

Managing Whistleblowing & Conduct of Investigation

Chayce Wong
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Agenda

- WHISTLE BLOWING
- INVESTIGATION



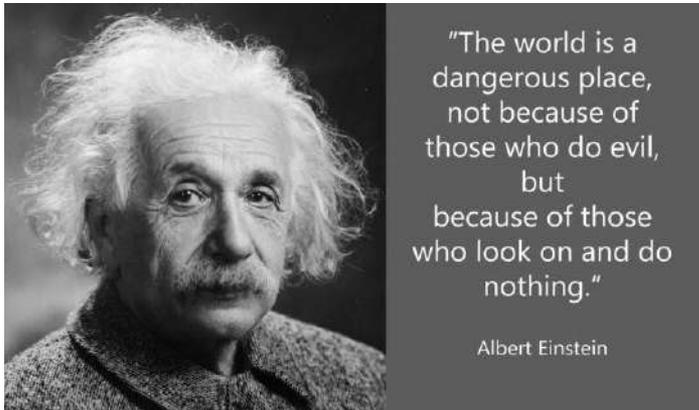
Whistle Blowing – Learning Objectives

- Able to identify what is reportable conduct
- Rights and responsibilities under the WB Policy
- Setting whistle blowing process and key factors



What is whistle blowing

- An avenue created by laws / policy to enable people within an organization and external parties to raise concerns on the affairs of the organization without fear of retaliation, subject to the fulfillment of certain conditions.



Regulatory significance

- Whistleblower Protection Act 2010 (WPA) enacted in accordance with Malaysia's obligations under the United Nations Convention against corruption.
- Enforced on 15 December 2010.
- Serves as an external reporting system enabling employees within an organization to report any illegal or unethical practices encountered within their workplace.
- Provides whistleblowers with legal protection and protection from being penalized or dismissed by their employers.
- Disclosure must be made to an enforcement agency.

Forms of Protection



- Protection of confidential information
 - **Section 8 of the WPA** ~ any person who makes or receives a disclosure of improper conduct, or obtains confidential information in the course of investigation into such disclosure must not disclose such confidential information. Section 8 prohibits not only the party receiving the disclosure, but also the whistleblower making the disclosure, from disclosing confidential information.

- Immunity from civil and criminal liability and any administrative or disciplinary action
 - **Section 9 of the WPA** ~ a whistleblower will not be subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, and any action, claim, or demand taken or made against the whistleblower, for making a disclosure of improper conduct. The inclusion of the provision, “any liability arising by way of administrative process” suggests that this protection is not limited to liability arising from legal suits but also internal actions taken by a corporation or organization against an employee, agent, or service provider that is a whistleblower.

- Protection from detrimental action
 - **Section 10 of the WPA** ~ protects a whistleblower and any person related to or associated with the whistleblower from detrimental action in reprisal for a disclosure of improper conduct. This protection **extends beyond the whistleblower himself**, and recognizes that the safety of these related or associated people is an important consideration for a whistleblower to blow the whistle

Circumstances For Withdrawal Of Protection

- The Whistleblower has participated in the improper conduct.
- The Whistleblower made his disclosure statements which he believed to be false or did not believe to be true.
- The disclosure of improper conduct is frivolous or vexatious.
- It involves questioning the merits of the government policy/public body.
- Made solely or substantially with the intention of avoiding dismissal or disciplinary action.
- In the course of making the disclosure of further information, commits an offence under the Act.

Limitations of Whistleblower Protection Act

- An individual is only a “whistleblower” under the WPA if he makes a disclosure of improper conduct to an “**enforcement agency**”, which excludes regulatory bodies and public bodies with investigative and enforcement powers.
- Where an employee discloses improper conduct to the management of the corporation in the hopes that the management will resolve the issue, he effectively renounces any right to claim protection under the WPA. On the other hand, where an employee discloses improper conduct directly to an enforcement agency, the corporation will then have no opportunity to rectify the issues internally.
- Section 6(2)(c) of the WPA provides that disclosure of improper conduct may be made in respect of information acquired as an officer of a public body. On the other hand, government documents, data, and other information are generally classified as official secrets under the **Official Secrets Act 1972 (“OSA”)**, which can only be **communicated with authorisation**.

As a result, disclosing such information without authorisation — even where it relates to improper conduct — amounts to an offence under the OSA and **automatically disqualifies the whistleblower from protection** under the WPA by virtue of Section 6(1) of the WPA. Additionally, the whistleblower then faces the possibility of prosecution for an offence under the OSA which, if convicted, carries a jail term of between 1 and 7 years.
- **Section 203A of the Penal Code** makes it a criminal offence for a public servant to disclose any information or matter obtained by him in the performance of his duties or the exercise of his functions. If convicted, the public servant faces a fine of up to RM 1 million and a jail term of up to 1 year or either.

Rationale for Implementing Whistleblowing Framework

- Concerns investigated upon expeditiously.
- Combats corrupt, dishonest or improper corporate activities.
- Encourages a transparent management.
- Increases the perception of detection of misconduct is in an organization.
- Nurtures good and healthy corporate culture.
- Develops culture of openness, transparency, accountability and integrity.
- Help to ensure that problems come to light before it is too late.

What Is Not Whistleblowing?

- Questioning financing and business decisions taken by the Board
- Interpersonal grievances at work
- Complaint or grievances in terms of employment.
- Complaint over administrative issues.
- Complaint over work stress.

General Malpractice

- Abuse of authority
- Breach of contract
- Negligence causing substantial and specific danger to public health and safety
- Manipulation of company data/records
- Financial irregularities, including fraud or suspected fraud or deficiencies in Internal Control and check or deliberate error in preparations of Financial Statements or Misrepresentation of financial reports
- Any unlawful act whether Criminal/ Civil
- Pilferation of confidential/propriety information
- Deliberate violation of law/regulation
- Wastage/ misappropriation of company funds/assets
- Breach of Company Code of Conduct or Policy or failure to implement or comply with any approved Company Policy
- Conflict of interest
- Bullying or harassment
- Breaches of copyright, patent and disclosure of confidential data/information to competitors/outside.



Factors lead to distrust in WB



- Lack of communication
- Inaccessibility of the hotline or WB Committee members
- Lack of transparency/ integrity of the process
- Too much emphasis on "credible" complaints
- Too many layers in WB system
- Lack of proficiency and objectivity i.e. involvement of management
- Lack of trust in the process i.e. hunting for the WB
- Inconsistent or No outcomes

Safeguards To Whistleblowers

- Confidentiality of Whistle Blower
- Protection from retaliation
- No adverse employment action



Safeguards To Whistleblowers (WBs)

- If one raises a concern under this Policy, WBs will not be at risk of suffering any form of **reprisal or retaliation**. Retaliation includes discrimination, reprisal, harassment or vengeance in any manner.
- Employee will not be at the risk of losing her/ his job or suffer loss in any other manner like transfer, demotion, refusal of promotion, or the like including any direct or indirect use of authority to obstruct the Whistle blowers' right to continue to perform his/her duties/functions including making further Protected Disclosure, as a result of reporting.
- Company will **not tolerate the harassment or victimization** of anyone raising a genuine concern.
- No action will be taken against anyone who makes an allegation in good faith, reasonably believing it to be true, even if the allegation is not subsequently confirmed by the investigation.
- Any other Employee/business associate assisting in the said investigation shall also be protected to the same extent as the Whistle blower.

Criteria

- Made in **good faith**
- **Genuine and reasonable** suspicion / belief
- **Reasonable grounds to believe truth of disclosure**
- No involvement of the Whistle blower in the subject matter of disclosure
- **Not acting for personal gain**

Anyone who abuses the procedure (for example by maliciously raising a concern knowing it to be untrue) will be subject to disciplinary action.

Avoiding retaliation



- Establish a strong pro-WB and **anti-retaliation procedures**.
- Include a **pro-WB and anti-retaliation statement** in all personal documents.
- **Audit the WB process** to ensure laws are being complied with.
- Establish and **communicate a consistent procedure** for raising concerns internally and that their concerns will be investigated fully and fairly.
- **Independence of WB and Investigation.**
- **Confidentiality and Consistency.**
- Regularly engage and train senior management, managers and supervisors. Do NOT HUNT for WBs.
- Take **stringent actions taken for retaliation**, including termination. Counsel managers and supervisors to change their mindset on WB.

Avoiding retaliation



- Alert all HR personnel and senior management to the reality that the whistleblowing laws may provide discontented employees which may be costly and damaging to the company.
- **Document performance issues** as they occur. Not doing so may implicate that such problems did not exist prior to the filing of the whistleblowing concern. Documentation is crucial to prove consistency and refute claims of retaliation.
- Ensure all whistleblowing concerns are **investigated immediately** with proper planning and documentation including the outcome of the finding, including claims of retaliations, harassments and discrimination.
- Do not allow apprehension or fear of retaliation prevent you from managing or supervising employees.
- Carefully review termination or other significant negative employment actions involving employees to ensure those actions does not violate the whistleblowing policy that might provide protection to employees.

WB Channels

- Internal
 - Board of Directors
 - Independent Non-Executive Directors
 - CEO / Senior Management
 - Integrity Officer
- External
 - Hotline



Key Success Factors - Whistleblowing

- **Provide channel** - outside the normal chain of command and can be directly routed to someone that is **independent** and has the authority to investigate and evaluate the claims.
- **Protect confidentiality**. If the investigation proceeds to the level where the employee must no longer remain anonymous, then that decision must be made carefully and with consent.
- Implement a detailed **non-retaliation policy** protecting whistleblowers who make reports in good faith.
- Reinforce a **culture of openness and transparency**. Instead of trying to limit complaints/concerns, companies should accept them and address them head on, resolving the issue to the extent possible while it remains in their control.
- Implement **records retention policy** for whistleblower reports, complaints and investigations.
- **Train senior management** on whistleblower policies, especially non-retaliation. Senior leaders can test the whistleblower hotline and share their experiences with employees, assuring them of equal treatment of complaints.
- Ongoing education/ workshops, from inclusion in a mandatory annual compliance training session to constantly displaying a poster in the company break room, is essential for getting employees to accept and embrace the idea of self-regulation using a hotline.

Conducting an Investigation – Objectives

By the end of this session you will be able to:

- Support to independently carry out and conclude appropriate and fair investigations as required.
- Understand the requirements and impact of an investigation.
- Independently deal with a range of situations that may arise during an investigation.

Why is an Investigation Necessary?

- Walk the Talk
 - Build creditability and trust in entity's Policies and system.
- Safeguard the interest of the entity against liability
 - When done effectively
- Performance and productivity
 - Swift resolution to issues / concerns / conflicts

Purpose of An Investigation

- Exactly what happened, where and when?
- Who was involved?
- Were the correct procedures/ rules followed?
- Were there any witnesses?
- Were other employees doing the same thing? Was it widely spread?
- Has anything similar happened in the past?
- What were the consequences for the business?
- Are there any personal issues that may have a bearing on the issue? Has the employee receive any previous warnings for same type of issue?

Investigation – Principles

- An investigation is conducted when there is credible information and where there may have been a potential or actual violation of the law or company policy, wrong-doing, misconduct or ethical lapse.
- Investigations must be conducted in accordance with **applicable laws and regulations** and ethical standards, and company's policies.
- Investigations must be conducted in a manner that will **satisfy relevant stakeholders** – including any court, regulatory body or police authority – as to the **integrity of the investigative process** and the reliability of the conclusions reached in the investigation.
- All those involved in the investigation process must be treated with **fairness and respect**.
- **Objectivity and impartiality** must be maintained throughout the investigation process, without any presumption of guilt, bias or other preconceived opinion being permitted to distort either the process or the conclusions reached in the investigation.
- **Investigation team** members must not do or say anything that gives others reason to doubt their **impartiality**.
- Investigators must not participate in an investigation if they have an actual **conflict of interest** or if they reasonably may be perceived to have such a conflict. If an investigator believes that an actual conflict or appearance of a conflict has arisen, the investigator must disclose this without delay.
- Investigators should seek to **gather all material facts and report those facts accurately and completely**.

Investigation – Principles

- All investigations must be managed **discreetly and confidentially**, with access to documents and other information collected or prepared during any investigation being controlled on a need-to-know basis.
- Investigators must safeguard **confidential information** and take all reasonable steps to prevent its improper disclosure.
- Investigators must make sure that any person being interviewed understands that the investigator is **representing the Company** rather than the person being interviewed.
- In the interests of a fair and effective investigation and of upholding the Code of Conduct, Company employees should **cooperate** as much as reasonably possible with any investigation, answering any question that is put to them accurately, with no omissions and **in good faith**.
- Investigations must be conducted in a **timely and expeditious** manner.
- **No Retaliation.**
- Conclusions must be **factual** and based on available evidence and not opinion

Investigation – Principles

An unbiased and unprejudiced mind is essential to investigators

bias means a highly personal and unreasoned distortion of judgment

prejudice means an opinion or learning adverse to anything without just grounds or before sufficient knowledge

Investigators should not attempt to exhibit expertise in all fields of law enforcement...

The Investigator...

- Set an appropriate tone
- Fair, objective and reasonable
- Confident enough to ask questions, challenge and probe
- Able to make good and accurate records
- Diligent and thorough
- Can be trusted to keep things confidential
- Can keep to a tight timescale



Investigation Process

Assessment

Planning

Implementation

Reporting & Closing

Investigation Assessment

Assessment

- When assessing information that has been brought to your attention there are a number of questions that you will need to answer before taking any further action.
- If you are able to connect with the source of the information then you should ask them certain basic questions, including:
 - How do you know that this information is true?
 - When did you first know this to be true?
 - When did you last know this to be true?
 - Who else knows that this is true?
- These basic questions will establish the strength of the information, the scope of the initial investigation and assist in identifying other potential sources of information.
- In some cases, you may not be able to get additional information, and will need to rely on other information, including interviews, to answer the above questions.

Investigation Assessment

Assessment

- As a general guide, the Designated Investigator should:
 - reviews the information gathered to date;
 - separate distinct components of allegations;
 - reviews the applicable policies and procedures;
 - identifies potentially relevant documentation;
 - considers risks and understand business context;
 - agree potential stakeholders to be told on a "need to know" basis; and
 - **contact the person making the Allegation** (the reporter) at the outset to assist in the assessment (e. g. , sending a Holding Note to the reporter to confirm receipt of the reporting and seek more information if necessary).

- Investigation is conducted at least one level above the person who is the subject of the allegation, and seek advice from Human Resources and Legal, if required.

- **Key principles:**
 - objectivity;
 - protection of the integrity of the investigation
 - protection of the whistle blower.

Investigation Process



Key Steps in Planning

- Define scope and timetable. Ensure you have agreed with stakeholders what is 'in and out' of the investigation remit.
- Identify the actions to be undertaken.
- Identify and brief any additional resources.
- Identify and preserve information/ material.
- Identify any legal risks (is legal support required?).
- Decide on who needs to know about the investigation and what they need to know.
- Ensure that the alleged perpetrator has the opportunity to respond to new information.



An investigation plan must be developed that will govern the investigation

- Identify all the people that need to be interviewed
- Know their background
- Interview schedule
- Order in which interviews will take place
- Whether internal or external counsel or investigators is needed
- Data that may need to be collected including emails

Timing of Investigation

- Investigations close to the incident are better.
 - Aids recall of key points by key parties/witnesses.
 - Minimises stress for all parties.
 - Minimises disruption to the workplace.
- Aim to **start an investigation as soon as possible** after the complaint or conduct issue being raised.
- The duration of an investigation may take weeks or even months (in rare cases). Investigation should aim to complete **within 30 days** if direct cases, and **not more than 3 months**.

Preparing for Investigation

Planning

- Notify the Audit and Risk Committee
- Review available information and/or documentation
- Seek further information (e.g. emails, policies etc)
- Develop a set of initial questions for each witness/ interviewee
- Think about questioning technique to direct and control the interview
- Think about the people you are about to meet – what may be their state of mind?
- Try not to prejudge as this may narrow the focus and restrict the flow of information
- Inviting witnesses/ interviewee for interviews:
 - Notice or not?
 - Invite letter
 - Venue



Interview Records

| Investigation record | | |
|---------------------------------|----------------------|----------------------|
| Action <input type="checkbox"/> | | |
| <input type="text"/> | | |
| Allocated to: | Date issued: | Date completed: |
| <input type="text"/> | <input type="text"/> | <input type="text"/> |
| Result | | |
| <input type="text"/> | | |
| Action <input type="checkbox"/> | | |
| <input type="text"/> | | |
| Allocated to: | Date issued: | Date completed: |
| <input type="text"/> | <input type="text"/> | <input type="text"/> |
| Result | | |
| <input type="text"/> | | |

| Interviews | |
|---|----------------------|
| Interview Subject | <input type="text"/> |
| Aims and objectives | |
| <input type="text"/> | |
| Location: | Date/Time: |
| <input type="text"/> | <input type="text"/> |
| Outcome | |
| <input type="text"/> | |
| A primary source of information will be from the recollection of individuals who have seen, heard or otherwise perceived relevant events. | |
| There are many different ways in which the accounts of different individuals may be relevant to your investigation. When recording the account, it is critical that you capture that person's own uncontaminated account. | |
| How you record a person's account will depend on the circumstances of the person and the evidence they can provide. The prime consideration is to ensure the integrity of the recorded account. | |
| Electronically recorded interviews provide greater assurance as to the integrity of the account, but can be unwieldy and awkward to manage over the length of a protracted investigation process. | |
| The undertaking of interviews both formal and informal should be part of an overarching strategic plan. All interviews should be planned and tactical working to identified aims and objectives. | |
| Interview Subject | <input type="text"/> |
| Aims and objectives | |
| <input type="text"/> | |
| Location: | Date/Time: |
| <input type="text"/> | <input type="text"/> |
| Outcome | |
| <input type="text"/> | |

Securing Potential Electronic Evidence

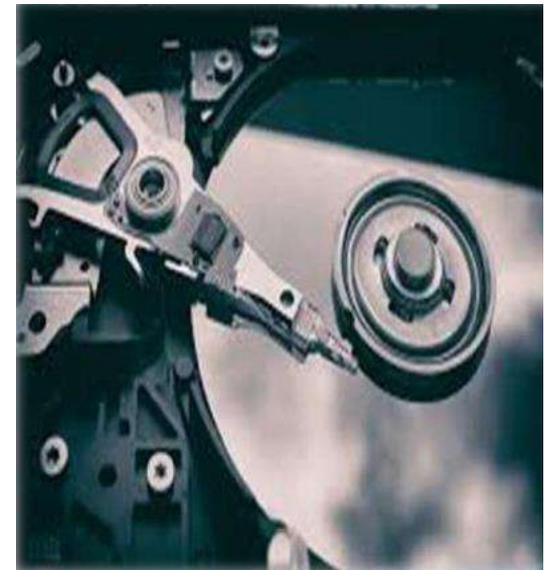
As quickly as possible, identify and secure potential electronic evidence. This might include but not limited to:

- Computers/ laptops
- Tablets
- Electronic databases (accounting records, etc)
- Back-up tapes
- PABX system records and voice mails log
- Building access records
- Telephone recording/ Virtual meeting recordings
- Fax machines
- Mobile
- External drive/ USBs

Electronic evidence is very fragile, and must be **handled with care**.

Do not let non-forensically trained staff handle / touch electronic evidence.

If there is no expertise, physically secure the devices (**keep original**)



Beware!

- Confidentiality
- The employee may get upset during the meeting.
- The employee may make counter-allegations during the meeting.
- Video or audio recording should not be permitted.
- Secure computers, relevant accounting information, and other documents.
- If appropriate, recommend the suspect / implicated persons on garden leave and restrict access to office/ computer until the investigation is completed.

Investigation Process



Three Distinct Steps

Step 1: Collect Information

Step 2: Conduct Interviews

Step 3: Analyse Information

“Information gathering is the basic task of the investigator.”

Analysis of information gathered should enable the investigation team to compile:

- **chronology of events;**
- **summary of key documents;**
- **list of process or control gaps or weaknesses; and**
- **other data and persons involved / required to be interviewed (e. g. financial data, access control records, etc.)**



Documentary evidence should typically be reviewed before interviews are conducted.

Obtaining, Handling and Preservation of information/ documents must be conducted in compliance with strict legal requirements.

Types of Interviewees

Implementation

a. Know-Nothing Type

b. Disinterested Type

c. Inebriated Type

d. Suspicious Type

e. Talkative Type

f. Honest Witness

g. The Deceitful Type

h. The Timid Witness

*i. The Boasting, Egoistic, or
Egocentric Witness*

j. Refusal to Talk

Interview vs Interrogation

Implementation

Interview

*Aim to gather information
and to find out the truth of
what happened...*

Investigative in nature

Interrogation

*Aim to extract confession,
incriminating statements or
admissions of guilt;*

Accusatorial in nature

Starting An Interview

Implementation

- At the beginning of each interview:
 - introduce everyone present
 - explain **purpose** of interview to the interviewee
 - signed **consent** for interview and confidentiality

- In the opening we should:
 - emphasize the need for cooperation and no interruption;
 - assure the interviewee of **fair** treatment;
 - be clear that the fact that the individual is being interviewed, as well as the content of the discussion during the interview, must be kept confidential by the interviewee; and
 - state that **retaliation is unacceptable.**



Conducting Interviews

Implementation

- Set expectations as to how long the meeting will last and whether decision will be taken on that day.
- Appear calm and neutral. No pre-judgement and no implied criticism.
- Try not to talk too much, allow silences to develop. Silent may be golden!
- Ask for the person's version of events (do no lead).
- Ask clarifying questions, don't be afraid to revisit a point if the employee doesn't answer your question and ensure that you understand the content of the answer.
- Pay attention to consistency.
- Any implicated employee is entitled to be heard and provide their views on the investigation before any disciplinary action may be taken.

The final interview of an investigation should generally be the implicated person or persons as information from the reporter and possible witnesses may assist to confirm or refute the allegation.



Conducting Interviews

Implementation

- Look at non-verbal behaviour. Record this.
- Ask if there were any witnesses.
- Ask if there is any other information to consider
 - What other supporting evidence there may be;
 - What, if any mitigating circumstances; and
 - If the allegation is denied and why the allegation is made
- **DO NOT:**
 - Give advise or personal views or opinions
 - Suggest likely outcome



Conducting Interviews

Implementation

- Use **probing questions** to determine whether there is any fact behind the hearsay. No leading question.
- Ask **open questions**
- Use **breaks** during long interviews
- Use **adjournments** to ensure that where possible, all questions have been asked
- Ensure that any new points raised during the meetings are put to the relevant witnesses



Questioning

Implementation

| Type of question | Example |
|------------------------|---|
| Open questions | Please describe... Please tell me about... Please explain... |
| Confirmation questions | Who When What Where How Why |
| Focused questions | Elicit yes/no answers or a specific detail of information |
| Closed questions | Have I understood correctly? I understand you to be saying that... |
| Completeness questions | Is there anything else you would like to tell me before we move on? |

Ethical excuses bingo

ethicsinsight

"Everyone else does it..."

"It's for the greater good."

"I had to make a snap decision."

"I was doing it for the company,"

"That's how it's always been done."

"I'm just following orders."

"I had to hit my targets/goals."

"If I don't do it, someone else will."

"It was an important customer."

"It's just a facilitation payment - it's ok."

"I didn't think it would hurt [anyone/anything]."

"Right and wrong are relative concepts."

"The devil made me do it."

"It's a cost of doing business."

"It's how things are done in..."

"I didn't want to lose the customer."

"Our agent paid it, not us."

"I assumed it was part of my compensation package"

"Look at the bigger picture."

"I'm under so much pressure."

"Someone had to do it."

"It's a market practice."

"No one ever told me to not do it."

"I didn't know it is not allowed."

"We have been doing it for years."

Question Any Inconsistency

Implementation



- If questions don't give you an accurate view then:
 - Show me!
 - Act out!
- Feel free to ask whatever you think is relevant to the situation. The aim is to get a true picture.

- At the end of the interview, take an adjournment to review the facts obtained in the interview.
- When the interview is reconvened, give a final opportunity to add further information and summarize the discussion.
- Emphasizes on confidentiality.

Considerations

- Review notes
- Relevant points addressed
- Confirm next steps
- Provide contact information
- Summarize facts
- Resolve inconsistencies
- Schedule follow ups
- Reiterate need for confidentiality

Recording

Implementation

- Written and accurate record of interview
- What was said by whom (summary)
- Key Questions and Answers
- Timings (start, finish)
- Location
- Attendees and in what capacities
- Note any refusal to answer any question.
- Note any views or comments given by the interviewees
- Print for them to review and agree/sign off
 - Retracting all or part of their statement
 - Significantly altering the notes



- Note your statements may be produced in court – ensure they are professional!



Interview Considerations

Implementation

- **Translation:**
 - Translators are permitted but must be independent and subject to confidentiality

- **Accompanied interviews:**
 - In general the subject of the investigation can not be accompanied

- **“Off the record” responses:**
 - There is no such thing!

- **Refusal to cooperate:**
 - Cannot force cooperation, but employees do have a duty to cooperate. Report non-cooperation in interview memorandum/report.



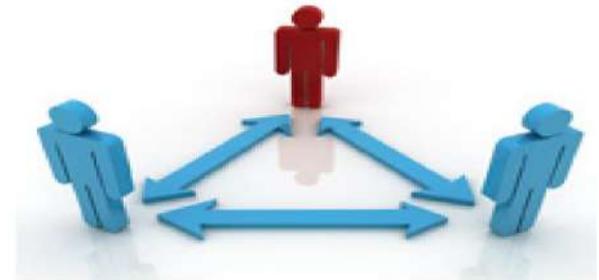
Anonymous Witnesses

Implementation

- Don't make promises
- Consider motive of witness
- Can you disclose enough to ensure the accused 'knows and understands the case against them'?
- No genuine fear but witness is reluctant to be involved



- Types
 - Some working relationship with the Company:
 - Contractors, 3rd Party providers,
 - No working relationship with the Company:
 - External e.g. businesses, neighbours, family, friends
- Challenges
 - Confidentiality
 - Conflicts of interest
 - Reliability
 - Politics and interdependencies
- How critical is it to involve 3rd party?
- Other ways to substantiate points?



Absent Employees

Implementation

- Employee on Suspension
 - Should be able to attend on request
 - Venue?
- Employee on Holidays
 - Consider impacts on timetable?
 - Stakeholder comms re: potential delays
 - Some individuals may be happy to attend despite being on hols
 - Planned or not?
- Employee on Medical Leave / Sickness
 - Related to investigation or not?
 - Occupational Health review where appropriate
 - Alternative adjustments (e.g. phone, companion, home visit etc)
- Employee who refuse to attend interview/ meeting
 - Requirement not optional
 - Explore concerns and try to address them
 - Outline potential impacts of non attendance



From the analysis, you want to be able to:

- Establish a **chronology of events**
- Provide a clear summary of the key documents and their contents
- Identify any system or control **gaps or weaknesses**
- Confirm you have sufficient data (e.g. financial data, access control records) to confirm or refute the allegations

If the analysis indicates a gap in the information, consider:

- Requesting further information
- Carrying out additional interviews



Investigation Process

Assessment

Planning

Implementation

Reporting & Closing

- **Misconduct** – An objective conclusion of facts gained including whether there has been a breach of a policy or procedure.
- **Grievance** - A conclusion about the facts obtained, determine whether there is a case to answer and provide the rationale to support this decision (e.g. Upheld / not upheld). If appropriate, put forward recommendations for the best way forward for all parties involved.

Hints and tips

- Ensure that the report addresses the grievance/misconduct issue alone – don't allow the scope to creep!
- Facts based
- Be specific
- Don't include/reference appendices on the grievance document – the employee does not always see the witness statements in a grievance case where it won't help resolve the situation. This might change if there is an appeal.
- Ensure any documents referenced have already been seen by the employee i.e. that there are no surprises!

Reports should include:

- **Executive Summary (in particular if the Report is lengthy)**
- **Summary of Allegations**
- **Summary of Investigation (what steps were taken and what was done during the course of the investigation)**
- **Summary of Factual Findings**
- **Outcomes, Recommendations and Conclusions**

Be Specific
Keep It Short & Simple



- Engage Line Manager of the implicated employee and HR. Present the summary report and corrective actions.
- Update the case on the Whistleblower Portal / Internal Investigation Management System (if any)
- Keep all relevant documentation collected during the investigation secured, including:
 - Report (destroy draft reports)
 - Information used in drawing conclusions
 - Relevant documents collected and analyzed
 - Interview notes
 - Handwritten notes
- Close the case in the Whistleblower Portal / Internal Investigation Management System (if any)
- Implementation of Corrective and Preventative Action is the responsibility of line management in the business. Corrective action should be consistently applied.



Investigation – Roles & Responsibilities



- All employees must report violations or potential violations.
- Integrity officer:
 - Determine if a WB is an Ethical and Compliance related or grievances.
 - Respond to the complainant that their report was received and will be investigated.
 - Inform HR that there is a complaint that will be investigated and review final reports with HR and Legal
 - Align on recommendations for substantiated findings
 - If local HR is part of the allegation, then report to regional HR
 - Maintain confidentiality of the reporter and witnesses
 - Investigate, document and maintain updated status in Investigation/Hotline Portal
 - Monitor implementation of any remediation actions
 - Close out the matter with the Complainant.
 - Report the WB and outcome of the investigation to Audit & Risk Committee.

Investigation – Roles & Responsibilities

■ Human Resources:

- Handles performance and HR related concerns.
- Assists in interviews as needed.
- Decides on disciplinary measures in alignment with Integrity function.
- Assists in execution of disciplinary measures.
- Provides input to final report to prevent future occurrences of non-compliant behavior.
- Closes out HR matters in the Hotline portal.
- Establish anti-retaliation statement in HR policies.

■ Legal:

- Review and approve investigative plan, as needed.
- Assist in interviews as needed.
- Assist when investigator needs assistance with external counsel.
- Support Integrity Officer's review of the final investigation report and align on disciplinary actions, as needed.

■ Designated Investigator(s)

- Draft an investigation plan and review with Integrity Officer and Chairperson of Audit & Risk Committee prior to initiating the investigation.
- Maintain strict confidentiality.
- Be objective and treat witnesses and implicated person fairly and with respect throughout the investigation.
- Prepare the investigation report outlining investigative findings, capturing the facts, interviews conducted and any relevant material to support or refute the allegations.



Case Study



Case Study 1



Background:

- A WB was received that a conflict of interest situation has arisen that the GM's new office was renovated by a personal friend and that he shared the price quotations by other vendors to his friend who won the office renovation tender.
- WB also alleged the GM went on a private holiday with the "vendor".

Investigation Approach:

- Interview with WB
- Interview with Procurement Officer
- Review the tender process and documentation
- Review social media related to the GM, vendor and those listed as their "friends".
- Interview key employees involved with office renovation planning and execution
- Interview the "Implicated Person"

During investigation, the GM told the investigation team that there is nothing wrong in giving or receiving gifts as this is Asia culture.

Facts Findings:

- Price submitted by the winning vendor was only RM10 lower than the next lowest tender.
- Procurement Officer claimed he was instructed by the GM to disclose quotations by other vendors.
- Vendor posted photos of holiday in Turkey on Facebook with the GM in the pictures. During interview, GM insisted it was a "self-paid holidays."
- Timing of holiday in conflict with the tender duration
- GM acted aggressively and defensive during investigation – instructing his PA not to share his calendar and finance not to provide documentation of his claims.

Lessons learnt:

- Allegations involving a Senior Management member is significant.
- Investigation must be handled independently or one level higher / by Group Investigation / Integrity Officer.

Applicable Policies/ Principles:

- Code of Conduct
- Conflict of Interest Policy
- Procurement Policy & Blackout Policy
- Employee Handbook
- No Gift Policy

Outcome/ Conclusion:

- Allegations substantiated and GM was terminated
- Procurement Officer given written warning.
- Obstruction of investigation is against the Whistleblower Policy, Employee Handbook and Investigation SOP and warrants sanction/ disciplinary action.
- All Senior Management hiring must undergo mandatory background check/ due diligence.

Case Study 2



Background:

- Allegation of unfair demotion without proper engagement on performance improvements and lacks of performance evaluation engagement and the demotion is an act of retaliation against past reporting by a WB against the HOD 3 years ago.

Investigation Approach:

Investigation on unfair demotion:

- Review Performance Management and Talent Review process and rationale of recent promotions and demotions
- Review KPIs setting and engagement on KPIs set
- Obtain the Personnel file of WB
- Interview WB
- Interview HR (Performance Management) to understand PMS process
- Interview HOD and immediate supervisor on PMS
- Review Performance Improvement Process carried out and demotion process
- Obtain and review past 3 years of performance review, objective setting, sales records and targets and annual review of WB and others within the same team.
- Review minutes of PMS meetings and Talents Review meetings
- Obtain and review documents of communication between HOD, supervisor and the WB.
- Interview former line manager of the WB on his performance
- Review PMS of other staff in same function for consistency on performance management

Facts Findings:

- PMS and PIP were not conducted by HOD with approval from HR.
- In past 4 years, there were 4 similar cases of demotion without proper documentation and PMS.
- Instruction was given by HOD to exclude the WB from all team meetings and decisions involving his team members (Performance, target setting, transfer and hiring) which basically incapacitate the WB.
- No performance rating was given / communicated to WB by immediate supervisor and HOD for past 3 years.
- No communication on areas for improvements to the WB for past 3 years.
- HOD had a meeting to find faults in WB after WB was isolated from his team to justify his demotion after the demotion was challenged by the WB.
- HOD was unable to provide latest PMS and when done so, it was noted the creation date was the date of the interview during investigation.
- HR admitted PMS was not implemented and she has ignored the complaint.

Applicable Policies/ Principles:

- Performance Management System (PMS) and Performance Improvement Procedures (PIP)
- Employment Principles in Employee Handbook and Code of Conduct

Outcome/ Conclusion:

- Allegation was substantiated
- WB was re-instated but given a-6 months observations (PIP as it was a fact that his performance was not up to par)
- HOD was given a written warning
- HR Manager was referred to Domestic Inquiry for discrimination, non implementation of PMS and breach of policies (subsequently resigned).

Misconduct / Disciplinary Guidelines

- Having **fair, transparent and consistent process** to manage misconduct can **further strengthen employees' understanding and appreciation** of entity's Code of Conduct and policies & **boost confidence** on managing such misconduct.
- Sanction taken must be consistent with misconduct classification, no matter what level the employee is.
- All sanctions shall be documented in personal files.
- Exception must be justified and documented.



How to classify Misconducts?

- **Minor Misconduct** – Counseling (coaching, re-training)/ verbal warning: Employees had either **little awareness** that the act was a misconduct, **no intention** to commit misconduct or misconduct was **beyond employees' control**, and **cooperative** in investigation and reporting, etc. Misconduct had low risk to entity.
However, wilful repeat of minor misconducts will be treated as serious offense.
- **Major Misconduct** - Verbal and Written warning, Salary/bonus penalty: Employee is **clearly aware** that his/her act is against the Code of Conduct and policies, may involve other persons to wrongdoing under his/her guidance, etc. Misconduct has a medium - high risk to entity.
- **Unacceptable Misconduct** – *Termination with or without compensation*: Employee is **clearly aware** that **his/her act is against** the Code of Conduct and policies but **continues with such behaviour** and **attempts to cover up** the misconduct. Wilful intent. Misconduct has high risk to entity.



How to classify Misconducts?



| Criteria | Meaning | Low | Medium | High |
|-----------------|---|--|---|---|
| Awareness | How aware is the employee of any applicable ethics and/or rules? | Unaware | Should have been aware | <u>Fully aware or wilful blindness</u> (deliberate avoidance of knowledge of the rules) |
| Intent | What is the employee's motivation? | <u>Carelessness</u> (failing to undertake action to prevent a breach or to check what rules may apply) | <u>Reckless</u> (being reckless in discharging one's own duties or as to the rules or consequences) | Intentional: pursuit of <u>personal or professional gain</u> (advantage, profit or benefit anticipated from breaching a policy) |
| Scope | What is the probability of financial and/or reputation damage to the organization? | Unlikely to occur | May occur | Has occurred or will occur |
| | To what extent are other employees or external parties involved? | No involvement or knowledge | Some involvement and/or knowledge | Active involvement and/or knowledge (collaboration) |
| | Leadership position in the organisation or level of fiduciary (especially financial) responsibility | Little if any leadership or financial responsibility | Some leadership or financial responsibility | Clear leadership role or financial responsibility |
| Responsiveness | How much has/have the employee(s) cooperated with the investigation? | <u>Self-disclosure</u> (informing management on own initiative about a breach that otherwise might not have been discovered) and cooperative | Cooperative after disclosure | <u>Hindrance</u> (obstructing or delaying the company's knowledge and understanding of all aspects related to a breach) and/or a cover-up |
| | Does the employee acknowledge wrongdoing and display remorse? | Fully, and takes initiative to make corrections | Somewhat, reluctantly, but shirks responsibility | Not at all, self-victimizing |
| Repeat Offender | Is this a first offence or out of character for the employee? | First or once-only lapse | Second offence or may re-lapse | Multiple offences and/or no improvement anticipated (including where offences occurred over a period of time) |

Key Points

- Investigation must be properly planned and structured.
- Wherever possible, an independent person should be appointed to carry out the investigation who is not part of the decision-making process in any subsequent disciplinary hearing.
- For serious cases (major misconduct), consider suspending the employee on pay during investigation.
- Investigation should be approached with an open mind.
- The employee whom the allegation has been made is interviewed, it should be made clear to the person that it is a facts-gathering interview and not a disciplinary hearing.
- It is not necessary to prove “beyond reasonable doubt”. The civil standard of proof (“on the balance of probabilities”) is acceptable standard.

Summary & Closing

For WB to work,

- TRUST in the process must be established.
- Investigation must be objective, impartial, timely, factual and confidential.
- Fair and consistent sanctions if there is misconduct.

Thank You!



Organisations that do not consider the full range of risks they face will likely be over optimistic in their ability to manage risk.

Limited identification means limited management!