Internal employment investigations in France: courts set the rules

January 24th, 2023

The conduct of internal investigations has developed rapidly within French companies in recent years under the impetus of the law of December 9, 2016, relating to transparency, the fight against corruption and the modernization of economic life (known as the Sapin II law). Inevitably, the courts have been regularly involved in investigations and the evidentiary value of the reports produced in the context of disputes following the application of disciplinary sanctions against employees and challenged by the latter. The French Supreme Court has ruled on practical questions concerning internal investigations, which are of particular interest to companies.

This article reviews these issues and the Courts' responses and notes some practical recommendations arising from them. It should be noted that the case law mentioned below essentially relates to situations of moral harassment, one of the main areas of internal investigations in the field of employment law.

Is the internal investigation mandatory in all cases?

Unless the report comes from a staff representative (i.e. an employee who has been elected by the other employees to represent them before the employer), the employer has no legal obligation to implement an investigation and the French Labor Code does not contain any rules regarding the manner in which the investigation is undertaken. However, the overriding obligation on the employer to preserve the health and safety of employees will make the internal investigation necessary in many cases and particularly in situations of moral harassment.

In this respect, the French Supreme Court ruled that the absence of or even the delay in undertaking an investigation, after a report of potential moral harassment, is a violation by the employer of its obligation to prevent occupational risks (Cass. Soc. January 5, 2022, n ° 20-14.927). If moral harassment is proven, the employer risks civil and even criminal liability if it has not taken the appropriate measures to prevent or put an end to such a situation.

Practical recommendation: the employer must obviously process any complaint it receives, but we do not recommend the automatic opening of an investigation. The risk is that conducting investigation may be a disproportionate response to the allegations in which case the employer is at risk of liability for engaging in the unjustified collection of personal data.

Indeed, some situations can be handled in a manner that does not require the need for the formalities of an internal investigation. If the facts reported are precise and supported by credible evidence (e.g. third party statements or other documents) already held by the employer, no investigation is necessary. The employer can then initiate a disciplinary procedure directly. If not, an investigation will be required.

In sensitive situations involving senior employees or staff representatives, undertaking an external investigation will be justified to offer the affected employees the necessary guarantees of confidentiality and neutrality.

In each case, we recommend proceeding in stages, commencing with a preliminary verification the conclusions of which will make it possible to assess whether the documents and information collected in this context are sufficiently serious and of the necessary gravity to justify a formal investigation.

Can an internal investigation be implemented without the accused employee being informed and without even being interviewed in this context?

For the French Supreme Court, an investigation report drawn up under these conditions does not constitute an unfair mode of proof. (Cass. Soc. March 17, 2021, n° 18-25.597; Cass. Soc. May 27, 2021, no. 19-23984)

The Court of Appeal dismissed the report considering that it had contravened the principle of fairness in the administration of evidence, insofar as the investigation had been conducted without the knowledge of the accused employee.

Article L. 1222-4 of the French Labor Code provides that "*no information concerning an employee personally can be collected by a device that has not been brought to their attention beforehand*". The testimonies collected during the investigation include personal information concerning the accused employee. The Court of Appeal held that this article did not allow the undertaking of an internal investigation that had not been brought to the attention of the accused employee.

However, the French Supreme Court, held that this principle is not applicable to internal investigations.

In France, the employer has the power to control and monitor the activity of employees during working hours, but cannot resort to clandestine monitoring means, i.e., one that has not previously been brought to the attention of the employees. The Supreme Court held that an internal investigation is not specifically intended to control the activity of employees and is therefore not required to be brought to the prior attention of the employees.

Last year, the French Supreme Court ruled that the fact that an accused employee did not have access to the elements of the investigation and to the statements collected during it or that he was not interviewed or had the opportunity to confront his accusers was not contrary to the rights of defence or to the adversarial principle. The Court ruled that the decision taken by the employer at the end of the investigation and the facts on which it is based can always, if necessary, be examined by the courts on application by the employee concerned. (Cass. soc. June 19, 2022, n° 20-22.220)

This does not mean that in all cases the accused employee does not have to be informed that an internal investigation has been carried out. The adversarial nature of the investigation must, as far as possible, be preserved with regard to him or her. He or she should therefore be able to be interviewed during the investigation in the same way as the complaining employee. Clearly, if the alleged facts are proved and dismissal envisaged, the accused employee will be called to a preliminary meeting and will then have the opportunity to put his or her case forward. However, this opportunity comes late in the process after the investigation has been completed and when it is more difficult for the accused employee to challenge the conclusions already reached, particularly if this meeting is the first the accused employee knows of the complaint.

Practical recommendation: we recommend carrying out a case-by-case assessment, determining in particular whether there is a real risk of pressure or reprisals against the complainant or witnesses from the accused employee, bearing in mind that in the event of a subsequent dispute, the employer must be able to justify that there were reasonable grounds to apprehend this risk.

The accused employee should obviously be interviewed if the investigation has not clearly established the veracity of the facts alleged and if a doubt remains after the interviews of the complainant and witnesses have been conducted.

In every case, the accused employee must be interviewed at the end of the investigation.

Does the internal investigation involve interviewing all the co-employees or team members (victims or witnesses) of the accused employee or who have contact with him/her?

No, it is not necessary to interview all the employees. Accordingly, an investigation conducted on an allegation of bullying cannot be dismissed on the grounds that only some of the employees who complained of bullying were interviewed (Cass. Soc. January 8, 2020, No. 18-20.151). In this case eight out of the twenty employees concerned were interviewed. In other words, the fact that only the alleged victims, or even only some of them, were interviewed does not lead to the conclusion that the investigation was incomplete.

Determining which people should be interviewed is part of the process of carrying out the investigation and must be dealt with even before the start of the investigation. If the investigation is entrusted to an external legal advisor, a preliminary list of the people to be interviewed will be agreed with the company in the engagement letter.

Practical recommendation: we recommend starting with a limited number of employees (i.e. the complainant(s), and those in a direct hierarchical relationship with the accused employee (above and below). The range of interviewees may, if necessary, be widened subsequently, depending on the results of the first round of interviews. The confidentiality of an investigation necessarily implies not involving too many people from the outset, to prevent rumors from circulating in the company. The same concern for confidentiality requires employees to be interviewed individually and separately, avoiding, as far as possible, them meeting each other coming in to or out of an interview. Direct confrontations between the complainant and the accused in these situations are of course to be avoided.

Does the company necessarily have to involve staff representatives in the investigation?

Not necessarily, as the French Supreme Court has held that an investigation report cannot be rejected on the grounds that the investigation was entrusted to the company's human resources department and not to the staff representatives (i.e., the social and economic committee – the CSE). (Cass. Soc. June 1, 2022, No. 21-11.437)

This does not mean that staff representatives have no role to play in internal investigations, particularly where moral harassment is suspected. Indeed, the members of the CSE can alert the employer of any appropriate behavior such as moral harassment that they observe or of which they are informed by an employee. In such a case, the employer must immediately conduct an investigation with the member of the CSE and take the necessary measures to remedy the situation. Failing this, the complainant employee, or the staff representatives (if the employee does not object), may refer the matter to the industrial tribunal.

Practical recommendation: except where required by law, the involvement of staff representatives should be assessed on a case-by-case basis depending on the alleged situation. If this situation relates to moral harassment, the CSE or the CSSCT (i.e., health, safety and working conditions commission in companies with 300 or more employees) must be involved in the investigation. Indeed, the CSE (or the CSSCT) has an essential role in any issue relating to the health, safety and working conditions of employees. The investigation will be carried out by an investigation committee made up of a limited number of members of the CSE and management.

Apart from these situations, the involvement of staff representatives may be useful if it appears that they will be able to provide information on the background of the complaint or matters that the employer may not be aware of.

Finally, staff representatives should be involved in drafting the internal company guide defining the procedure and methods of investigation for guidance of the people who will conduct the investigations.

Can the testimonies collected as part of the investigation be anonymous?

Anonymity is a real issue which can raise difficulties if the allegations are proved, and the resulting sanction taken by the employer is challenged by the employee before the courts who question the credibility of the testimonies and thus limit the evidentiary value of the investigation report.

Many companies do not provide for the anonymity of witnesses. Some even exclude employees who wish to remain anonymous from the process mainly out of a concern to avoid exaggeration and embellishment that may be inherent in anonymous testimonies. Other companies maintain the possibility of witnesses choosing to remain anonymous, no doubt fearing that the exclusion of anonymity will discourage employees from reporting certain behaviors.

French courts refuse to base their decisions "*solely or decisively on anonymous testimonies*" (Cass. Soc. 4 July 2018, n° 17-18.241). This means that in the event of a dispute over the disciplinary sanction decided by the employer, the latter must be able to justify its decision (e.g., dismissal) on evidence other than anonymous testimonies (e.g. emails or other written evidence that may be the subject of cross-examination). Failing this, anonymous testimonies alone will not justify the accused employee's dismissal.

That said, it is quite possible to preserve the identity of employees who testified during the investigation. The employer has no obligation to communicate to the accused employee the testimonies collected, nor to indicate the identity of the people interviewed. In the same way, following the investigation the employer is only required to convene the accused employee to a preliminary meeting, to explain to him or her precisely the grounds of the complaint and to get his or her observations and the identity of the witnesses does not have to be revealed.

However, if the accused employee challenges his or her dismissal before the industrial tribunal and the employer has no other evidence to justify the dismissal apart from anonymous testimonies, the witnesses must be disclosed.

Practical recommendation: we therefore recommend, as far as possible, to avoid anonymous testimonies. Reluctant witnesses should be reminded of their legal protection against reprisals, sanctions, or dismissal, as well as their rights relating to their personal data collected in the context of their interviews.

To convince those employees minded refusing to testify if their anonymity is not preserved, the employer should assure them that it will not tolerate any reprisal against them and will take all appropriate measures to protect them. The employer should also explain that if the employees' identity cannot be revealed, their statements will not be considered in the event of a dispute with the accused employee which may weaken the investigation.

Anonymous testimonies should be collected only in exceptional circumstances (e.g., where there is a real fear of physical reprisal). In such a case, the employer must meet the requirements of the case law and ensure it has enough other evidence to support its decision such as dismissal for serious misconduct of the accused employee.

Finally, anonymous testimonies should not be attached to the investigation report to avoid the employees concerned from being identified from their statements. Care should also be taken when drafting the report, that identification is not possible and t that identifying sentences or references are removed or redacted.

In conclusion:

Investigation reports are now widely accepted by French courts as having evidentiary value.

Employers are given some leeway in defining the rules for the conduct of internal investigations. For the courts, the challenge is to enable employers to act to practical measures to preserve the health and safety of their employees in the workplace.

In return, investigation reports will be the subject of rigorous substantive examination by the courts. Accordingly, the protocols under which the investigation will be carried out need to be clear, fair, and objective. The investigation report itself should be drafted carefully in the expectation that it may be the subject of critical judicial review.

Engaging an external legal advisor experienced in undertaking investigations (particularly in sensitive situations such as alleged moral harassment), offers both employers and employees a guarantee of independence, impartiality, and professional confidentiality.

Joëlle Hannelais
Partner,
Vivien & Associés, Paris