



Effecting summary dismissals for serious misconduct

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*In last month's Journal, we canvassed the process set out under the Fair Work Act 2009 (Cth) (**the Act**) for the performance management of employees and, where necessary, effecting dismissal for underperformance or workplace misconduct.*

However, there are certain situations which may give rise to a need to dismiss an employee with immediate effect.

Where an employer has reasonable grounds to believe that an employee has engaged in serious misconduct which goes to the heart of the employment relationship, it may be appropriate to summarily dismiss the employee: that is, without giving prior notice of the dismissal and without making payment in lieu of notice.

However, a summary dismissal may only be effected in exceptional circumstances, such as where it can be demonstrated that the employee has engaged in conduct which is so serious that it is unreasonable for employment to continue.

Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) (**the Regulations**) defines 'serious misconduct' which includes, inter alia:

- wilful or deliberate behaviour inconsistent with the employment contract;
- conduct causing imminent and serious risk to a person's health or safety, or the employer's reputation, viability or profitability;
- theft;
- fraud;
- assault;
- intoxication at work; or
- refusal to follow lawful and reasonable instruction that is consistent with the employee's contract of employment.

Given the serious penalties which apply for contraventions of the *Fair Work Act 2009* (Cth) (**the Act**), it is very important that employers exercise care to ensure that they have appropriate grounds to effect a summary dismissal prior to communicating the dismissal to the employee.

Therefore, prior to determining whether a summary dismissal is warranted, the employer should hold cogent evidence of the occurrence of serious misconduct on the part of the employee.

If such evidence is not available immediately, it will be appropriate for the employer to first stand the employee down from his/her duties on full-pay pending the completion of a thorough and unbiased investigation by the employer.

By requiring the employee to cease work while investigations are undertaken, the employer not only manages any ongoing risk(s) associated with the alleged misconduct but it also affords the employee fairness of process by ensuring that the allegations are properly investigated prior to determining whether further disciplinary measures are warranted.

Therefore, prior to determining whether a summary dismissal is warranted, the employer should hold cogent evidence of the occurrence of serious misconduct on the part of the employee.

The employee should be given written notice of the reasons why he/she is being stood down from his/her usual workplace duties, however, he/she should not be subjected to loss of income during the period in which the employer's investigations are undertaken.

It is, of course, critical that the employer acts in a timely manner. Once an employer suspects the occurrence of serious misconduct which is incompatible with ongoing employment, it must act swiftly to stand the employee down and conduct the relevant investigations. Where delays occur, the opportunity for summary dismissal may be lost, exposing the employer to penalties for a dismissal which has been effected in a harsh, unjust or unreasonable manner.

While the employer is not obliged to disclose to the employee any evidence which it gathers during the course of its investigations, it must nevertheless provide sufficient particulars of the alleged misconduct to the employee such as to afford the employee the opportunity to be able to properly respond to those matters prior to the employer finalising its investigations and determining how to proceed.

If the evidence demonstrates that the employee has engaged in serious misconduct, as defined by regulation 1.07, the employer should hold a further meeting to discuss the outcome of its investigations. The employer should not unreasonably refuse the employee from bringing a support person to that meeting.

Where the employee is engaged under a Modern Award, the employer ought to have regard to any provisions concerning summary dismissal prior to proceeding with the dismissal.

If it becomes necessary to communicate a summary dismissal, the employer must provide to the employee written notice of the reason(s) for the dismissal. In accordance with section 123 of the Act, an employee who is summarily dismissed for serious misconduct will not be entitled to payment in lieu of notice.

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