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Instant dismissal for serious misconduct - what you need to know!

Under the Fair Work Act 2009, an employer can instantly terminate employment where the employee is found to have engaged in 'serious misconduct.' If an employee is instantly dismissed on this basis, they will not be entitled to any notice and will be required to exit the company immediately.

Instant dismissal, also known as summary dismissal, is a serious step. Ending an employee's employment without providing notice can leave the business exposed to a variety of claims if not properly considered and investigated.

What is "serious" misconduct?

The Fair Work Regulations defines 'serious misconduct' as wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, and is conduct that causes serious risk to the health of a person or the viability of the business.

Examples include, but are not limited to, theft, fraud, violence, serious breaches of confidentiality or conduct which causes and imminent and serious risk to health and safety.

What if I get it wrong?

Although an employer has the power to dismiss someone for serious misconduct, there can be a high level of risk involved with a decision to instantly end the employment relationship.

If the employee feels as though their dismissal was harsh, unjust or unreasonable, they can make an unfair dismissal claim against their employer. If the employee's claim is successful, the damages awarded to the employee can be extremely costly, with the maximum payment being 6 months wages.

It is especially important to consider harshness when terminating an employee for serious misconduct, as this is a factor given considerable weight by a Court. The Court will also consider the both the personal and economic consequences of the dismissal, as well as, its proportion to the gravity of the conduct.

Unfair dismissal is not the only risk of instantly dismissing an employee. Instant dismissal can also leave your business exposed to a claim for a breach of the Fair Work Act for not providing notice, which can also attract individual and company fines.

Additionally, where an employer dismisses an employee for serious misconduct, which is then found not to be serious misconduct and is therefore contrary to the contractual terms (such as by failing to give notice) the Court may conclude that other clauses in the contract, such as confidentiality, and restraint of trade, are no longer enforceable. This is known as repudiation of the contract as the



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employer's breach of the employment contract (by not providing notice when the conduct was not considered serious misconduct) demonstrate their intention not to be bound by its terms.

Stop and think...

The above highlights the importance of taking time to consider an employee's actions and hold a thorough investigation into the events. As an employer you can be exposed not only to a claim for unfair dismissal or a claim for notice and breach of the Fair Work Act, there is also the potential you may forfeit your right to important contractual terms such as confidentiality and post-employment restraints.

Given the risk and difficulty associated with this decision, we encourage members to contact the VANA employment relations line on (02) 9083 0091 should you find yourself investigating allegations of misconduct.



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Fair Work Ombudsman achieves record penalty in Western Australia for the exploitation of vulnerable workers.

The Fair Work Ombudsman (FWO) have achieved record penalties in Western Australia for the systematic exploitation of overseas workers. With the penalties reaching \$510,840 against a Perth cleaning business, the FWO's push towards strict compliance is further illustrated.

In this case it was found the cleaning business had a history of deliberate, repeated and systematic exploitation of their employees, who were all on working visas. Upon this basis, it was determined the Company would be penalised to the highest extent.

The husband and wife owners were both responsible for the underpayments along with other employment breaches, including a failure to keep records and provide pay slips. As such, the couple both faced individual fines in addition to Company fines.

These penalties mark the third highest in the nation, and the substantial fines are becoming a regular trend. The Courts are showing little to no mercy when handing out fines, something that employers should be aware of.

This case acts as a reminder of the importance of not only meeting minimum wage requirements, but also to keeping adequate employee records and meeting pay slip obligations.

In November we also saw another cleaning operator penalised \$255,000 and the owner operator \$51,000 for failing to pay a number of young overseas. These rulings demonstrate the FWO's push to crack down on the exploitation of vulnerable workers, particularly in the retail, hospitality and cleaning industries.

How to mitigate your risk:

The FWO has not only expressed the need to adhere to relevant awards, but has voiced concerns regarding the lack of accurate record keeping.

Employers should familiarise themselves with all employee entitlements and their obligations relating to pay slips and employee records.

Understanding Australia's workplace relations system requires specialised knowledge. It is difficult to know whether your existing practices are compliant, let alone best practice. **We encourage members to contact the VANA employment relations line on (02) 9083 0091 for assistance in understanding your employment obligations.**



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Performance Management vs Managing misconduct - What's the Difference?

It is important to understand the difference between a performance management process and managing misconduct as it may result in using the wrong approach to address an issue with an employee.

Understanding whether the concerns with an employee is a performance issue or misconduct issue will help you identify the correct strategy in addressing it.

Questions to ask

In determining whether the issue is considered performance or misconduct based ask yourself the following:

- Is the behavior intentional or deliberate?
- Have policies been breached?
- Has the behaviour caused risk to the health and safety of others?
- Could the behaviour be considered unlawful?
- Is the issue related to their ability to meet KPI's or fulfil the duties of their role?

Misconduct

If you answered yes to any of the first four points then the situation may constitute misconduct, however it is the first point that will generally determine how to address the situation. Misconduct is defined by the as behaviour that is wilful and premeditated with the wrong intent. If misconduct has occurred disciplinary action may be necessary.

Our best practice approach for addressing misconduct is as follows:

- Commence your investigation prior to meeting with the employee and ensure you have all the facts. This will usually involve talking to witnesses or checking footage;
- Invite the employee to a meeting to discuss the allegations and invite them to bring a support person with them;
- In the meeting, outline allegations and evidence you have;
- Give the employee an opportunity to respond to the allegations; and
- At the conclusion of the meeting, and after considering their response, determine a possible outcome: No disciplinary action, warning, termination. This may require a separate outcome meeting to be held on a later date depending on the seriousness of the allegations of misconduct.

Poor Performance

Contrasting to the above, a situation may be considered underperformance when an employee is trying and wanting to fulfil the requirements of their role but may be unable to due to lacking the necessary skills or not understanding the expectations.

Our best practice approach for addressing performance; is as follows:

- Request meeting with employee to discuss performance concerns;



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- Prepare by collating evidence of underperformance;
- In the meeting outline concerns and note any prior warnings or training you have provided them. Give them an opportunity to respond;
- At the conclusion of the meeting, and after considering their response, determine a possible outcome: No disciplinary action, written or verbal warning;
- Confirm the review period and provide employee with a performance improvement plan which should outline key expectations/ areas for improvement with measures of performance and strategies to improve; and
- Meet with employee at the end of the review period to discuss performance and determine next steps: Warnings, continue on performance improvement plan or no action if the employee is now performing to standard.

For more information regarding employee underperformance or misconduct terminating employees during probation please contact the VANA employment relations line on (02) 9083 0091.