

WE KNOW

HUMAN RESOURCES

DEALING WITH SERIOUS MISCONDUCT

QUICK GUIDE

This quick guide provides summarised information on how to deal with Serious Misconduct. Related Quick Guides are: Serious Misconduct v Misconduct and Suspension from Employment.

Employment relationships have at their core a mutual implied term requiring the parties to maintain trust and confidence. Serious breaches of this term will raise the spectre of summary termination or instant dismissal. This Quick Guide describes the process which an employer should follow when dealing with allegations of serious misconduct.

Getting the process right is important. It is not sufficient that there be evidence of wrong-doing alone. Rather, what is required is that an employer be able to demonstrate that a decision to dismiss can be justified on an objective basis by considering whether the employer's actions were consistent with what a fair and reasonable employer would have done in all the circumstances at the time dismissal occurred? The process leading to a decision to dismiss has become an integral part of the consideration of whether the decision is justified and is often referred to as 'procedural fairness'.

CONDUCT A FAIR AND THOROUGH INVESTIGATION

No disciplinary action – and particularly when contemplating summary dismissal – should be taken without first undertaking a fair and thorough investigation. In extreme cases – the unprovoked, physical assault upon an employer perhaps – the Courts may be prepared to accept that no further enquiry preceding termination was necessary for justification, however, these circumstances would be rare and we recommend close consideration be paid to ensuring that the requirements of a fair process are fully met (see below).

Investigation should proceed without undue delay and while events are fresh in people's minds. As part of the preliminary investigation the employer should establish the 'who, what, when and where' and identify the existence of any witnesses. Where there are witnesses to the alleged serious misconduct, they should be requested to provide, in their own form, a written account of what they witnessed. The employment agreement and any relevant work rules or policies should be consulted for information about both the process to be followed and to establish whether the alleged misconduct transgresses any express rules and what the consequences of such a breach may be. Having gathered together this information in a preliminary manner, the manager/employer will be in a better position to form a view as to whether there are grounds for further investigation. It is important to retain an open mind and that no action is taken or anything said which may be capable of inferring pre-determination.

FAIR PROCESS

If a decision to proceed with an investigation is made, the alleged offender should be informed of that decision and specifically informed of the purpose of the investigation and the allegations which the employee will be required to answer. Where specific breaches of the terms of employment or relevant policies are alleged to have occurred, the employee should be informed of that and be provided with the relevant clauses. It is important that the employee understands the possible consequences arising from the investigation i.e. that disciplinary action, including dismissal, may result and that the employee is informed of their right to have a competent representative present at all meetings. If the employee initially elects not to have a representative present you should record that fact and remind him or her that they are entitled to involve a representative at any stage and that, if necessary, the meeting will be adjourned to facilitate this.

It is essential that an employee confronted with the possibility of disciplinary action have access to the decision maker. The employer's representative(s) carrying out the investigation should make it clear at the start as to who will actually be making any decisions and determining any consequences at the conclusion of the investigation. It is important therefore that the person in charge of the investigation has sufficient authority - or delegated authority - to make these decisions.

Consideration may need to be given to whether the employee should be suspended pending the conclusion of the investigation. This is an area requiring a high degree of care and members should refer to our related Quick Guide, *Suspension from Employment*.

Consideration should also be given to whether or not the employer should have a representative; if not a representative then it is strongly advisable that at least a witness be present to take notes at meetings. The Employers' Chamber of Commerce is able to provide a consultant to assist its members to conduct these investigations.

Once the allegations have been presented and the employee/employee's representative has had an opportunity to respond, it may be necessary to adjourn in order to clarify information or carry out further investigation arising from the employee's explanations. The results of any further investigation should be communicated to the employee so that the employee again has an opportunity to respond. It may be necessary to repeat this process. Remember that anything which might be relied upon later to justify dismissal should have been first put to the employee so that he or she has had an opportunity to respond and that explanation has then been taken into account when making a decision.

It is not necessary to make an immediate decision at the conclusion of the investigation. Undue delay should be avoided but no adverse consequences will follow by ensuring that full and fair consideration of all the facts and evidence established during the course of the investigation is given.

MAKE A DECISION

First, it will be necessary to determine whether the alleged misconduct is in fact serious misconduct (refer to our related Quick Guide *Serious Misconduct v Misconduct*) and if so whether the evidence, upon a balance of probability, supports a finding that serious misconduct has occurred. Secondly, consideration should then be given to whether there are mitigating factors to the extent that some lesser penalty to dismissal should be applied.

In considering whether or not to dismiss it is also important to be consistent. How have similar breaches been dealt with in the past? Where there is disparate treatment is there good reason for doing so?

In order to rebut challenges to a dismissal through the Personal Grievance procedures a decision to dismiss must be one open to a reasonable employer on an objective basis having regard for all the circumstances at the time the dismissal occurred. As stated above, both the substantive reason and the actions of the employer in reaching a decision to dismiss will be assessed.

Provided the employer conducts a full and fair investigation into allegations of serious misconduct and can demonstrate that the breach is of a level which can rightly be classified as serious misconduct, then the employer can be much more confident that it will have deterred any personal grievance from arising, and in the event that a personal grievance is taken, is well placed to defend its actions..

For further information regarding Dealing with Serious Misconduct or other aspects of Employment Relations, please contact the Canterbury Employers' Chamber of Commerce, email Keith Woodroof; keithw@cecc.org.nz or phone 03 366 5096.