Whistleblowing - How should employers deal with this phenomenon?

Whistleblowers are employees who report irregularities in a company internally or directly to external authorities or the media. Is whistleblowing permissible from an employment law perspective and what do employers have to pay attention to in this context?

By Polia Rusca and Marcel C. Steinegger

Whistleblowers regularly expose themselves to the risk of retaliation. This is even though reporting internal irregularities can be of the great relevance, especially for companies. While there are protective provisions for federal personnel in public personnel law (Art. 22a Federal Personnel Act), the protection of whistleblowers in private law in Switzerland has not yet found its way into the law. After about 12 years, the revision project to legally regulate protection when irregularities are reported failed in parliament in March 2020. At least there are court rulings that provide guidance. Further, the *EU Directive 2019/1937 on the protection of persons who report breaches of Union law* may also be of assistance in this regard, especially for internationally active employers.

1. Right to report or duty to report?

Within the scope of his duty of loyalty, the employee is entitled to inform his employer of irregularities. This has been confirmed by the Swiss Federal Supreme Court, according to which the employee is allowed to make such reports, all the more so if the employee's own work situation is affected. This ***internal right to report*** requires that the report is made in the ***interest of the employer*** and is based on ***probable cause*** - the report is thus made in good faith and is not malicious in nature. Furthermore, if the employer has issued instructions in this regard, the employee is obliged to comply with the formal reporting procedure.

In contrast, the employee only has an ***external right to report*** in exceptional cases, as external reports of irregularities are regularly associated with a loss of image for the employer and therefore can have negative financial consequences for the employer. Against this background and according to the applicable case law, an external report of an irregularity may only be made if there is an ***overriding interest*** (be it a substantial self-interest, third-party interest, or public interest) and the ***principle of proportionality*** is respected. A report is proportionate if the ***cascade principle*** established by the Swiss Federal Supreme Court is complied with: Accordingly, an employee does not act disproportionately if he informs the competent external authority after an unsuccessful internal report. If the latter also fails to act, the employee is allowed to inform the public as an ***ultima ratio***, provided that this is justified in view of the circumstances.

While the employee has a *right* to report, it is questionable whether in certain constellations there is also a contractual ***duty*** to report perceived irregularities in the employer's organisation. Such a ***duty to report*** is recognised in principle on the basis of the duty of loyalty, but its scope has not been conclusively clarified. However, a duty to report is assumed to exist in connection with significant occurrences and incidents of damage, whereby the scope of the duty to report applicable in an individual case is ultimately dependent on the position of the employee concerned. In analogy to the right to report, an employee who is obliged to report is also required to comply with the cascade principle, meaning that a report must always first be made to the internally responsible body.

2. Report received - what now?

Current employment law does not explicitly oblige employers to implement an internal procedure regarding reporting and its handling. However, as a result of ***different legal provisions***, employers are required to ***consider*** and ***respond appropriately*** to ***reports*** of internal irregularities.
If the employer has received an internal report, he will first have to decide whether he wants to follow up on this information.

From the perspective of employment law, the employer is obliged ***to protect*** the ***personality of the reporting employee*** and the ***accused employee*** with regard to the handling of reports due to his ***duty of care***.

On the one hand, this means that the employer may only disclose the ***identity of the whistleblower*** to the accused person or to other employees if there is a ground for justification for doing so within the

meaning of the Data Protection Law. Such ground for justification may exist, for example, if a confrontation between the whistleblower and the accused employee is indispensable for the purpose of clarifying the internal irregularity. However, in the end it always depends on the concrete circumstances. In any case, the sole interest of the accused employee in the identity of the whistleblower is unlikely to be a suitable justification.

On the other hand, the employer is obliged to inform the ***accused employee*** of the allegations made against him and, if already initiated, of the internal investigation. In addition, the employer must ensure confidentiality regarding the allegations and the measures taken in this context. The relevant information is only to be disclosed to those individuals who, due to their position in the employer's organisation, must have knowledge of it (preservation of the ***"need to know" principle***). The accused employee must also be granted the ***right to be heard,*** i.e. he must have the opportunity to comment in detail on the accusations made against him.

Finally, the employer has a duty to the whistleblower to protect him from ***retaliatory measures*** such as harassment, bullying or other disadvantages (e.g. groundless non-promotion, downgrading or negative performance evaluation).

3. Limits of internal investigation

Where reports are followed by clarifications by the employer – involving third parties where necessary – these are referred to as internal investigations. They are subject to various legal restrictions. First, it is prohibited to use control or monitoring systems that exclusively or mainly monitor the behaviour of employees at the workplace. If, during an internal investigation, it becomes necessary to ***monitor*** certain employees for the purpose of investigating a suspected irregularity, the provisions of data protection and employment law concerning the processing of personal data must be complied with in addition to the provisions of public labour protection law. In particular, the employer is obliged to inform employees in advance about the use of monitoring systems (principle of recognisability) and the monitoring may only take place in limited periods of time and must always be proportionate. Not only regarding the monitoring of employees, but also in general, the employer is bound by the provisions of data protection and employment law with regard to the ***collection of data***. Accordingly, only data that has a ***connection to the workplace*** can be collected, whereby the data processing must be ***recognisable*** to the employee ***in advance*** and must be ***proportionate***.

Furthermore, the employer will have to regularly ***interrogate*** employees as part of an internal investigation to pursue reported indications. In doing so, the employer is only allowed to ask questions that are related to the workplace. Accordingly, the employee is in principle not obliged to answer questions about his private life, unless the relevant question is directly related to the irregularity to be investigated and thus has a connection to the workplace. Due to the ***duty of loyalty,*** employees are then obliged to answer permissible questions truthfully and completely. It is questionable whether employees have a ***right to refuse to testify*** in this context, i.e., whether they may refuse to provide information if this would incriminate themselves. There are various opinions in favour of a ***duty to provide information under employment law*** and thus against a right to refuse to testify in the context of internal investigations. This contrasts with criminal proceedings, where accused persons have a general right to refuse to testify by law. If an employee refuses to testify in internal investigations or provides untruthful information, he risks the corresponding sanctions under employment law.

Finally, due to the ***duty of care,*** the employer is required to refrain from intimidation during an internal investigation. He is not allowed to put pressure on the employees involved in the internal investigation.

4. Termination as a reaction

An ***ordinary*** termination against the ***reporting employee*** solely in response to a permissible whistleblowing is abusive. Therefore, although the termination is valid, the employee is entitled to compensation. In contrast, an ordinary termination is presumably not abusive if the reporting employee has acted maliciously or has even shared responsibility for the irregularities. Similarly, the termination will not be abusive if the reporting employee did not adhere to the cascade principle and accordingly did not first address the internally competent body. Under special circumstances, ***termination with immediate effect*** may even be justified.

An ***ordinary*** termination of the ***accused employee*** is not abusive if the suspicion of unlawful conduct is confirmed. Likewise, an ordinary termination based on suspicion is not abusive if it is grounded on

serious indications and the employer has carried out the investigative actions expected of him. This is even the case if it ultimately turns out that the allegation cannot be confirmed.

Finally, great caution is required regarding the issuing of a ***termination with immediate effect***. In the sense of an "emergency valve", terminations with immediate effect are only justified in exceptional cases. In principle, however, such a termination would be justified if the ***accused employee*** can be proven to have committed a criminal offence as a result of which the relationship of trust has been destroyed. The termination with immediate effect may also be justified against the ***reporting employee***. Hence, such termination was considered as being justified when employee maliciously reported his superior to the prosecution authorities for embezzlement and fraud without objective evidence and without prior internal clarifications.

5. Conclusion

The correct handling of whistleblowing is a legal challenge for the employer. As has been shown, the employer has to comply with various legal requirements in connection with the reporting of suspected irregularities. At the same time, the employer itself has the greatest interest in ensuring that internal irregularities can be uncovered and subsequently remedied. Accordingly, the employer should strive to create a corporate culture that motivates employees to report irregularities. To this end, it is advisable to issue directives on how to deal with reports of irregularities and to implement an internal reporting system that is applied according to clear and transparent guidelines as soon as an irregularity is reported.

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