



Sacked for serious misconduct – summary dismissals

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Hall Payne Lawyers has noticed a spike in employees being terminated ‘summarily’ or without notice, for alleged serious misconduct since the COVID-19 pandemic started. This may be connected to unscrupulous employers panicking about their financial security and in an attempt to save money (that is, the notice period under the Fair Work Act or the employee’s contract which they would have to pay), they’re using serious misconduct to avoid such payments.

So, what is serious misconduct; what can you be instantly terminated for and can you challenge being sacked summarily?

Serious misconduct

Serious misconduct is defined in the Fair Work Regulations as being:

1. wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
2. conduct that causes serious risk to WH&S, or the reputation, viability or profitability of the employer;
3. theft, fraud, assault;
4. being drunk or high at work;
5. refusing to carry out a lawful and reasonable instruction from your boss that is consistent with the employee’s contract of employment

At common law, serious misconduct is often a question of fact. Guidance of what can constitute serious misconduct can be found in the High Court case of *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 80-81:

"Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal...But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."

Can I bring an unfair dismissal claim?

Yes.

If you are eligible to make an application for unfair dismissal pursuant to the *Fair Work Act 2009* (Cth), it is up to your employer to prove that you engaged in the alleged serious misconduct.

Eligibility for unfair dismissal

You are eligible to apply for unfair dismissal if:

- you are a national system employee;
- you have been employed for at least six months, or twelve months in the case of a small business employer (i.e. an employer with fewer than 15 employees); and
- you are covered by an award or enterprise agreement or earn less than the high-income threshold.

Get advice from a lawyer experienced in industrial and employment law on whether you're eligible.

State and local governments are not generally national system employers (except for Victoria) and you would need to bring an unfair dismissal claim in your state's Industrial Relations Commission or Tribunal.

For example, in Queensland, a registered nurse employed by Queensland Health could make an 'application for reinstatement' under the *Industrial Relations Act 2016* (Qld), rather than an unfair dismissal claim.

Summary dismissal and procedural fairness

Regardless of the seriousness of the allegation/s made against you, you generally have the right to be afforded natural justice and procedural fairness during the course of any disciplinary process.

What this means is that you ought to be given:

1. clear details of what it is alleged you have done; and

2. an opportunity to respond to any allegation made against you.

If you make an application for unfair dismissal and that matter proceeds to arbitration, the Fair Work Commission will consider whether you have been provided an opportunity to respond to any allegation/s relating to your capacity or conduct.

There is no hard and fast rule as to the amount of time that an employee should be given to consider and respond to allegations; however, the Commission has held that an employer's processes ought to be applied in a common sense way that ensures that the employee has been treated fairly.

What is a 'reasonable opportunity' to respond to allegations?

Your employer must provide you with a 'reasonable opportunity' to respond to the allegation.

What is a reasonable opportunity will depend on, among other things:

- the seriousness of the alleged conduct;
- the factual complexity of the allegation/s;
- the possibility of alternative explanations; and
- whether you have had an opportunity to arrange a support person.

Although it is not necessary for an employer to do so, it is common practice for employers to provide employees with a standard period of time (e.g. one week) to provide a written response to allegations. Though the Commission has in some cases found that allowing the employee to respond at the meeting in which they were provided with the allegations, was fair.

If you are summarily dismissed for serious misconduct and not afforded a reasonable opportunity to respond, you may have grounds to make an unfair dismissal application. In such circumstances, even if the Commission holds that there was a valid reason for the dismissal, the Commission may order that you be paid as compensation for failure to give you procedural unfairness.

Small Business Fair Dismissal Code

Small business employers (those with less than 15 employees) are able to rely on the [Small Business Fair Dismissal Code](#) ("the Code"). This provides them with a defence to an unfair dismissal claim that larger employers don't have.

The Code provides that it is fair for a small business employer to dismiss an employee without notice or warning when the employer believes, on reasonable grounds, that the employee's conduct is sufficiently serious to justify immediate dismissal.

Serious misconduct is generally regarded as including:

- theft;
- fraud;

- violence; and
- serious breaches of occupational health and safety procedures.

In such circumstances, if you were to make an unfair dismissal application, a small business employer would be able to lodge a jurisdictional objection against it. However, ultimately the Commission still looks at most of the same issues in these cases.

Have you been dismissed and you think it is unfair?

It's important to act fast. Strict time limits apply to unfair dismissal claims. You must bring your claim within 21 days of the date you are terminated, and the Commission is loathed to grant an extension of time.

You should seek urgent advice from a lawyer experienced in employment law. You can contact our employment law team for further advice or assistance.

Legal advice and assistance continues during COVID-19

We continue to provide our client services during the coronavirus outbreak.

Most of our teams have now returned to their respective offices with others remaining fully equipped to work remotely, where necessary.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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