

# EMPLOYERS' GUIDE TO CONDUCT

HR/IR is a Human Resources business in Wollongong. We are legally trained and focus on workplace/employment problems solving and Human Resources issues. We help managers with performance management and unfair dismissal claims.

## Conduct Issues

Much like managing poor performance in Volume 1 of this e-book series, conduct can be both minor and serious.

### 1. Minor Conduct Issues

Minor conduct issues are issues of misconduct that do not pose an imminent risk to the health and safety of other people, do not pose a serious risk to the reputation and profits of the employer's business and are not inconsistent with continuing their employment.

Minor misconduct matter may result in a notice to show cause but may not result in termination without notice but a final warning.

Therefore, issues such as inappropriate language, showing up to work late and failure to accurately follow directions *may* be minor conduct issues.

Minor conduct issues follow the same rules as performance management issues as discussed in Volume 1 of this series.

This includes:

1. Your employee knowing conduct expectations
2. Having a meeting to discuss issues when they arise
3. A solution should be found together in the meeting
4. Allow for additional training as required
5. Set a date for a review in the future

### 2. Serious Misconduct

The rest of the booklet will follow Serious Misconduct, as there are a different set of rules to deal with this in the workplace, compared to performance management.

If serious misconduct is found to have occurred after a proper investigation, then the employee would be terminated without notice or payment in lieu of notice.

### **What is it?**

Serious misconduct involves an employee deliberately behaving in a way that is inconsistent with continuing their employment. It is conduct that causes a serious and imminent risk to the health and safety of a person or to the reputation, viability or profitability of the employer's business. Examples include risking the health and safety of another person, theft and sexual harassment.

### **What to do next?**

If you have suspicions that an employee has engaged in any form of misconduct, you need to give supply your employee with their right to procedural fairness. Procedural fairness is related to all of your actions leading up to your final decision. First, it applies to the investigation.

Any such allegation directed to one of your employees should be treated seriously, but it is important that you maintain a high level of professionalism in your investigation procedure. You must exercise a full and extensive investigation into all relevant matters. Such an investigation should be seen to be, and in reality, unbiased.

After your initial investigation, you should hold a meeting with your employee. You should give notice about this meeting, and what it relates to. During the meeting, give the employee every reasonable opportunity to respond and make sure any findings are based on reasonable grounds.

Failing to do any of the above will most likely make any dismissal harsh, unjustified or unreasonable.

### **Standard of Proof:**

Serious misconduct, by its serious nature, requires you to be sure that your employee engaged in the alleged conduct.

The case of *Briginshaw v Briginshaw* establishes the relevant principle. The standard of proof is the balance of probabilities. This means that it must be more probable than not that your employee engaged in the alleged activities. The proof that you use must not be 'inexact or indefinite'. In other words, the evidence you use to form your final opinion must be strong.

### **3. Conducting the Meeting**

Formal meetings are complex.

- Notice must be given to the employee about when and where the meeting will be held.
- The notice must specify what the meeting is about
- The notice must be clear that a support person can be present in the meeting.

The meeting should ultimately achieve three major objectives:

1. The concerns and evidence for such concerns should be explained and shown to the employee.
2. The employee is given the right to respond and tell their side of the story.
3. The meeting should discuss the next steps of the process. This may be an intention to issue a formal written warning, pending the outcome of the meeting, an intention to do nothing, or an intention to dismiss.

You should send a letter to the employee, informing them they have been counselled.

### **4. Notice to Show Cause**

Prior to termination, you will need to give a notice to show cause. A notice to show cause is the starting point of disciplinary action. You should conduct a thorough investigation which allows for procedural fairness. If you conclude that there has been misconduct, you should present your findings to your employee with a notice to show cause.

A notice to show cause is a document which describes the alleged misconduct, sets out the specific grounds for disciplinary action and advises the employee on how they can respond to the notice. This will allow the employee one last opportunity to plead their case as to the findings being incorrect, or how the punishment is somehow unfair.

A notice to show cause is an excellent way to show that you have given your employee every opportunity for procedural fairness.

## 5. Dismissal

If you have had a valid, fair investigation process and find that your employee has engaged in serious misconduct, it is easy to dismiss the employee.

If you dismiss an employee for serious misconduct, it is one of the few dismissals that do not require any notice of termination. You do, however, need to pay your employee all outstanding entitlements such as payment for time worked, annual leave and sometimes long service leave, depending on state/territory laws.

This final decision should not be made alone. Whenever possible, you should have a third party make the final decision to show that the procedure has been fair. Optimally, a manager will be able to ask a senior member of the organisation to make a final determination, based on the unbiased investigation procedure.

If this is not possible, attempt to get a member of the organisation who is on the same level as the manager to make the decision. At all times, you should look to show that the final decision made was completely un-biased and evidence based.

## 6. The Natural Justice Rule

As mentioned previously, your employees must be given procedural fairness. Natural justice is another way to say procedural fairness, and both of them mean that your employee should be given every right to respond and plead their case.

Every right does not mean that the employee has one opportunity to respond. Every right means that the employee should be briefed about the initial meeting ahead of time, allowing for the employee to prepare. It also means that the employee should be given ample opportunity to respond within the formal meeting, meaning that your decision about guilt or termination has not been made up yet. Finally, it means that when you have made up your mind, you give your employee a final notice to show cause as to why they should not be fired.

The Fair Work Commission and Ombudsman will not look kindly upon SME's that do not give every opportunity for procedural fairness. This may result in fines, ongoing investigations or reinstatement.

## 7. Examples of Serious Misconduct

### Social Media:

The case of *O'Keefe v The Good Guys* discusses whether social media use can constitute serious misconduct. It was found that on the balance of probabilities, an employee who made negative and threatening comments about a colleague on Facebook was a case of serious misconduct. Despite not being at work, the words directed at the victim would not be tolerated in any workplace and therefore constituted serious misconduct.

### Drinking Alcohol at work:

The case of *Selak v Woolworths* discusses the consumption of alcohol whilst on a lunch break. The employee was terminated for consuming two beers whilst on their lunch break, whilst the employer had a strict no consumption of alcohol during work hours policy. It was found that this was a valid reason for dismissal.

### Dishonesty:

The case of *Woodman v Hoyts*, involves a co-worker allowing another co-worker to steal an item. The accused allowed an employee to take a chocolate bar from the workplace. When questioned, the employee lied, stating that it did not happen. Despite the small size of the theft, covering up the incident amounted to serious misconduct and a valid reason for dismissal.

**Serious misconduct can be an issue in any workplace. You should be prepared for the possibility that it may happen in yours. This means having policies things such as investigations and workplace health and safety. Contact John on 040706507 for a free consultation about any workplace concerns or documentation to be drafted.**

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