Missed Conduct - Misconduct Revisited

The term 'misconduct' finds a place in state and federal acts, industrial agreements and the common law. This seminar explores how to navigate these different contexts and what can happen when things go wrong.

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What is Misconduct?

Definitions of “misconduct”:

- Common law
- Legislation
- Industrial Agreements
- Policies
Misconduct – Common Law

• Something more than mere negligence, error of judgement or innocent mistake
• An act done wilfully with a wrong intention
• Fault beyond the error of judgment
• Wrongful, improper or unlawful conduct motivated by a premeditated or intentional purpose or by obstinate indifference to the consequences of one’s acts
• Does not necessarily imply corruption or criminal intention
• An evil intention is not a necessary ingredient
• Misfeasance as well as malfeasance
• Professional people – unprofessional acts even though such acts are not inherently wrongful
• Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences

*(Pillai v Messiter (No 2) [1989] 16 NSWLR 197)*
Misconduct – Common Law

Examples of conduct which may constitute misconduct include:

• Non-compliance with reasonable and lawful direction
• Acts of dishonesty or theft
• Acts that are unlawful
• Acts involving inappropriate disclosure or use of confidential information
• Fighting
• Drunkenness/drug taking
Misconduct – Common Law

• Out of hours conduct may amount to misconduct

Rose v Telstra Corp Ltd [1998]

• The conduct must be such that viewed objectively it is likely to cause serious damage to the relationship between the employer and employee

• It damages the employer’s interests

• It is incompatible with the employee’s duty as an employee
And...what about social media?

“A Facebook posting while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see. A Facebook posting coming within the scope of a Rose v Telstra consideration but may go further. It would be foolish of employees to think that they may say as they wish on their Facebook page with total immunity from any consequences”.
Misconduct – specific legislation

- *Public Administration Act 2004 (Vic)*
  - VPS Code of Conduct

- *Police Regulation Act 1958 (Vic)*
  - Victoria Police Manual

- *Education and Training Reform Act 2006 (Vic)*
  - Victoria Teaching Profession Code of Ethics and Code of Conduct

- *Health Practitioner Regulation National Law (Victoria) Act 2009*

- VPS Workplace Determination
Misconduct – specific legislation

• Common elements to definition of misconduct in different legislation:
  – Breach of an Act, regulations or code
  – Refusal to follow a lawful direction
  – Improper conduct
Misconduct – specific legislation

• ETRA and PRA
  – Disgraceful or improper conduct whether in an official capacity or otherwise
  – Negligent or incompetent/careless in discharge of duties

• ETRA
  – Unfit on account of character

• Teachers and registered health professionals
  – Conduct being of a lesser standard than a member of the public or that profession would reasonably expect

• PRA
  – Conduct which is likely to bring the force into disrepute or diminish public confidence
  – Aiding and abetting misconduct
  – Acting in a manner which is prejudicial to the good order or discipline of the force
PAA and VPS Code of Conduct

• Public sector values in the PAA are contained in the Code of Conduct

• Contravention of values may constitute misconduct

• PAA and Code of Conduct supported by organisation specific policies
Serious Misconduct

- **Fair Work Act 2009 (Cth) - Reg 1.07 under the Fair Work Regulations 2009 (Cth)**
  - Conduct that causes serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of the employer’s business
  - Theft
  - Fraud
  - Assault
  - Employee being intoxicated at work (alcohol or drugs, other than prescribed drugs)
  - Employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee’s contract of employment

*Rebecca Jones v Brite Services* [2013] FWC 3392 (20 May 2013)

*Mr Stuart Rollo v Serco Traffic Camera Services (Vic) Pty Ltd* (U2010/15201)
Termination of employment for misconduct – when can it constitute ‘unfair dismissal’?

*Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 131 ALR 422; (1995) 185 CLR 410 (11 October 1995), per McHugh and Gummow JJ:

“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

“Procedures adopted in carrying out the termination might properly be taken into account in determining whether the termination thus produced was harsh, unjust or unreasonable.”
Criteria under section 387 *Fair Work Act*

(a) whether there was a **valid reason** for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); *and*

*Hill v Compass Ten Pty Ltd (No 2)*
[2012] FCA 815
Criteria under section 387 *Fair Work Act*

(b) whether the person was **notified of that reason**;
and

*Fiona Stewart v Sea Change Conveyancing Pty Ltd* [2012] FWA 1896
Criteria under section 387 *Fair Work Act*

(c) whether the person was given an **opportunity to respond** to any reason related to the capacity or conduct of the person; *and*


*Dimovski v Howe & Co Pty Ltd* (2002) 127 IR 390

*John Ryan v Department of Human Services* [2013] FWC 4060 (9 July 2013)
Criteria under section 387 *Fair Work Act*

(d) any unreasonable refusal by the employer to allow the person to have a *support person* present to assist at any discussions relating to dismissal; *and*

*Dewson v Boom Logistics Ltd* [2012] FWA 9027

*Jalea v Sunstate Airlines (Queensland) Pty Ltd T/A Qantas Link* [2012] FWA 1360
Criteria under section 387 *Fair Work Act*

(e) if the dismissal related to unsatisfactory performance by the person - whether the person had been *warned about that unsatisfactory performance* before the dismissal; *and*
Criteria under section 387 *Fair Work Act*

(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 dedicated **human resource management** specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

*Somveer Narwal v Aldi Foods Pty Ltd [2012] FWA 2056*
Criteria under section 387 *Fair Work Act*

(h) any **other matters** that FWC considers relevant.

*Fagan v Department of Human Services*
[2012] FWA 3043 - **differential treatment**

*Janusz Tymoszuk v ComfortDelgro Cabcharge Pty Ltd T/A Westbus Region 1* [2013] FWC 3507 – **harshness** (cf *Nasrieh* (Nov 2012))

*John Ryan v Department of Human Services* [2013] FWC 4060 (9 July 2013)
Risks in getting it wrong!

- Breach of enterprise agreement claims
- Workers’ compensation claims management
- Bullying claims
- General protections/discrimination litigation
- Breach of contract
- Discrimination claim
- Appeals Boards
- Judicial review
Employee may have a right to review disciplinary action

– *Public Administration (Review of Actions) Regulations 2005* (Vic)

– Failure to provide right of review Industry Specific Boards
  – Police Appeals Board (PR Act), Merit Protection Board (ETRA 2.4.44), Disciplinary Appeals Board (ETRA - section 2.4.72)

– *Paras v Department of Infrastructure* [2006] FCA 2006
– *Quinn v Overland* [2010] FCA 799
Take home messages

- Ensure that a fair and transparent process is followed
- Document any decisions or action taken
- Consider OHS and discrimination risks