

TERMINATION OF EMPLOYMENT

The existence of unfair dismissal and unfair contracts legislation makes it imperative that the principles of procedural fairness are adhered to in the termination of all employees. Any procedure adopted should be genuine and should be based on the legally prescribed principle of “a fair go all round”.

The procedure for terminating an employee should satisfy the following checks:

- If the termination is for reasons of poor work performance or unsatisfactory conduct (other than serious misconduct), the employee has been warned and counselled about their poor performance or conduct. The number of “warnings” which should be given to an employee concerning their conduct or performance varies. **There is no legal requirement that there be three warnings**, and the number or warnings need only conform to the “custom and practice” of each workplace. The number should be no more than enough to enable the employer to satisfy the “fair go” criterion.
- Where there are allegations against an employee’s conduct or capacity, a reasonable investigation has been conducted concerning the allegations.
- The employee has been presented with the reason for their possible termination and any allegations against them, preferably in writing.
- The employee has been interviewed a reasonable time after having been given the reason, and it has been made clear to them in advance that:
 - termination is under consideration and that the outcome of the interview could be termination; and
 - they should have a witness of their choosing present with them at the interview.
- At the interview, the employee was given a full opportunity to:
 - reply to any reasons/accusations put to the employee;
 - be heard about any issues the employer should be aware of when deciding whether to dismiss the employee; and
 - be heard about whether they should be terminated, if the employer finds that the allegations against the employee are true.
- The employer has carefully considered all matters raised by the employee at the interview prior to making a decision to dismiss the employee.

SUMMARY DISMISSAL & MISCONDUCT

Summary dismissal allows an employer to terminate an employee's employment without notice, and is usually restricted to those instances where an employee has committed serious misconduct in breach of the terms of the contract of employment. Where an employee is summarily dismissed, the employer will only be required to pay the employee up to the time of dismissal.

Generally, an employer's right to exercise the power to summarily dismiss will depend on the following factors:

1. whether there has been a breach by the employee of the express or implied terms of the contract or a demonstrated intention not to be bound by those terms; and
2. an assessment of whether the breach is sufficiently serious to allow summary termination of the contract of employment: *Bruce v AWB Ltd* [2000] 100 IR 129.

Grounds for summary dismissal may include but are not limited to:

- *misconduct while acting in the capacity of employee* – examples may include insubordination, abusive language, violence, sexual harassment or a failure to observe safety rules;
- *serious or wilful misconduct* – conduct involving dishonesty or harm or a real possibility of injury or harm to others. There must be a probability of serious consequences arising out of the employee's behaviour (irrespective of whether these consequences eventuate);
- *disobedience* – serious and wilful flouting of any lawful and reasonable order of the employer, usually as part of a pattern of behaviour;
- *absenteeism* – an employer would need to establish that there was no reasonable excuse of the absence and that the absenteeism formed part of a pattern of behaviour; and
- *incompetence* – summary dismissal will usually only be justified in extreme cases of incompetence.

The following cases provide illustrations of the type of behaviour that may or may not be considered to constitute "serious misconduct" justifying summary dismissal (*CCH Recruitment & Termination Guide*):

- An employee punched a fellow employee during the course of employment and without provocation. This was held to be a valid reason for summary dismissal. The employer had in place a written policy stating that fighting in the workplace may lead to dismissal and the employee was aware of this policy. As the employee had 21 years of service with the employer, however, the effect of the termination of his employment was regarded as harsh, and it was recommended that consideration be given to his re-employment at a later date. On balance, however, the Court did not regard the dismissal as harsh, unjust or unreasonable: *Hibbs v BHP (Westernport)* [1995] AILR 3-116(16).

- An electronic technician ran his own business with the employer's agreement subject to it not interfering with his work. The employee was summarily dismissed after admitting that he had tried to sell his own speakers on the employer's premises and that he had carried out work privately for his employer's customers. The Court held that the employee's conduct warranted an instant dismissal and that the dismissal was for a valid reason. The employee had a conflict of interest by working privately for a client of the employer and therefore depriving the employer of income: *Dwyer and Bill McLean's Hi-Fi* [1996] AILR 3-247.
- An employee had engaged in an affair with a co-worker, including having sexual intercourse at work. The employee was employed as a Residential Support Worker and was required to sleep over in a care centre. It was during a sleep over that the sexual intercourse took place. The employer did not become aware of the incident until several months after its occurrence, when the employee's partner informed the employer. The Court held that the incident did not result in any detrimental consequences for the employer and that dismissal of the employee was therefore unjust: *Bourke v North Western Residential Support Services Inc* [1999] 45 AILR 15-075.

It is important to note, however, that an employee who has been summarily dismissed may still bring an unfair dismissal claim against the employer. Accordingly, the summary dismissal should only be exercised by employers in extreme circumstances to minimise the risk of an action being brought by the employee. In all other circumstances, the rules of procedural fairness should be applied to the termination.