



INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER — 10-05-12/4

Remember to call us if you need some help, we do not normally charge for phone advice.

FREQUENT QUESTIONS WE GET ASKED:

- How many warnings do I need to give an employee before I can end their employment?
- Is there a time limit on warnings to employees?
- When can I dismiss an employee with immediate effect?
- What is harassment of an employee?

How many warnings do I need to give an employee before I can end their employment?

There is no prescribed number of warnings necessary and each issue or matter turns on its own merits and the gravity of the issue.

There was a case some time ago where the Tribunal took the view that three warnings were appropriate in a particular matter but there is no requirement that an employee must receive three warnings before the dismissal can occur.

For example if an employee continually makes mistakes then a process of advising the employee of those mistakes and a reasonable time to rectify those mistakes would be the process that should be applied.

However if the employee made the same mistake repeatedly over a period of three weeks or six months then the employee must be advised of the mistake on each occasion and given a further warning or dismissed but it depends on the gravity of the issue.

Another example is if an employee does not advise the employer that they are not coming into work and as a result the employee is given a warning as to their future employment.

If the same employee did it again 12 months later then that may not be enough to dismiss the employee and again it depends on the gravity of the matter and its effect.

If an employee abuses or threatens a client of the Company or another employee of the Company then that is a serious matter

and following a meeting to go over the issue the employee dependant on the circumstances could be dismissed with immediate effect.

The reasons for the dismissal can be sound and reasonable but the test at a hearing will be as follows and the employer can lose the case if the procedure is not implemented.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) whether there was valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employee's); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given the opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance prior to the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of a dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWA considers relevant."

It follows that not only is the issue and evidence for the dismissal critical but so is the record of the procedure and the evidence of the procedure used.

Is there a time limit for warnings to employees?

There two issues in this matter and firstly the warning must be given as soon as possible after the incident following any investigation.

The other issue is that warnings do not lapse because of a period of time and they remain on the employees file for the duration of their employment.

When can I dismiss an employee with immediate effect?

An employee can be dismissed immediately for serious misconduct that is:

"wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;

Conduct that causes serious an imminent risk to:

- i) the health or safety of a person; or
- ii) the reputation, viability or profitability of the employer's business."

That includes:

- iii) theft; or
- iv) fraud; or
- v) assault;
- vi) being intoxicated at work;
- vii) the employee refusing to carry out a lawful and reasonable direction that is consistent with the employee's contract of employment."

The procedure and the evidence are again critical to a summary dismissal.

What is harassment of an employee?

As to this issue it is easier to set out what harassment and discrimination is not:

Discrimination or harassment must not be confused with legitimate comment and advice including relevant negative comment or feedback from managers and supervisors on the work performance or work related behaviour of an individual or group.

Managers and supervisors must not avoid their responsibility to provide full and frank feedback to employees.

Who Can I Contact for More Information and Assistance?

If you would like to discuss any concerns you may have in relation to issues of employment or any other employment related issues you may have, please contact:

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Or go to our web-site at www.johntamplinconsulting.com.au

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