Internal Employment Investigations in France

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The Code of Practice on Disciplinary and Grievance Procedures published by the UK Advisory, Conciliation and Advisory Service (ACAS) on 3 April 2011 (**UK Code**) provides that: "Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary or grievance issue. In some cases an external mediator might be appropriate".

French labour and employment law is based on the same premise. In this article we examine the laws and protocols that are applicable in France to internal employment investigations arising out of disciplinary and grievance issues in the workplace with particular reference to the roles of in-house legal and HR managers and external lawyers.

Disciplinary rules and grievance procedures in the French workplace

Do French employers generally have set disciplinary rules and procedures and mechanisms to deal with grievances?

In France, disciplinary rules and procedures are defined in the internal regulations ("*Règlement Intérieur*") of the company. The creation of these regulations is mandatory under the Labour code in all companies employing at least 50 employees. Whilst these internal regulations are not mandatory in smaller companies, they can of course put in writing the internal rules of the company relating to discipline and the related sanctions.

In addition to these internal regulations and rules, over the years French employers have established written mechanisms to deal with grievances in codes of conduct drawn up unilaterally by the employer or negotiated with the union representatives. In both cases, the codes are submitted to the employee representatives (i.e. social and economic committee) for their information and consultation prior to their implementation. These codes are considered as an appendix to the internal regulations and are therefore subject to the same formalities in order to be enforceable against employees.

It is to be noted that codes of conduct have been developed in French companies in response to new obligations, particularly in terms of transparency, better corporate governance or better prevention of occupational risks within the workplace, and the increasingly frequent involvement of the employer's liability. These codes often set up workplace notification systems, the implementation of which is compulsory in companies with at least 50 employees.

The scope of internal regulations is legally limited, unlike codes of conduct which act as a means by which the employer may bring together in a document, (the content of which and its degree of precision are negotiable) the respective commitments and obligations of the employer and employees within the framework of the performance of the employment contract.

How detailed, in general, are these rules and procedures?

The content of the internal regulations is strictly regulated by the French labour code. The employer's document must precisely set the general and permanent rules relating to discipline in the company, in particular the nature and scale of the applicable sanctions. It must also specify the rights of employees in the context of a possible disciplinary procedure, such as the holding of an interview prior to the sanction, and the measures that employees must comply with in terms of hygiene, health and safety (for example, a ban on eating in the workplace and instructions on the use of equipment). Finally, the internal regulations must include the provisions of the labour code relating to the prohibition of sexual and moral harassment (in particular the prohibition on sanctioning a possible victim of harassment and the sanctions applicable to the perpetrator of the harassment).

The content of the internal rules on grievances procedures is not defined by law. However, a National Interprofessional Agreement (**ANI**) on harassment and violence at work signed by all French trade Unions on March 26, 2010, provides that employers, in consultation with employees or their representatives, shall take the necessary measures to prevent such abuses. It suggests that these measures be formalized through a written document ("*Charte de référence*"). which clarifies the procedures to be followed in such a case. The ANI also suggests the establishment of an internal alert procedure and sets out guidelines for the management of cases.

It is therefore up to the employer to precisely define the content of grievances procedures which can be done unilaterally or through negotiation with the union representatives and submitted to the information and consultation of the employee representatives (i.e. social and economic committee). These codes thus have a variable content, but they generally include a preamble recalling the values that the company intends to promote, defining the behaviour expected from employees in this framework and the procedures for notifying and dealing with inappropriate behaviour. Finally, they usually remind employees that any inappropriate behaviour will be subject to the disciplinary sanctions provided for in the internal regulations.

What is your recommendation in terms of the legal form of these rules and procedures?

Under French labour law, in order to be enforceable against employees, the implementation of internal regulations must follow a procedure which must be strictly observed. These regulations must be subject to prior information and consultation with employee representatives (i.e., social and economic committee). Then, they must be filed with the competent Employment Tribunal and displayed in the company's premises in a place easily accessible to employees. The internal regulations become enforceable against the employees one month after the filing and posting formalities have been completed.

Failure to comply with these formalities, none of the sanctions referred to in the internal regulations (such as warnings, temporary layoffs, demotion but not dismissal) will apply to employees who can request their cancellation before the Employment Tribunal. We recommend employers also adopt the same formal process for the grievances procedures so that they operate as part of the internal regulations and have the same effect vis-à-vis employees.

Are there any specific sectors of the economy where these rules and procedures are mandatory or in common usage?

Disciplinary rules and procedures are mandatory in all companies in all sectors as soon as they reach the required threshold of 50 employees.

In some specific sectors national collective bargaining agreements (e.g. banking – the "*Convention collective nationale de la banque*") are applicable which contain provisions which strengthen the rights of employees within the framework of disciplinary procedures. One such provision could be an obligation on the employer to refer the matter to an internal disciplinary board before deciding any sanction, or for the employee to have the right of appeal to an internal body of the company. It is therefore essential that the employer who intends to impose a disciplinary sanction first verifies that the national collective bargaining agreement applicable to the company does not contain any specific provision in this regard.

What is the attitude of French courts and Employment Tribunals to applications involving the use or construction of these internal rules and procedures?

French courts and Employment Tribunals do not hesitate to validate dismissals for violation of the rules set out in codes of conduct which they consider as binding on the employees. The courts consider that compliance with these rules is part of the good faith performance of the employment contract.

Is there any guidance available to employers in France that is similar to the UK Code?

There is no similar code in France which would cover disciplinary rules and procedure in such a broad way.

In March 2019, the French Ministry of Labour published a guide on sexual harassment and sexist acts in the workplace with the aim of clarifying the rights and obligations of employers and employees on the specific issue of sexual harassment in the workplace. This guide offers concrete solutions to the many questions raised by victims and witnesses of sexual harassment and sexist acts, or by employers when faced with such situations. Particular issues for employers include - what actions should be taken to meet my obligation to prevention this type of behaviour? How should we act following a report? How do we carry out an internal investigation? How can we maintain the working relationship during and after the investigation?

Internal employment investigations

What circumstances will generally result in the commencement of an internal investigation?

These circumstances are very diverse depending on the circumstances of the case and the likely sanction such as demotion or dismissal. An internal investigation may be appropriate before a dismissal in order to collect the necessary documents, take statements of employees, establish false sick leave taking, identify acts of unfair competition involving employees, and instances of discrimination or bullying. Harassment will often result in recourse to an internal investigation.

If an employee disputes an allegation that is made against him or her, does that automatically result in an investigation?

There is no general obligation in French labour law which would require the employer to initiate an internal investigation.

The Labour Code (article L. 2312-59) provides for only one situation in which the investigation is compulsory - when an employer is informed by an employee representative ("*droit d'alerte*") of an infringement of the personal rights of an employee (e.g. harassment or discrimination). In such a case, the employer must immediately conduct a joint investigation with the social and economic committee and take the necessary steps to remedy the situation.

Under French labour law, the employer is bound by an obligation to protect the safety and the physical and mental health of the employees. Based on this, French case law has established that an employer who is notified of the circumstances of moral harassment, must initiate an investigation to verify the allegations reported by an employee.

As mentioned above, the ANI provides that harassment complaints must be investigated and dealt with without delay.

In practice, commencing an investigation is strongly recommended, in particular before notifying an employee of his or her dismissal. The process aids with the collection of documents and other evidence (such as statements) as though the matter was to be litigated. Experience shows that obtaining such evidence once the matter is being contested before an Employment Tribunal many months later is much more difficult for the employer.

If an investigation is only usually commenced in relation to "serious" issues, who decides what is "serious"?

In all cases, the decision is made by the employer. It is up to the employer to assess, in the light of the early verification of the facts, whether a formal investigation should be launched.

If an allegation of serious misconduct (e.g. discrimination or harassment of an employee by a manager) is brought to the attention of the HR manager, what are the most important immediate steps that the manager must take?

The HR manager must react quickly, especially since under French labour law no misconduct can be sanctioned after the expiration of two months from the day on which the employer first became aware of it or from the day on which the findings of the internal investigation are known.

The HR manager should as a first step, listen to the parties involved (the employee claiming to have been harassed, the employee to whom the harassment is suspected and any colleague who may have witnessed the event) and identify any other relevant information and witnesses. to verify the allegations. The employer should take care to avoid initiating an internal investigation on the basis of fanciful allegations. In cases of harassment or discrimination it may be preferable to first hear from the employee who claims to be the victim in order to be able to carry out an initial analysis of the facts and then, depending on the result, to hear the accused.

Whatever the size of the company, it is recommended to define the procedures for implementing the internal investigation upstream in order to be able to react quickly if the first indications confirm that an investigation is necessary**.**

In what circumstances should an external lawyer be appointed to conduct the investigation?

An external lawyer can be appointed as such in all circumstances, but situations of moral and sexual harassment are the most frequent cases in which French employment lawyers are appointed to conduct investigations, followed by cases involving discrimination.

On June 12, 2020, France's National Bar Council (**CNB**) published a comprehensive guide for French lawyers conducting internal investigations. This guide sets out the ethical obligations of lawyers in this context and makes numerous recommendations to assist lawyers with difficulties they may experience as investigators.

Performance of employment contracts in good faith

Article L.1222-1 of the French Labour Code obliges employees and employers to perform employment contracts in good faith. In light of this, they are therefore under an obligation to act fairly.

What are examples of acting fairly or unfairly in the context of an internal employment investigation involving accusations of discrimination or harassment?

For the employer, acting fairly implies that the employer should not use tricks to try to obtain information from the employee. In addition, article L. 1222-4 of the Labour Code obliges the employer to inform employees in advance of the measures implemented to collect information relating to them personally. Failing that, the evidence collected will be deemed illegal. It is to be noted however that the French Supreme Court recently ruled in March 2021 that evidence

from an investigation carried out in a case of moral harassment without informing the suspected employee was not unfairly obtained.

For the employee, acting fairly means that the employee must refrain from doing any act that is contrary to the interests of the employer and therefore should participate in the investigation. According to French case law, the refusal of an employee to attend the hearing to which he has been summoned could justify a disciplinary sanction, or even justify dismissal for misconduct. On the other hand, the interviewed employee has the right not to answer all or part of the questions that will be asked. Indeed, being questioned in an internal investigation which is not a judicial investigation the employee is not legally bound to say anything and enjoys the right not to self-incriminate.

In all cases, an employee must not be subject to any form of pressure when being interviewed. In this respect, the CNB guide provides that employees participating in an investigation must be informed of the non-coercive nature of the interview (i.e., it is not a disciplinary meeting), which means that they can refuse to appear for the interview or to leave it at any time, although the employer has the right to make its own decision on the consequences of such behaviour.

The accuser

Is an offer of professional counselling required or recommended?

The French Labour Code obliges employers to protect the health of their employees. All French companies must therefore have an occupational health service which can be specific to them (for large companies) or which can be shared by several companies. The occupational physician conducts regular examinations of employees to ensure their ability to perform their duties. It is up to the employer to organize these medical visits, the costs of which are paid by the company. Occupational medicine plays an important role in preventing bullying. Employees who are victims of harassment can call on the occupational physician who can come to the company's premises to assess the situation and advise the employer on the measures to be taken.

Who should obtain an initial statement? Does this need to be a lawyer?

Initial statements are received by the employer, i.e., in practice by the employee's direct supervisor, or a member of human resources department, a member of management, or by an employee representative. At this stage, the presence of a lawyer is neither necessary nor even opportune. Indeed, for the accuser, the situation will often be difficult and should not be part of an overly formal framework. In addition, the facts will have to be the subject of preliminary verification to be carried out informally by the employer before deciding the need for an investigation possibly entrusted to a lawyer.

Depending on the conduct complained of, does the accuser have any legal right to time off from work?

Under French labour law, there is no such legal right for the accuser, but nothing prevents the employer from granting such time off, in particular if it appears necessary to preserve the health of the employee.

The accused

Is there a presumption of innocence? How is this protected in a practical sense e.g. reputational issues within the workplace?

The presumption of innocence benefits all employees, including those suspected of misconduct and they continue to enjoy the same rights as other employees (e.g. the right to be interviewed with impartiality and to benefit from the assistance of a lawyer).

In practice, if an internal investigation is carried out, it should be carried out quickly to prevent suspicion from spreading within the company to the detriment of the presumption of innocence. The confidentiality of the investigation also makes it possible to avoid reputational issues within the workplace.

In this respect, the CNB guide stresses the need to inform employees participating in the investigation of its confidential nature, which implies that they must not discuss the interview with their colleagues or even disclose the fact that an interview took place.

Is there a legal right for the accused to be accompanied? If so, what is the earliest stage at which this right is exercisable?

There is no legal right for the accused to be accompanied when he or she is interviewed for the first time as part of the preliminary verification of the alleged facts. Indeed, at this stage, the interview is not an interview prior to a disciplinary sanction and the guarantees provided for by the labour code (e.g. employee's right to be assisted) do not apply. In practice however, nothing prevents the employer to grant this request.

The CNB guide considers two situations for the lawyer conducting the investigation on behalf of the company:

- the lawyer knows that the employee is suspected of having committed an offence or a violation of the internal rules of the company before interviewing him or her. The employee should then be notified in writing before the interview that he or she may be assisted by a lawyer; and
- during the interview it appears that the employee is likely to have committed the offence or violation. It is then appropriate to put an end to the interview and to suggest an adjournment to the accused to allow him or her to be assisted by a lawyer.

Is suspension always necessary?

French labour law requires the employer to take all immediate and appropriate measures to protect the health of an employee who claims to be the victim of harassment. In circumstances of a serious allegation, suspension may be part of the protective measures ("*mesures conservatoires*") appropriate for the accused to be suspended for this purpose provided the term of suspension is not too long. The accuser can also be granted time off from work with his or her agreement.

An alternative to suspension might be to separate the protagonists by temporarily transferring one or the other, to other duties or to another service or establishment, taking care not to modify their level of responsibilities. It should be noted that such measures are not disciplinary sanctions, which must be clearly indicated to those concerned.

If the accused is suspended, what rights does he or she have - access to IT, documents, salary and other employment benefits?

Since the suspension is not a disciplinary sanction, it has no impact on the salary and other employment benefits owed to the accused, unless the internal investigation results in a dismissal for serious or gross misconduct. In such case the suspension period will not be remunerated. During the period of suspension, the accused who can no longer come to the company to work no longer has access to IT or documents.

What are the key issues Employment Tribunals will consider if the accused challenges suspension?

Suspension should be considered cautiously and reserved for sufficiently serious allegations likely to lead to dismissal for serious or gross misconduct. It should only be used for a short period of time. It must not have any vexatious character for the accused, and therefore, not be the subject of untimely publicity within the company. These are the key issues that will be considered by Employment Tribunals.

What are the key GDPR issues to be considered at this stage?

The European General Data Protection Regulation (**GDPR**) sets out six data protection principles that companies must follow when collecting, processing, and storing individuals' personal data. These data should be (i) collected lawfully and fairly (i.e., for explicit and legitimate purposes), (ii) transparent about how they are going to be used, (iii) kept accurate and up to date, (iv) secured by all appropriate means, (v) kept for a length of time necessary to achieve the purposes for which they are processed, (vi) restricted to the minimum needed for these purposes, with a right to access, rectify or delete data for individuals. The data controller is responsible for enforcing these principles and must be able to demonstrate the company's compliance practices.

The CNB guide confirms that the lawyer conducting an internal investigation is the controller of the data collected in this context. In other words, the lawyer may be regarded as guarantor of data protection.

Appointment of the external legal counsel to conduct the investigation

In France, it was only in March 2016 that for the first time the Paris Bar considered that an internal investigation fell within the professional field of lawyers. Subsequently, the Sapin II law of 9 December 2016 relating to transparency, anti-corruption and economic modernisation, contributed to the development of internal investigations in large companies conducted by lawyers. The development of this practice is more recent in social matters and has taken place in particular through whistleblowing activities ("*dispositifs d'alerte professionnelle*") denouncing potential offenses, such as situations of moral or sexual harassment, or even discrimination.

In practice, nothing prevents the company's usual lawyer from being entrusted with the investigation in order to verify the alleged facts by collecting information, interviewing the people involved and analysing from a legal point of view whether e.g. harassment or discrimination has occurred. But a difficulty may arise if based on the facts established in the process, the employee is dismissed and challenges this dismissal in court (which happens frequently). It will be impossible for the lawyer who carried out the investigation to act for the employer against the employee he will have interviewed. For this reason, some employment practitioners consider that the investigating lawyer should not be the usual company's external counsel. The findings from an investigation conducted by an "independent" lawyer may also be given more strength in the event the matter is heard before an Employment Tribunal.

Finally, when the investigation is conducted upon request of an employee representative jointly by the employer and the social and economic committee in accordance with article L. 2312-59 of the Labour Code, the lawyer appointed to conduct the investigation will act as an expert. In this specific case, he or she cannot be the company's usual lawyer. As he or she obviously cannot act in the procedures that would result from his or her expertise. His or her report is not covered by legal professional privilege.

What are the key issues that the lawyer will need to address to meet the requirements of the CNB Guide?

The first key issue to address by the lawyer is the one of conflict of interest for which the CNB guide makes several recommendations. For example, if the lawyer anticipates that the investigation is likely to implicate his or her usual points of contact in the company (with whom the lawyer has close working relationship), they should be invited to straight away appoint their own lawyer. If the lawyer or another lawyer of the same firm was involved in the circumstances to be the subject of the internal investigation, in particular by participating in the negotiation, conclusion or execution of an agreement of which the terms or legal effect of which is an issue, neither the lawyer nor the firm should participate in the investigation.

Another key issue relates to the terms of engagement and specific powers of the lawyer to conduct the investigation. The CNB guide recommends that an agreement be concluded with the client before the start of the investigation. In addition to the terms of the lawyer's remuneration, this agreement must strictly define the lawyer's role, the context of the investigation and the different steps of the investigation process with a short description of the facts. It must also clarify the lawyer's principal point of contact within the company for the purposes of the investigation and any others with whom the lawyer can discuss the internal investigation.

It is also recommended that the agreement allows the lawyer to engage experts on certain aspects of the investigation (such as, for example, experts in psychosocial risks in the workplace). The result of the work carried out by these experts appointed by the lawyer, will be delivered to the lawyer and will be covered by legal professional privilege.

Conduct of the investigation

The CNB guide provides that lawyers must ensure that the basic principles of the profession are upheld and refrain from pressuring or intimidating interviewees in any way. In compliance with these principles, before any contact with third parties, with a view to carrying out the internal investigation, the lawyer should explain, preferably in writing, to them the purpose of the investigation and its non-coercive nature.

In all circumstances, the lawyer should inform the interviewees that he or she is not their lawyer but that he or she is acting on behalf of the client who entrusted him or her with the conduct of the internal investigation i.e. the employer company and that their exchanges are not covered by legal professional privilege and that whatever they may say may in whole or in part be transcribed in his or her report.

In French law, legal professional privilege only applies between lawyers and their clients which does not include the clients' employees and is absolutely binding on lawyers who cannot even be released from it by clients. In contrast in France in house legal counsels do not benefit from legal professional privilege as they are not considered to be sufficiently independent from the company who employs them, and they are not members of the Bar. Therefore, communications between in-house counsel and other company officers and employees in the context of an internal investigation are not covered by legal professional privilege.

Witnesses

The significance of Article L.1222-1 of the Labour Code obliging employees and employers to perform employment contracts in good faith presumably will require the attendance of one or several employees as witnesses if required and the giving of evidence. We recommend that following each meeting with a witness a draft report is prepared confined to the questions asked and the answers provided, and that this report is signed by the witness. Interviewing employees as witnesses is a sensitive subject for the employer because this may involve risks of internal conflicts between work colleagues. The investigation should not rely upon anonymous statements as Employment Tribunals do not hesitate to dismiss such evidence.

The findings of the investigation

The findings of the investigation are delivered to the client (i.e. the employer) which has the responsibility and power to decide what to do. It is essential to complete the investigation by writing a full investigation report, which will be the key document in the event of a dispute.

How are the findings conveyed to the accused and the accuser and at what stage?

It is recommended to communicate the findings of the investigation to the accused and the accuser at the end of the investigation, although it is not necessary to give them the full report. For employees who were witnesses, some practitioners advise the giving of a summary of the findings. However, this can create a problem with regard to confidentiality so that in our opinion this should be avoided.

Is any part of the investigation process subject to judicial review so that, for example the accused may challenge the decision of the employer on the basis that the processes of the investigation were inadequate or the findings of fact unsupported by the evidence?

The accused may challenge the findings of the investigation which lead to the sanction (e.g. dismissal for misconduct) before the Employment Tribunal. In this case, the findings and the full report will be submitted for examination to the Tribunal, which will assess both the regularity and conduct of the investigation process (e.g. the impartiality of the investigation and the notification of the employees' rights) and the reliability and relevance of the evidence upon which the report's conclusions were based and which was relied upon in deciding the sanction. Furthermore, if the outcome of the investigation is dismissal, it is strongly recommended to describe precisely and transparently in the dismissal letter how the investigation was carried out. Indeed, under French labour law, the drafting of the letter of dismissal is for the employer the key to success in the event of litigation. The fact that the investigation method has been precisely described in this letter will limit the risk of dispute of the investigation by the dismissed employee.

In a current US case a civil action has been brought against a law firm that was engaged by the board to conduct an investigation into the conduct of the CEO on the grounds that it did not do a good enough job with the result that the board in reliance on the flawed investigation agreed to pay a much larger sum in severance to the departing CEO than they would have done had the full story about the CEO been disclosed in the investigation, which it should have been as it was in emails on the company's system with the law firm allegedly didn't look at. Would a claim of that kind find favour in French courts?

Such a complaint would be possible in France where the liability of lawyers can be called into question before the civil courts which award damages if it is established that the lawyer has committed a fault or a negligence in the performance of entrusted mission which caused harm

to the client. In addition, if it is established that in the course of the investigation the lawyer violated his or her ethical and professional obligations, he or she is also subject to disciplinary sanctions such as warnings or temporary suspension of the right to practice.

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