iel International Employment Lawyer

GUIDE TO WORKPLACE INVESTIGATIONS

BERMUDA

AUTHORS:

MICHAEL HANSON, JAY WEBSTER & MARCUS SYMONDS

CAREY OLSEN

Bermuda 

Michael Hanson, Jay Webster & Marcus Symonds
Carey Olsen

Starting an investigation

1. What legislation, guidance and/or policies govern a workplace investigation?

In Bermuda, the primary employment legislation of relevance to a workplace investigation is the Employment Act 2000 (EA 2000).

The Personal Information Protection Act 2016 (PIPA 2016), the Good Governance Act 2012 (GGA 2012), and the Human Rights Act 1981 (HRA 1981) will also apply.

Many employers will have internal policies outlining investigation procedures. Regulators, such as the Bermuda Monetary Authority, may also provide investigation requirements for specific industries, such as where employees' conduct or other issues affect their fitness or propriety, regulatory compliance or workplace culture.

Bermuda is a British Overseas Territory of the United Kingdom, and the common law, doctrines of equity, and Acts of the Parliament of England of general application which were in force in England when Bermuda was settled on 11 July 1612 have force within Bermuda.

The practical effect of this is that Bermuda's Courts and Tribunals will ordinarily be guided by decisions by the UK Supreme Court on common law issues which are not materially impacted by local considerations, even though such decisions are not strictly binding in Bermuda.

Similarly, where any Bermuda legislation is modelled on prior enacted statutes in other Commonwealth jurisdictions, Bermuda's Courts and Tribunals will generally regard pronouncements of the Courts in the relevant jurisdiction from which the Bermuda statute was derived as persuasive authority as to the corresponding position under Bermuda Law.

Further, the Courts and Tribunals in Bermuda will often have regard to foreign guidance, for example, the UK's ACAS Codes of Practice and Guidance on workplace matters and ICO Guidance on data protection matters.

Under the Bermuda Employment Act 2000, an employer is entitled to take disciplinary action, including suspending an employee, when it is reasonable to do so in all the circumstances. When deciding what is reasonable, employers should consider the following factors:

- nature of the conduct in question;
- the employee's duties;
- the terms of the contract of employment;
- any damage caused by the employee's conduct;
- the employee's length of service and previous conduct;
- the employee's circumstances;
- the penalty imposed by the employer;
- the procedure followed by the employer; and
- the practice of the employer in similar circumstances.

2. How is a workplace investigation usually commenced?

Investigations typically begin following a complaint, grievance, performance concerns, whistleblowing, disciplinary concern, incident or accident reporting.

Employers must assess whether an investigation is necessary and proportionate. Terms of reference should be drafted to define scope, witnesses and documentary evidence required and an impartial investigator appointed.

3. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

Yes, in principle, an employee may be suspended pending an investigation.

However, as suspension is not viewed as a neutral act and should not be adopted as a default practice in workplace investigations. Employers will need to consider whether suspension is appropriate (and this may involve a preliminary investigation) to consider, without limitation, whether:

- the employee's presence could interfere with the investigation;
- there is a risk to the health and safety of the employee or other employees of the business; or
- there is a risk of further misconduct.

Employers should have regard to contracts of employment which should confirm the right to suspend and the conditions of any such suspension. It will usually be the case that suspension is on a fully paid basis, unless the contract provides otherwise.

In some contexts, regulators or authorities may also need to be notified and potentially even involved in decisions regarding the suspension of employment, as they may have a view on the matter.

In a nutshell, a suspension should be justified by the circumstances, proportionate and time limited, and reviewed regularly to ensure it remains necessary. Suspension will typically be on a fully paid basis unless otherwise stated in the employment contract.

4. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?

There are no qualifications required of someone to conduct a workplace investigation in Bermuda.

However, best practice is that the investigator should:

- be impartial and not involved in the incident under investigation;
- be competent, ideally with training or experience in handling investigations;
- be separate from the person who will make any disciplinary decisions, to ensure procedural fairness; and
- be able to document findings clearly, assess evidence objectively, and maintain confidentiality.

An investigator can be internal or external to an organisation. If an internal investigator is appointed, this will typically be either an HR official, line manager, senior manager or director. External investigators (for example, HR consultants or lawyers) will usually be engaged in instances where allegations are serious, complex or sensitive, and/or if an internal conflict of interest arises. Even in instances where an external investigator is appointed, the employer ultimately remains responsible for the investigation process and outcome.

In all instances, employers should ensure compliance with any internal policies or guidelines regarding the appointment of an investigator in workplace investigations.

5. Can the employee under investigation bring legal action to stop the investigation?

It is uncommon but not impossible for an employee to bring legal action to stop a workplace investigation, but this is rare. Legal action may be considered if:

- the investigation is conducted in breach of the employee's contract;
- the investigation is not adjourned pending the outcome of criminal proceedings and failure to do so amounts to breach of the implied duty of trust and confidence; or
- there is a violation of statutory rights, such as discrimination or breach of data protection laws.

However, Bermuda courts are generally reluctant to intervene in internal employment processes unless there is clear evidence of unfairness or illegality. Most challenges would arise after the investigation, typically in the form of an unfair dismissal or constructive dismissal claim.

Evidence gathering

6. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

Co-workers cannot be compelled to act as witnesses in a workplace investigation. Participation is generally voluntary.

However, in some cases, providing information may be considered a reasonable management instruction, especially for senior staff or those with a duty to report misconduct, and failure to comply with the instruction may present grounds for disciplinary action.

Employers should avoid coercion and instead encourage cooperation through clear communication and assurances of confidentiality. If an employee has concerns about participating as a witness, these should be discussed and workarounds considered, for example, having the employee address any questions by way of written representation.

Employees who participate in a witness capacity in workplace investigations are entitled to:

- protection against victimisation and retaliation, especially in cases involving discrimination or whistleblowing;
- compliance with their rights under PIPA 2016, ensuring that personal information shared during the investigation process is handled lawfully and securely;
- any additional safeguards stemming from contractual provisions or internal policies and procedures (eg, where appropriate allowing participation in an investigation on an anonymous basis or offering employee support services); and
- an expectation of confidentiality.

7. What data protection or other regulations apply when gathering physical evidence?

Workplace investigations (including the gathering of physical evidence) must comply with PIPA 2016, which has comparable principles to those applied by the EU's General Data Protection Regulation (GDPR). Key considerations for employers when gathering physical evidence include:

- uses of personal information must be lawful, fair, and transparent;
- personal information used must be adequate, relevant, and limited to what is necessary;
- a Data Protection Impact Assessment (DPIA) may be good practice if evidence gathering involves high-risk uses (eg, surveillance or accessing sensitive personal information);
- CCTV use should comply with best-practice guidance issued by the Office of the Privacy Commissioner;
- confidentiality and security of all collected information should be ensured and the employer should be prepared to respond to data subject access requests; and
- the employer should not further use personal information without a valid purpose.

In addition, if the gathering of physical evidence involves the personal possessions of employees, employers should comply with any internal policies on such matters.

Regard should always be had to the right of data subjects to make data subject access requests for copies of their personal information, and so any documentation created during an investigative process should be in accordance with the employer's privacy notice. Where an external investigator is involved, they may also have their own obligations under PIPA 2016.

8. Can the employer search employees' possessions or files as part of an investigation?

In Bermuda, employers may search an employee's possessions or files as part of an investigation, but this is usually in exceptional circumstances and subject to specific conditions. Note that:

- the search must be lawful, proportionate, and justified;
- while employers may have a contractual right to search an employee's possessions or files as part of an investigation, it is advisable that an employer obtains the employee's explicit consent to the search. If an employee refuses consent to the search, the employer should consider whether the employee has a valid reason for refusing consent and determine next steps appropriately;
- searches must comply with PIPA 2016;
- it is advisable to notify an employee of the search of their personal possessions or digital files and ideally, allow the employee or an impartial third-party to be present during the search;
- if the search involves digital files or devices, employers:
    - must distinguish between company-owned and personal property;
    - must avoid accessing private communications or personal content unless strictly necessary and legally justified; and
    - should consider conducting a DPIA, if sensitive personal information is involved.

9. What additional considerations apply when the investigation involves whistleblowing?

The employer should identify whether any individuals have made a "protected disclosure" under Section 29A of the EA 2000 or Section 3 of the GGA 2012. This requires analysis of the subject matter of the disclosure, how it is made, and the recipient of the disclosure.

Employers must then ensure that employees are not subject to dismissal or disciplinary action and that other workers (eg, contractors) are not subject to the termination of their contracts or the withholding of their payment on the grounds of their protected disclosure. Although the causation test for these purposes is not straightforward, as a general rule if the protected disclosure has a "material influence" on the decision, there may be liability.

A dismissal due to an employee's protected disclosure will be "unfair". An Employment and Labour Relations Tribunal can order an employer to compensate an employee up to 26 weeks' wages for an

unfair dismissal, and/or reinstate the employee or reengage them in other work. Termination of a contract and withholding of a payment due to a protected disclosure are offences for which both a company and its senior officers can be liable and are punishable by fines of up to $10,000 and/or 12 months' imprisonment.

Confidentiality and privilege

10. What confidentiality obligations apply during an investigation?

While there is no single statutory framework governing confidentiality in workplace investigations, obligations stemming from the contractual documentation (including internal policies), PIPA 2016, common law principles, and best practice:

- investigations should be conducted on a confidential basis to protect the integrity of the process and the individuals involved;
- all parties involved, including the complainant, respondent, witnesses, and investigators should be reminded of their duty to maintain confidentiality;
- breaches of confidentiality may be treated as a disciplinary matter, especially if they compromise the investigation or cause harm;
- appropriate exceptions may apply to the duty of confidentiality including:
  - employees needing speak to their representative, legal adviser, or a regulator; and
  - disclosure may be required under data protection law or legal proceedings.

Employers should have a clear confidentiality clause in their employment contracts and internal policies dealing with workplace investigations and clearly communicate this requirement at the outset of the investigation.

11. What information must the employee under investigation be given about the allegations against them?

While there is no statutory checklist, fair procedures and natural justice principles require that the employee under investigation be given:

- a clear explanation of the allegations, including relevant dates, events, and individuals involved, allowing them sufficient information to be able to respond to the allegations; and
- copies of relevant documentary evidence, policies, and procedures.

Failure to provide this information may result in a breach of the implied duty of trust and confidence and could undermine the fairness of any disciplinary action taken.

12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

The identity of complainants, witnesses, or sources of information may be kept confidential, but only in exceptional circumstances. Key considerations include:

- fairness vs. confidentiality – the employee under investigation has a right to know the case against them, which may include knowing who made the complaint or provided evidence. Keeping this information confidential may frustrate the employee's ability to answer the allegations and should be limited to exceptional circumstances only;
- risk of retaliation – if there is a genuine risk of harm or victimisation, anonymity may be justifiable; and
- data protection – under PIPA 2016, personal information must be processed lawfully and fairly. This includes balancing the rights of the complainant and the respondent.

Employers should avoid guaranteeing anonymity unless absolutely necessary and should explain the limits of confidentiality to all parties involved. It may be appropriate to consider redacting names in early stages on the understanding that these may ultimately be disclosable to ensure fairness in the investigation process. Any decisions regarding anonymity of witnesses, sources, or information in the workplace investigation should be properly documented.

13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

NDAs may be used in settlement agreements to keep the fact and substance of an investigation confidential, with certain important limitations:

- they cannot override statutory rights (eg, the right to make protected disclosures, report a criminal offence or cooperate with a regulatory investigation);
- they should be clear and specific about what is to be kept confidential and should not be used to silence legitimate concerns or the lawful reporting of matters; and
- clawback clauses or penalties should not be included if they are aimed at deterring lawful disclosures.

Regulators may scrutinise NDAs which attempt to restrict disclosures involving personal information or regulatory breaches.

NDAs should never be used to intimidate or supress an employee.

14. When does privilege attach to investigation materials?

Legal privilege may attach to investigation materials under two main categories.

- Legal Advice Privilege (LAP):
  - applies to confidential communications between a lawyer and their client;
  - the dominant purpose must be to seek or provide legal advice; and
  - only employees who are authorised to seek legal advice on behalf of the employer are considered “the client”.

- Litigation Privilege (LP):
  - applies to communications made for the dominant purpose of preparing for litigation;
  - litigation must be reasonably contemplated, not merely possible; and
  - can extend to communications with third parties (e.g, external investigators or experts).

Rights to representation

15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?

There is no statutory right for an employee to be accompanied or legally represented during an investigation meeting.

However, best practice and principles of natural justice suggest that:

- it may be good practice to allow employees to be accompanied by a colleague or trade union representative in serious or sensitive cases;

- legal representation may be permitted in exceptional circumstances (which is rare);
- employers should check their internal policies or employment contracts, which may grant broader rights to a companion or representation; and
- if the employee has a disability, allowing a support person may be required as compliance with the employer's legal obligation under the HRA 1981 to make reasonable adjustments.

16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?

There is no automatic right for a union to be informed or involved in an investigation. The involvement of a trade union or works council depends on the terms of the employee's contract or collective bargaining arrangements.

Under data protection law, employers must also consider whether informing a union could involve sharing personal information, and whether the employee has consented to that disclosure.

In practice, employers often allow union representatives to be involved if the employee requests it, especially in public sector or regulated environments.

17. What other support can employees involved in the investigation be given?

There is no statutory list of support measures that can be offered to employees involved in a workplace investigation. Some recommended support measures include:

- access to a nominated contact for queries and information on the investigation process;
- access to employee assistance programmes;
- regular updates on the progress of the investigation, expected timeline, and next steps; and
- where appropriate and reasonably practicable, adjustments to working arrangements.

Employers may well have a host of support measures in employment contracts and internal policies and in those instances, must ensure compliance with these support measures.

Issues during the investigations

18. What if unrelated matters are revealed as a result of the investigation?

If unrelated matters are uncovered during a workplace investigation it is recommended that the investigator:

- document them separately;
- avoid including them in the current investigation report unless they are directly relevant to the scope or terms of reference; and
- report them to the employer or appropriate internal authority for consideration.

The employer may decide to:

- initiate a separate investigation into the unrelated issues; or
- address them informally, depending on their nature and seriousness.

From a data protection perspective, any personal information collected that is not relevant to the investigation should be:

- disregarded; and
- deleted (unless there is a lawful reason to retain it securely).

This approach helps maintain the integrity and focus of the original investigation while ensuring that other concerns are not ignored.

19. What if the employee under investigation raises a grievance during the investigation?

If the grievance is related to the subject of the investigation, an employer may choose to incorporate and address the grievance within the same investigation process, ensuring that the employee's concerns are fully considered.

If the grievance is unrelated, the employer has the options of:

- concluding the investigation first;
- pausing the investigation and dealing with the grievance first; or
- running both processes concurrently and using separate investigators if necessary.

Employers must ensure that both the investigation and grievance are handled fairly and impartially, with clear documentation.

The employer should avoid delaying the investigation unnecessarily but must also ensure the grievance is not dismissed without proper review. Employers should assess whether the grievance is an attempt to delay or derail the investigation.

20. What if the employee under investigation goes off sick during the investigation?

If an employee goes off sick during an investigation, the employer should:

- pause the investigation temporarily to assess the nature and severity of the illness;
- consider whether the employee is fit to participate in the process, possibly with adjustments, which may involve requesting a medical certificate, medical report or referring the employee to occupational health for an assessment; and
- consider offering alternatives for the employee to participate in the investigation process, such as the opportunity to submit written responses instead of attending meetings or having remote interviews at a neutral location.

If the absence is prolonged, the employer must balance:

- the need to conclude the investigation; and
- the employee's right to fair participation.

If the investigation proceeds without the employee, the employer should document all efforts to involve the employee.

Employers should always ensure that decisions are based on available evidence, not assumptions and that decisions are well documented.

21. How do you handle a parallel criminal and/or regulatory investigation?

Handling parallel investigations requires careful balancing of legal obligations and procedural fairness. Workplace investigations may proceed even if a criminal or regulatory investigation is underway, but employers should assess:

- the risk of prejudicing the external investigation;
- whether the employee may be advised not to participate in the internal process; and
- the length of delay if waiting for external proceedings to conclude.

There is no legal requirement to stay the internal investigation, but doing so may be appropriate if:

- the criminal matter is serious;
- the employee's participation could risk self-incrimination; or
- the employer lacks sufficient evidence to proceed fairly.

Police powers under the Police Powers and Criminal Evidence Act 2006 allow for:

- search of premises and seizure of documents; and
- compelled disclosure of information under warrant or statutory authority.

Employers must ensure that any disclosure complies with data protection law and does not breach employee confidentiality unless legally required.

Outcome of investigation

22. What must the employee under investigation be told about the outcome of an investigation?

There are no statutory obligations on employers dictating what an employee must be told about the outcome of an investigation.

However, it is good practice that once the investigation completes, the employee should be informed about the outcome of the investigation in writing, and what steps the employer intends to take next in relation to the outcome of the investigation – whether it results in no action, informal resolution or formal disciplinary action.

23. Should the investigation report be shared in full, or just the findings?

There is no statutory obligation to share the full investigation report with an employee. Relevant considerations in disclosing an investigation report include:

- the status of the reports in terms of legal advice or litigation privilege, and whether disclosing the report would inadvertently waive privilege; and
- whether criminal proceedings are ongoing or anticipated and whether disclosing the reports poses a concern of contaminating evidence.

24. What next steps are available to the employer?

The investigation report should set out the investigator's recommendations. These recommendations are generally divided into three broad categories:

- that there is no case to answer;
- that there is a limited case to answer; or
- that there is a case to answer.

It will then be for the employer to decide whether to accept that recommendation and action next steps accordingly.

For example, if the investigator recommends informal resolution such as training or development, the employer should consider arranging for this. If the recommendation is that no action is required, then unless the employer has additional evidence or good reasons to disregard the investigator's finding, the matter should be closed (although a record of the investigation should be retained). If the recommendation is that there is a case to answer and that it should be escalated to formal

disciplinary action, the employer should consider this and, if in agreement, initiate its formal disciplinary process, ensuring compliance with any internal policies and procedures. If an employer disagrees with an investigator's recommendations, it is advisable to document the reasons for the decision.

Employers may also choose to use the outcome of the investigation to assess and improve on gaps in internal policies and procedures or practices.

25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

Investigation findings should be disclosed to the employee whose conduct is under investigation or who is the subject of any grievance.

Investigation findings can be shared with relevant internal stakeholders albeit on a strictly need-to know basis.

External disclosure may be required in the following circumstances:

- law enforcement – if the investigation uncovers criminal conduct, employers may voluntarily choose to disclose these findings to law enforcement. However, unless charges have been brought against the employee, the police cannot compel disclosure; and
- regulators – regulated entities may be under a legal obligation to report misconduct which goes to the fitness or propriety of prescribed persons. This does not, however, require the disclosure of the report or the investigation details and care should be taken in respect of what is disclosed and for what purpose.

Interview records will constitute personal information for the purposes of PIPA 2016. Therefore, they should be stored securely and only accessed by authorised personnel. Disclosure of interview records may be permitted if required by law or necessary for legal proceedings, or if consent is obtained for disclosure. Employees may also be able to access interview records through data subject access requests, albeit on a limited basis with any third-party data or non-relevant being redacted.

26. How long should the outcome of the investigation remain on the employee's record?

It is not only the outcome of the investigation but also the steps taken following the outcome of the investigation (whether that be informal resolution or formal disciplinary action) that are important for an employee's record.

If the employee is issued with a formal disciplinary sanction (for example, either a verbal or written warning), there is no statutory limitation on the period that it must remain on the employee's file. Often, internal policies specify the validity period of formal disciplinary sanctions. For as long as the disciplinary sanction is valid it remains on an employee's file and is relevant for disciplinary purposes. Once the disciplinary sanction has expired, it may be retained on an employee's file but should not be considered for disciplinary purposes.

The outcome of the investigation report will of course contain personal information for the purposes of data protection laws and should therefore be retained in accordance with an employer's data retention policy.

27. What legal exposure could the employer face for errors during the investigation?

Employers can face significant legal exposure if errors occur during a workplace investigation, including:

- claims of unfair dismissal if the investigation is found to be unfair. Common errors include failing to allow the employee an opportunity to respond to allegations, failure to appoint an impartial investigator, and failure to follow internal disciplinary procedures;
- claims of harassment or discrimination, which include biased questioning or assumptions, ignoring complaints from certain groups of people, or failing to accommodate employees with disabilities during the investigation process;
- data protection breaches if personal information arising from the investigation is not handled in accordance with data protection laws; and
- breach of contract claims if the investigation is carried out in breach of contractual terms or policies. Some examples include conducting covert investigations without justification and failing to follow internal procedures, potentially resulting in a breach of the duty of trust and confidence in the employment relationship.