

Serious Misconduct – A Common Misconception

Employees who are dismissed for serious misconduct are not entitled to written notice of termination nor payment in lieu of notice. However, it is a common misconception that employees also forgo the right to procedural process and natural justice.

What is Serious Misconduct?

The Fair Work Regulations describe 'serious misconduct' as being both:

- (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, and
- (b) conduct that causes serious and imminent risk to the health or safety of a person or to the reputation, viability or profitability of the employer's business.

The regulation gives examples of the types of conduct deemed to be serious misconduct – the examples include theft, fraud or assault, sexual harassment, being intoxicated at work, and refusing to carry out a lawful and reasonable instruction.

Wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment infers a deliberate flouting of the essential terms of the employment contract, thereby making the employment contract null and void. Essential terms implied in an employment contract include a duty of loyalty, honesty, confidentiality and mutual trust.

When terminating an employee's employment for serious misconduct

Before an employer can legally terminate an employee's employment for serious misconduct, the employer must:

- (a) establish that the employee has in fact engaged in serious misconduct; and
- (b) follow the procedural fairness process affording the employee natural justice.

If the requirements (a) and (b) above have not been followed, an employee with at least 12 months service (6 months if the business has fewer than 15 employees) is likely to succeed in an unfair dismissal claim.

What is procedural fairness?

Procedural fairness means that employees are:

- advised of the allegation/s and provided an opportunity to defend or refute the allegations, and are permitted to register mitigating circumstances, and
- given a reasonable time period to prepare and respond to the allegations.

Before deciding on the appropriate action to take, which could include a warning, dismissal or summary dismissal, the employer must consider the employee's defence, and investigate any counterclaims claims. The appropriate action should take into account any mitigating circumstance registered by the employee.

Further Advice

Members are encouraged to contact the Association to seek advice regarding their specific circumstances. This article provides general information only and does not constitute legal advice.

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