QUEEN CITY LAW
BARRISTERS & SOLICITORS

"You're fired!"

Do you have a personal grievance claim?

Dismissal

We have all seen the Hollywood movies, the dramas and also heard of outrageous conduct "warranting" dismissal. However, does serious misconduct actually justify dismissal in New Zealand? The short answer is "no." Hardly any serious misconduct will warrant immediate dismissal as the Employment Relations Act 2000 has taught us that **due process** and **good faith** are the two corner stones in employment relationships, often at the dismay of employers.

In a country where temporary/fixed term contracts are scrutinised and have to be clearly justified and where employers are fined ($10,000 for individuals and $20,000 for companies) for not having a written (and signed) employment agreement, correctly dismissing an employee is hard. It is not just hard, it is extremely difficult (especially without legal assistance). Immediate dismissal has only been upheld in **exceptional** circumstances (e.g. where an employee was found to be drunk and urinating out of the manager's office - *Amaltal Fishing Co Ltd v Morunga* [2002] 1 ERNZ 692- even this case was seriously questioned to consider whether it passed the line of "exceptional"). Cases generally involving incompetence, failure to follow orders/guidelines/requirements, dishonesty (even stealing from the employer), not turning up to work, being continually late/sick does not ordinarily justify dismissal and employers will need to ensure correct procedure is followed and documented to be able to justify their actions.

Case law has shown that an employee stealing is not enough (***Drummond*** *v Coca Cola Bottlers Ltd [1995] 2 ERNZ 229*) just like an employee fired for assault could not be upheld as the employer did not give the employee a chance to explain himself as the dialogue basically went "Did you hit her?" "Yes" "You are fired!" "But-" "I don't care, you're fired!" (***McGregor*** *v Armour creations ltd [1990] 1 NZLR 610 and also in* ***Hennessy*** *v Auckland City Council [1981] ACJ 213 and [1982] ACJ 699 (CA)*).

The case of *Trotter v Telecom Corp* [1993] 2 ERNZ 659 at 569 shows that an employer cannot just simply fire an employee for being incompetent. The employee must be told exactly what their short comings are and be given an opportunity to improve. The employee must be warned, mentored, trained and again warned before being dismissed. Even in a probation period, the employer cannot silently sit on their hands and then surprise the employee with a dismissal. There is again the inherent basis of good faith where the employer has to want the probation period to work and want the employee to be made permanent. Therefore the employer must advise the employee during the probation period if the employee is not

performing up to standard (Nelson Air v Alpha [1994] 2 ERNZ 665 (CA)). Employers must understand the probation period is not an unfettered discretion for the employer to pick and choose at their whim.

I have still seen some shocking cases where employers have simply "sacked" the employee believing that their actions "obviously" deserved dismissal.

So, what do employers need to do?

1) They need to first warn the employee of their actions. This often needs to be done a number of times. Where the issue is competence, the employer needs to give the employee chances to improve and provide specific advice about what needs to be improved further. It is best to do this in writing, warning the employee of the specific allegation(s), its gravity and possible outcome.

2) The employer then needs to give the employee an opportunity to refute the allegation with an opportunity to have a legal representative (not simply a witness) present. This means that any meetings should be pre-planned days in advance with plenty of time given to the employee to arrange a representative. Often giving the employee leave until this meeting is wise.

3) After the meeting, it will be good practice for the employer to send the employee and their representation the meeting minutes to document what was discussed.

4) The employer will need to then have an unbiased decision and show that they have considered the employees responses from the discussions (not a pre-determined decision).

Even after following these steps, you could find the employee filing a personal grievance.

What is a personal grievance?

There is a tight timeframe to filing action against an employer in what is known as a **personal grievance claim**. This is formally giving notice to the employer that you believe that you have been unjustifiably dismissed; there has been unjustified action/disadvantage (e.g. missing out of a promotion); discrimination; sexual harassment; racial harassment; duress over membership of employee organisation. The most common is a personal grievance claim for unjustified dismissal.

A personal grievance claim must be filed within 90 calendar days from the date the grievance occurred or from the date the personal grievance claim came to your notice. However there can be exceptional circumstances for a late grievance including:

1) your employment agreement not containing an explanation for the procedure (all employment agreements must now include a flowchart of how to deal with a personal grievance);

2) being so affected or traumatised that you could not raise this within 90 days;

3) making reasonable arrangements for someone to raise the grievance but the person failed to do this; and/or

4) your employer failing to give you a written document setting out the reasons for dismissal.

The personal grievance claim does not mean preparing legal documents of claim to file in court straight away. This is simply a notice setting out the background to your case; important documents, meetings etc; list of important documents that support your case (nowadays print outs of texts/emails are becoming common); employers details; who the employer should contact regarding this case (it could be you or your legal representative or friend); what you want as remedies. The remedies can include reinstatement, interim reinstatement, reimbursements, compensations (often involving further payments for "hurt and humiliation" especially if the employer has humiliated you by making accusations or even firing you in front of other staff or people).

This will start the process and become an important document so we recommend you seek legal advice before you start this process and you can contact Tina Hwang our employment lawyer (who has acted for both employers and employees) for more advice on this process.

After this the employer will respond and you can negotiate through a meeting or simply leave this to your lawyers to handle if you do not want to get further involved in the discussions. The case will likely be referred to mediation at the employment authority and failing this will go to the employment authority for a hearing. Most cases settle before or during mediation on a confidential settlement.

About the author Tina Hwang

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