of the first interrogation. Although the bank's internal regulations granted the employee the right to be represented by a person of trust, the absence of such person of trust at the first interview does not constitute such a serious deficiency that would render the dismissal abusive. This applies all the more as the employee did not claim to have requested a further meeting with the presence of a person of trust.

Finally, the Swiss Federal Supreme Court examined the lower court's consideration that the employer had not sufficiently informed the employee about the allegations. The Swiss Federal Supreme Court disagreed with this view, which was based on the principle of indictment in criminal proceedings. An internal investigation by an employer cannot be compared with a criminal investigation conducted by the state. In addition, a conflict of interests arises between the accused employee's legitimate right of self-defense and the protection of the reporting individual. The employer was therefore not allowed to disclose the personal details of the individuals reporting the harassment to the accused employee. Moreover, the allegations were not completely vague, but the employer had informed the accused employee that an incident occurred at a company event in November 2017, during which he had allegedly touched female employees in an inappropriate manner. The employer also asked him specific questions about statements that were attributed to him. Thus, for an internal investigation, in the opinion of the Swiss Federal Supreme Court, the employer had presented the allegations to the employee with sufficient details.

Freedom of dismissal and dismissals on suspicion

In this ruling, the Swiss Federal Supreme Court reiterated that, in principle, dismissals on suspicion are permissible even if the suspicion later proves to be unfounded. The employer does not have to prove that the allegations are true. The freedom to dismiss is only limited by the prohibition of abuse. A dismissal on suspicion is deemed to be abusive if the employer does not carry out sufficient investigations or its investigations do not substantiate its suspicion, and the employer nonetheless dismisses the employee frivolously and without reasonable grounds. In the present case, however, the employer had carried out extensive investigations by a dedicated team, whereupon the suspicions against the employee had been further reinforced.

As a result, the Swiss Federal Supreme Court did not qualify the dismissal as abusive in this case and upheld the employer's appeal. The Swiss Federal Supreme Court criticized the lower

court for partly demanding more from the employer than from a criminal prosecution authority.

Why is this decision important?

This Swiss Federal Supreme Court decision clearly denies applying criminal procedural guarantees to an employer's internal investigations. Although the Swiss Federal Supreme Court rendered the decision with a full panel of five judges, the decision will not be included in the leading case collection. Perhaps this indicates that, according to the Swiss Federal Supreme Court, the circumstances of the individual case still remain decisive. The Swiss Federal Supreme Court indicated that, under employment law, certain "rules of the game" must also be observed in an internal investigation and that the circumstances of the individual case must be taken into account.

Against this background, for employers to "forget" all criminal procedural principles would not be advisable. Rather, they should choose an approach appropriate for the individual case. For example, employers should not only ensure that they communicate the allegations to the accused employee in sufficient detail (without compromising the reporting individual's right to privacy) but also grant the employee his/her "right to be heard" in an appropriate manner.

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No legal or tax advice

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