

## Dealing with employee's misconduct in Malaysia through Domestic Inquiry

April 2023  
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### 1. What is misconduct?

The Malaysian law does not expressly interpret what amounts to “misconduct” by employees. Section 14(1) of the Employment Act 1955 (the “Act”) indicates that a misconduct may be the ground of employment termination if such act was inconsistent with the fulfilment



of the express or implied conditions of the employee's service after a **due inquiry** has been conducted.

In practice, the scope of misconduct is wider as it covers various acts or behaviour that is against the company's policy and generally cause harm or damages to the employer's operation, reputation, or assets. From minor misconducts like absence without notice, late attendance and misuse of company's properties to major misconduct such as violence, sexual harassment, bribery or fraud, both shall warrant disciplinary action to be taken. However, the law is generally more inclined towards protecting the employees' rights and entitlement in which employers are not allowed to take disciplinary actions, unless the said actions are properly justified and as mentioned at the above, after a **due inquiry** process has been conducted.

Due inquiry is not defined under the Act, but often referred to as a domestic inquiry session. This article will discuss the legal requirements of a domestic inquiry and to which type of disciplinary action requires a prior domestic inquiry to be held.

## 2. Domestic Inquiry

### What is Domestic Inquiry?

A Domestic Inquiry is a legal process used by employers to investigate an employee's alleged misconduct or violation of company policies or rules. The Malaysian statute does not provide the guides to conduct domestic inquiry therefore the validity and the fairness of the process is evaluated based on the rules held in the precedented law cases.

The purpose of a domestic inquiry is to provide the accused employee with an opportunity to defend themselves against the allegations and to ensure that any disciplinary action taken by the employer is fair and reasonable. The process may involve gathering evidence, conducting interviews with witnesses and the accused employee, and making a decision based on the findings of the inquiry.

As the nature of this process is domestic, the inquiries must be conducted internally by a panel of individuals, which may include company representatives of higher rank, or any individual which is deemed impartial and independent, and does not have any element of bias towards the accused employee or directly or indirectly connected to the misconduct.

### The legal requirements

In addition to the requirement of a **due inquiry** as provisioned under Section 14(1) of the Employment Act 1955, the domestic inquiry is also required in order to establish whether there is **just cause and excuse** for an employer to take disciplinary action against an employee who has allegedly committed misconduct or violated company policies or rules.

Under the Industrial Relations Act 1967, particularly in Section 20(1), an employee who has considered that he has been dismissed without just cause or excuse by his employer, may claim for constructive dismissal and make a representation in writing to the Malaysian ministry of human resources to be reinstated in his former employment.

Therefore, domestic inquiry is an important element for the employer to establish just cause and excuse for taking disciplinary action against the employee based on the findings of the investigation and thus the disciplinary action may be considered lawful under the Malaysian law. However, if the employer fails to follow the proper procedures or cannot establish just cause and excuse for the disciplinary action, the employee may have legal grounds to challenge the disciplinary action and claim for constructive dismissal if his service is terminated after the said procedures.

### **The recommended process**

Based on the precedents in case laws in Malaysia, a valid and fair process of domestic inquiry should include the following steps:

1. **Notice of Inquiry:** The employee should be given a prior written notice of the inquiry, which includes the date, time, and location of the inquiry, as well as the allegations against them.
2. **Selection of Inquiry panel:** An inquiry panel, who is usually a senior employee or a neutral third party, should be selected to conduct the inquiry. The inquiry panel should be impartial and should not have any personal interest in the outcome of the inquiry.
3. **Evidence Gathering:** The inquiry panel should gather evidence from all relevant parties, including the employee, witnesses, and any relevant documents or records.
4. **Hearing:** The employee should be given an opportunity to present their case, including any evidence or witnesses they wish to call. The inquiry panel should also allow the employer to present their case or call witness to support their position.
5. **Decision:** The inquiry panel should make a decision based on the evidence presented during the inquiry. The decision should be communicated to both the employee and the employer in writing, along with the reasons for the decision.
6. **Appeal:** If the employee is not satisfied with the decision, they should be given the right to appeal the decision. In cases where the case is further brought to the Industrial Court, the Court in general will not interfere with the decision made based on the company's policy, unless the decision was unreasonable and the process done did not follow the above steps which may render the domestic inquiry as unfair or invalid.

Apart from the above, it is important to note that the process of domestic inquiry should be conducted in accordance with the principles of natural justice, which include the right to be heard, the right to be informed of the allegations, and the right to a fair and impartial hearing.

### **3. What should employers do?**

#### **Strengthening the employment framework in the company.**

Employers are advised to implement clear and updated policies, procedures, and practices that guide the employees regarding the types of the misconducts, the disciplinary procedures and actions which may be taken.

Having a clear and comprehensive employment framework in a company helps to ensure that both the employer and employee have a clear understanding of their rights and responsibilities in the employment relationship. It can also help to reduce the risk of misunderstandings, disputes, and legal issues.

#### **Consult with experts in employment laws and regulations**

It is recommended that companies consult with lawyers on the process of domestic inquiry. The domestic inquiry process can be complex and involve legal issues, and a lawyer can provide valuable guidance on how to conduct a fair and valid inquiry while ensuring compliance with relevant laws and regulations.

A lawyer can help employers to understand their legal obligations in the domestic inquiry process and to ensure that the domestic inquiry process is conducted in a manner that is consistent with the company's employment policies and procedures, as well as any applicable laws or employment agreements or contracts.

### **4. Conclusion**

Employees are valuable asset to a company. They are the backbone of the organization, responsible for executing business strategies, achieving objectives, and driving growth. Employees bring a wide range of skills, knowledge, and experience to the workplace, and their contributions are essential to the success of the company.

However, when an employee commits misconduct, it can have a negative impact on the company in several ways. It may damage the company's reputation, causes company to suffer losses and also may cause the company to face legal liability. As such, having a strong compliance framework including the framework on how the employers manage

disciplinary issue will help employers to manage employment issue more effectively and less risky.

Our team is experienced in advising employment related matters, from constructing the employment framework tailored to the business nature of the employers, drafting the employment agreement with the comprehensive terms and conditions of employment to advising the lawful and valid domestic inquiry process. If you wish to engage our service, please do not hesitate to contact us.

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He established his own firm in Japan and worked as a representative partner of a law firm with three offices in Japan. He has provided legal service as advisor to a wide range of organization in Japan, including companies in construction, real estate management, system development as well as local government and politic parties. He has been a member of One Asia Lawyers since September 2020, providing advice on general cross-border Asian legal matters (M&A, regulatory investigations, etc.) with a focus on Malaysia.

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She is an attorney qualified in Malaysia and currently enrolled as an Advocate and Solicitor of the High Court of Malaya. She has numerous years of experience in both in-house and private practice and her main areas encompass commercial and corporate advisory work, real estate disposal and acquisition, technology-based contract negotiation and more. After joining One Asia Lawyers in 2021, her practice is focused primarily on general corporate matters, structuring and handling cross border transactions involving joint ventures, mergers and acquisitions, business transfers and restructuring of share capital, foreign investments, regulatory compliance and corporate governance, employment and industrial law related matters.

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