

BRIEFING FEBRUARY 2024

FEDERAL SUPREME COURT: NO CRIMINAL DUE PROCESS GUARANTEES IN CORPORATE INTERNAL INVESTIGATIONS

In Switzerland, it has been debated for some time whether employees who are the subject of an internal investigation should be entitled to criminal due process in the context of internal investigations. In a recent landmark decision concerning an employee termination dispute, the Swiss Federal Supreme Court concludes the long-standing dispute, firmly stating that criminal procedural guarantees are not applicable within the realm of corporate internal investigations.

Nonetheless, consistent with current best practices, companies conducting internal investigations are well advised to continue to follow certain principles of due process. This is especially the case if the findings of an investigation shall be available for use in subsequent legal proceedings.

BACKGROUND

In an employment dispute between a bank and its former employee, the Swiss Federal Supreme Court had to decide in its decision 4A_368/2023 whether the termination of the employee was lawful or not. The employee's termination was preceded by an internal investigation into allegations of sexual harassment, the results of which formed the basis of the employee's termination.

In line with standard protocol for addressing alleged workplace misconduct, the bank's investigation encompassed a thorough examination of the employee's electronic communications, alongside interviews conducted with both the employee in question and select

colleagues. While the employee was provided with the minutes of his interview and the chance to amend such minutes, he was not given advance information of the reasons for the interview nor the chance to be accompanied by a "trusted person". The employee also argued that he was not sufficiently informed about the allegations against him in advance of his interview. He considered this procedure to be unlawful.

THE COURT'S RULING

The decision of the Federal Supreme Court addresses several significant issues relevant for conducting internal investigations, particularly when interviewing employees who are suspected of misconduct. The decision was rendered in the context of a civil employment termination dispute and may not apply to employment disputes governed by public law.

Most importantly, the Swiss Federal Supreme Court clarifies that **criminal due process guarantees do not apply in internal investigations**, thereby resolving previous uncertainty regarding the (procedural) rights of employees subject to internal investigation. Such uncertainty was aggravated in part by a previous decision of the Swiss Federal Supreme Court in 2016, which quoted certain legal scholars advocating for the application of criminal due process in internal investigations. While the 2016 decision at the time was understood by some scholars as an indication of the Swiss Federal Supreme Court's endorsement of this view, the Swiss Federal Supreme Court in this most recent decision now clarified that it did not embrace such view.

In the absence of criminal procedural guarantees, the Swiss Federal Supreme Court held that:

- > **Employees under internal investigations must not necessarily be given advance information of the purpose and content of an interview.** Rather, employees may be informed of the purpose and content at the beginning of the interview even if it means that they are not able to prepare for the interview and search for exculpatory evidence in advance of such interview.
- > **Employees do not necessarily have the right to be accompanied by a "trusted person".** The Swiss Federal Supreme Court held that the absence of a trusted person at the interview does not constitute a significant process deficiency which would render the employee's termination unfair. It furthermore clarified that the criminal principle requiring that accused persons must be informed at the beginning of their first interrogation about the right to be defended by a lawyer does not apply in internal investigations.
- > **It is sufficient to provide employees who are suspected of misconduct with anonymized information about the allegations.** The Swiss Federal Supreme Court affirmed that the level of detail provided to employees regarding investigated allegations does not need to be equivalent as to the standards applied in governmental criminal proceedings. However, the Swiss Federal Supreme Court did not definitively specify the required level of detail for informing employees about the accusations. Therefore, it remains advisable to apprise employees undergoing internal investigation of the various allegations against them, affording them the opportunity to address these allegations during interviews. In cases where anonymity is necessary to safeguard potential victims or whistleblowers, anonymized disclosure can be employed.

OUTLOOK

The decision of the Federal Supreme Court underlines critical aspects, as the outcome of internal investigations often depends on the examination of the facts which are derived from or confirmed in interviews of employees. These interviews serve as the cornerstone for understanding the information obtained from the data analysis, for contextualizing the results and often also for tracking down further sources of information. Interviews are all the more important today due to the increasing spread of "bring your own devices", which means that employees often use (i) private communication channels (instead of official company channels and in breach of internal policies) as well as (ii) ephemeral messaging platforms to which the employer has no, or only limited, access.

The Federal Supreme Court's clarification that employees subject to corporate internal investigation do not benefit from the criminal procedural rights granted to the accused person in governmental criminal proceedings does not negate the importance of various factors such as labor and criminal laws, ethical standards, and in particular strategic considerations in shaping the parameters of successful employee interviews. For instance, notwithstanding the Court's determination that prior information of employees is not compulsory, some companies may opt to routinely provide employees with advance notice of allegations, depending on the subject matter being investigated and strategic considerations related to the respective internal investigation. This approach aims to bolster employee cooperation and facilitate a more informative interview, albeit one that may be less spontaneous.

When conducting interviews with employees investigated for alleged criminal misconduct, adhering to current best practices remains advisable in most cases. These consist of, *inter alia*, the following key points:

- > In investigations in which serious allegations are made, the right to legal counsel for the questioning of employees who are at the center of the investigation and who are accused of misconduct;
- > the right to refuse to answer questions in certain situations, in particular in those that could lead to criminal prosecution or to a professional ban by a supervisory authority;
- > provide a notice that company's counsel represents only the company and not the employee at the outset of the interview; and
- > inform about the parameters of the interview, i.e. the way in which the interview is recorded and used.

It is crucial that the company strategically considers in advance what the results of the investigation are to be used for: If an internal investigation is to provide evidence for subsequent criminal and other court proceedings, it may still be advantageous to follow criminal due process to increase the probative value of the investigation results (cf. our briefing on the formal requirements to increase the probative value of interview minutes in subsequent criminal proceedings [here](#)). However, the Federal Supreme Court's recent decision increases flexibility for companies that wish to deviate from criminal due process for tactical and other reasons.

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