



THE DOS AND DON'TS OF DISCIPLINING EMPLOYEES

Although necessary, the investigative and disciplinary process can be a minefield for unprepared employers

BY JONATHAN YUEN

UNFORTUNATELY, the painful truth is that not all employees are honest or well-intentioned; and in any event, even if their acts or omissions may be unintentional, the result is the same – the employer or business suffers loss and damage. How do employers handle investigations to get to the root of the issue; and thereafter, if warranted, discipline the employee in a manner that sends a clear message that such conduct will not be tolerated, protects the company and does not fall foul of employment law obligations?

From accidents on the factory floor, a customer’s complaints of an order that was incorrectly fulfilled or delivered late, to an embarrassing and glaring mistake on marketing materials meant for a big pitch to an important client and even the seemingly inexplicable loss of monies – it is never a pleasant thing for a business owner to find out that an event causing disruption to the business has occurred. Every responsible manager or business owner in such a situation would naturally want to get to the bottom of the issue to find out what went wrong, how to fix the

situation and then how to prevent the issue from happening again.

While investigating the issue is obviously a laudable exercise, employers have to be very careful as to how they conduct the investigation – lest they end up unintentionally escalating the situation and end up with more unproductive downtime dealing with aggrieved or even opportunistic employees who may bring claims against the business.

Here are three simple principles to adhere to when conducting an investigation at the workplace: First, fact find objectively. Don’t jump to conclusions. Second, be fair in engaging the employee who is the subject of the investigation. Third, if an offence has been committed, ensure that the response is legally consistent with the employee’s employment agreement and the law. An employer who violates any of these core principles risks allowing the errant employee to instead seize the initiative and re-frame the entire issue as one of being the “victim” and claiming that his rights have been breached and in an extreme case, even alleging that he has been constructively dismissed by the employer and claiming damages against the employer.

• **Objective fact finding**

Business owners and managers may understandably be upset and angry at the employee involved in the incident, but they should nonetheless approach the situation calmly, objectively and not jump to conclusions. At the onset, managers involved in or affected by the incident must not be involved in the fact-finding process. The task must instead be performed by a neutral senior employee from the company’s human resources (HR), legal department or head of a different business unit. This is obviously to dispel any allegations of bias in the investigation. All evidence collected during the investigation should be properly documented and stored.

One particularly contentious aspect of the fact-finding process is when the team investigating the incident interviews witnesses. Many times, these interviews are informally conducted, where the same questions are asked by different people; and more often than not, poor or few records are kept. We have seen “records” of interviews as nothing more than barely legible handwritten notes scribbled on the back of recycled paper. This type of record keeping poses a significant risk to the employer because if the employee chooses to contest the employer’s narrative and/or record of events, the entire record generation process will come under the harsh light of judicial scrutiny.

Interviews conducted by the investigation team ought to be, as much as possible, recorded verbatim through the use of digital recording devices. Given the proliferation of recording apps on mobile phones nowadays, not recording an interview is hardly excusable. Thereafter, it should be transcribed so that the evidence can be reviewed by the investigators post-interview, and further inquiries or clarifications posed to the employee if necessary. At the bare minimum, if a recording is not made of the interview, then the employee should be at least presented with the notes taken of the interview so that he or she can make any corrections to any parts of the interview and sign off on the notes to affirm this. This is to prevent any future disputes in relation to the testimony/evidence given by the employee during the interview and also to be upfront with the employee as to what has been recorded.

A final point to note during the fact-finding process is that the investigators must keep their minds open and refrain from making any premature judgements or pronouncements. In particular, this extends to their body language during the investigative process. It will only damage the objectivity of the process if investigators are seen, for instance, to be rolling their eyes or making dismissive or accusatory statements to the interviewees.

• **Be fair in engaging the employee**

Until the investigation is complete, a recommendation has been made to a properly constituted disciplinary committee and pronouncement made in respect of the incident, the employee who is the subject of the investigation must be treated as innocent.

This means a few things. First, the company must continue paying the employee as per normal during the course of the investigation – even if the employee is not required to perform his/her normal work duties and is instead asked to assist in the investigation. Second, the employee must not be deprived of his/her usual benefits such as access to medical care, the payment of rent or payment of school fees if so provided for in the employment agreement. Third, if the employee under investigation is asked to cease performing his/her ordinary duties whether partially or fully, the messaging to internal and external stakeholders must be carefully managed to ensure not just continued confidence in the operations of the company, but also that the employee is not wrongly maligned.

One critical point that is frequently overlooked is giving the employee being investigated a reasonable opportunity to respond to allegations that have been made. This right of response must be observed not just in form, but also in substance; and the engagement should be approached in a “cards face-up” manner rather than by way of an ambush. For instance, it would be a huge breach of procedural justice if

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the employee was only told of some but not all of the allegations against him/her; or if, when the employee was presented with the findings of the investigation, it was also demanded of him/her to respond on the spot.

Even if not provided for in the employment documents/framework of the company, in order to protect the sanctity of the investigation and not allow the employee to derail its focus, it would be prudent to always (a) present a copy of the allegations in full to the employee and (b) require the employee to provide a written response within a reasonable time for the investigative team’s consideration and further clarification.

• **Legally consistent response**

If, after examining the evidence and the responses provided by the employee, the investigation team concludes that the employee has indeed conducted himself/herself in breach of his/her employment obligations, the next step will be to determine the consequences of the employee’s action.

This is not as simple as it would appear at first blush. The threshold question which needs to be asked is: what employment obligation is the employee in breach of exactly? Is the act complained of contrary to (a) the employment agreement, and if so, which part; or (b) in law? This threshold question needs to be answered clearly because only when the breach of the employee has been properly categorised, can the employee be dealt with in a legally consistent manner.

For instance, if the investigation concludes that the employee had harassed a colleague, does that give the company the right to terminate the employment relationship summarily “for cause” without notice? What if the investigation concludes that the employee was responsible for the accident on the factory floor? Does that give the company the right to demand that 100 per cent of the employee’s pay be deducted every month with interest of 20 per cent per annum until the cost of rectifying the damage has been paid back to the company; or perhaps, to instead penalise the employee’s entire team financially?

The short answer is that the remedies available to a company or employer are necessarily limited to those found in the legal framework/ documentation governing the employee’s relationship with the company and in general law. For instance, unless the employment agreement specifically provides for summary termination where the employee is consistently late for work, the company cannot use the errant employee’s lateness, even if that is an established fact, as a ground for summary termination.

Employers must also be careful that they do not impose disciplinary actions which might end up breaching the Employment Act, such as deducting anything more than 25 per cent of the employee’s salary.

Although necessary, the investigative and disciplinary process can be a minefield for unprepared employers. On top of applying the three principles discussed above, employers are also encouraged to (a) ensure that their employment framework and documentation is sufficiently robust and (b) in a contentious situation, especially where the employee turns hostile, to immediately seek legal advice to manage and mitigate litigation risks. ■

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