

WE KNOW

HUMAN RESOURCES

SERIOUS MISCONDUCT V MISCONDUCT

QUICK GUIDE

This Quick Guide seeks to distinguish serious misconduct from the form of less serious misconduct and its implications within the context of the employment relationship. The reader is referred to our related Quick Guide Dealing with Serious Misconduct, for information about investigating and determining appropriate action in suspected cases of serious misconduct.

The reason for distinguishing between lesser and more serious forms of misconduct is that a single instance of the latter will invariably justify summary (immediate) dismissal (procedural considerations aside) whereas a single instance of the former will not.

SERIOUS MISCONDUCT

At common law an action which damages the implied term of trust and confidence (which is fundamental to any employment relationship) to the extent that it seriously undermines the continued, effective performance of that relationship will allow the employer to terminate the relationship without need for further notice.

Whilst it is not essential, it is good practice for the terms of employment (either within the employment agreement itself or more commonly, within annexed work rules) to set out examples of the types of behaviours which the parties have agreed will be regarded and dealt with as 'serious misconduct'. Without being exhaustive this may include such behaviours as, refusing to carry out reasonable instructions; interfering with safety equipment; unauthorised possession of company or other persons' property; dishonesty/fraud; assault; intimidation; disregarding safety instructions; consumption of non-prescribed drugs or alcohol; actions (including actions outside of work) likely to bring the employer into disrepute.

LESS SERIOUS MISCONDUCT

For less serious offences, repetition (not necessarily of the same behaviour) will be required before the termination of employment would be justified and only then after the following a structured, disciplinary process the aim of which is not to punish but to correct. Here again it is good practice to provide a clear process for dealing with lesser misconduct and performance issues within the employment agreement or associated work rules. Typically such a process will require fair and open investigation and at least one warning before dismissal is contemplated.

Again, without being exhaustive, examples of less serious misconduct may include, failing to wear protective clothing, unauthorised absence, failing to report any accident or personal injury occurring at work, being discourteous to other employees, customers or clients.

BURDEN OF PROOF?

It should be remembered that when dealing with allegations of either form of misconduct, if dismissal or any other disciplinary action is contemplated, the onus will be upon the employer to show that such action is justified if subsequently challenged. The burden of proof required to be discharged by an employer is said to be upon the 'balance of probability' with that itself being proportionate to the seriousness of the allegations so

requiring that more serious allegations be accorded a higher degree of proof - although not so high as the higher standard of 'proof beyond a reasonable doubt.

TEST OF JUSTIFICATION

The 2004 amendments to the Employment Relations Act included the introduction of a statutory test for justification. What is required is an objective evaluation of an employer's actions against the benchmark (largely established by the Courts) of what a fair and reasonable employer would have done in all the circumstances rather than what action could have been taken.

FAIR PROCESS

It is not sufficient that good reason alone exists for disciplinary action to be taken. Our law requires that decisions result from the application of a fair process. This is often referred to as 'procedural fairness'.

The requirements of a fair process include, that:

- Allegations of misconduct/serious misconduct be promptly investigated and with an open mind.
- Employees be provided with sufficient and specific information about the alleged offence(s) and the possible consequences.
- Employees be informed of their right to have a competent representative present at meetings carried out with the employee for the purpose of investigating the allegations.
- Employees are afforded a real opportunity to respond to the allegations and an unbiased consideration of the employee's explanation.

For further information on Serious Misconduct or any other aspects of employment relations/human resource management, please contact the Chamber, email info@cecc.org.nz or phone 03 366 5096.