

Investigation and disciplinary action: law and practice in Hong Kong

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Where an employer suspects its employee(s) has committed an act of misconduct, an employer should take reasonable steps to find out what has happened. The earlier an employer learns about the misconduct, the better. A proper investigation into the issue may give the employer a fighting chance of resolving it, addressing it and, even if it doesn't, might at least give the employer a defence to a future lawsuit.

Unlike other jurisdictions, there is no statutory procedure in Hong Kong governing investigations and disciplinary actions. As such, many employers impose their own internal procedures when deciding how to address possible employee misconduct issues.

It is of vital importance to get the process right. First and foremost, depending on the circumstances, an employer could be held to be vicariously liable for the actions of its employees. Second, it is always better to grapple with these issues promptly. If there is a rotten apple, an employer should want to take action to prevent it from spoiling the entire barrel.

In this article, we discuss the steps an employer should take when there is suspicion of employee misconduct in the workplace.

Investigation

The investigation will enable an employer to find out all it reasonably can about the issue. Not only will it allow the employer to establish facts and gather evidence, it will also enable the employee who is subject of the investigation to have an opportunity to state their case and/or provide the employer with any mitigation they wish the employer to consider.

When putting together an investigation, an employer should first consider:

- **Who should investigate the matter?** The process should be conducted by someone who has been trained to handle investigations, who will be independent, and who is not the subject of the investigation and/or a relevant witness. From a practical perspective, it is important to find someone who has the time and availability to deal with what could be a lengthy process (and be a witness to any subsequent legal proceedings).
- **Confidentiality?** The investigation should be kept confidential so that employees are only informed on a 'need to know' basis. Witnesses and the subject of the investigation should be asked to keep the matter confidential to avoid cross contaminating any evidence and/or otherwise tainting the investigation.

It's important to note that, in the event of litigation, any documents produced by the investigation may lose their confidentiality and may be discoverable, so investigators should exercise caution when committing thoughts into writing.

- **Where to conduct interviews?** Interviews should always be conducted in a private setting in the office, where the discussions can be handled privately and without the risk of interruptions. This is important both for confidentiality of the employees as well as to maintain the integrity of the process.
- **Should an employer instruct solicitors to carry out the investigation?** This should be assessed on a case by case basis taking into account matters such as: whether there is someone suitable available in-house (who has undergone the relevant training, is independent and able to conduct the investigation), the complexity of the investigation and the seriousness of the allegations. Where solicitors are instructed, the interviews and all advice in relation to the investigation and any subsequent disciplinary action may be subject to legal privilege – which entitles the employer to resist compulsory disclosure of the documents and information. The protection of legal privilege may well be a deciding factor when instructing solicitors in sensitive and complex investigations.

Evidence gathering: document collection

During the investigation, investigators should only collate documents which are relevant to the misconduct in question – including those which prove or disprove any allegations. Investigators should not go on a fishing expedition and/or attempt to obtain irrelevant material. Where the information sought contains personal data, investigators should take care not to breach the Personal Data (Privacy) Ordinance and/or any other privacy rights of the employee and/or third parties. Where the investigator is unclear as to what can and can't be collected as evidence, they should seek legal advice.

It is recommended that the least intrusive methods are used to collect documents, for eg the employer may wish to search employee workspaces outside office hours to ensure that employees are not alerted to the fact of the investigation. Work property and office electronic files and systems may also be searched remotely (such as inboxes and workplace instant messaging programs). Once the documents have been collected, they should be stored securely.

Evidence gathering: interviews

When investigating the matter, the employee who is the subject of the investigation should be interviewed so that they can state their case and respond to all allegations put to them. Witnesses who can shed light on the matter should also be interviewed.

It is best practice to have the same person conducting each interview as a single point of contact for further information sharing and questions. This enables consistency in approach to interviewing and decision making. Open and simple questions should be put to the interviewee, and interviews should avoid any cross-examination style interrogation. This will help to keep the interview neutral and encourage the interviewee to share information openly.

Post-investigation

In certain cases, and where there is a contractual right to do so, employers should consider whether to suspend the employee whilst the investigation is ongoing. It may be sensible to suspend the employee who is the subject of the investigation if it would be disruptive to keep the employee in the office and/or where there is a risk that evidence could be destroyed.

Where further information is required or new information has come to light, it may be appropriate to hold a further meeting with the relevant employees and/or witnesses. This meeting should follow the same best practices as outlined above for interviews.

Outcome

Where the employer has established that the employee has committed an act of misconduct, the next step is to consider what action should be taken.

When deciding on the outcome, there should be consistency in the approach – where any employer makes an exception for one employee, it risks alienating the others.

Typical outcomes or sanctions include, in order of increasing severity:

- verbal or informal warning
- written or formal warning
- mandatory training
- suspension
- demotion
- reduction in bonus
- termination (with notice or payment in lieu), and
- summary dismissal (without notice).

The decision should be formally notified to the employee as soon as practicable, which can be done orally and/or in writing.

Reporting to third parties

Employers should also consider whether any external and/or third parties also need to be notified of any finding of misconduct. Depending on the circumstances, an employer may be obliged to report their findings to their regulators (for eg those in the financial services industry may be required to report any acts of misconduct to the Securities and Futures Commission and/or the Hong Kong Monetary Authority) or, where the employer believes a criminal offence has occurred, the employer may wish to report the matter to the police.

Wider business changes

Finally, it is recommended that the employer should take this opportunity to self-assess whether it should implement any internal changes to prevent a similar reoccurrence in the future. It is often useful for an employer to ask questions such as: Was the act of misconduct an isolated incident or is there something that can be done to prevent a similar act of misconduct from occurring in the future? Have any deficiencies been highlighted throughout the process that should be rectified? If so, perhaps another member of staff, who was not connected to the process, could provide their insight as a form of checks and balances to improve internal processes.

Conclusion

Where there are allegations of misconduct, employers should promptly carry out an internal investigation in accordance with best practices. When done effectively, this will give the employer a chance to resolve any issues, take decisive and consistent action, reduce the prospect of a later dispute and, in the event of litigation, it will set up the employer with the basis of a good defence.

If in doubt, employers should seek legal advice on how to conduct an investigation and/or issue appropriate disciplinary sanctions. We regularly advise employers and employees on internal investigations. Please do not hesitate to contact Andrea Randall, a Partner and Head of the Employment Practice in Hong Kong for any queries you may have.

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