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## Dismissing an employee for serious misconduct

Whether a dismissal was justifiable will be tested by an objective look at how the employer acted and what a fair and reasonable employer could have done in all the circumstances at the time the dismissal took place.

Some of the matters to be considered are:

- Whether the employer carried out a sufficient investigation of the allegations against the employee.
- Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before they were dismissed.
- Whether the employer raised the concerns that the employer had with the employee before dismissing the employee.
- Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing them.

### Good faith

Overriding all employment relationships is that both the employer and the employee deal with each other in good faith and not do anything to mislead or deceive the other. This requirement will be important when deciding whether the dismissal of an employee was justifiable.

The Employment Court recently considered Mrs Hoff's case. Mrs Hoff worked as a caregiver in a retirement village. She was dismissed on the grounds that an incident she was involved in was serious misconduct as it was an incident which brought the employer's business into disrepute.

The Employment Court Judge said it is essential that an employee accused of serious misconduct, with dismissal as a possible outcome is entitled to have the charge and the employer's issues of concern clearly identified. The employee must be given details of the evidence the employer intends to rely upon in support of the allegation and a proper opportunity to respond before any final decision is made. This will ensure the employer's obligation of fairness and good faith are adhered to.

The Employment Court decided that the employer's decision to dismiss Ms Hoff was not made in good faith. It was apparent to the Court that the evidence established that prior to the disciplinary meeting between the employer's manager and Ms Hoff the employer had predetermined the outcome of the meeting. It did not matter what response Ms Hoff (or her husband) were going to give at that meeting about what had happened, the employer's manager had already determined that the rumoured behaviour (that had passed around the employer's premises about Ms Hoff and another employee) constituted serious misconduct. The Court said that if those rumours were intended to be the subject of the disciplinary meeting, then that should have been made very clear in the employer's letter of allegation. Ms Hoff should have been given a proper opportunity to respond. That did not happen and the employer's decision to dismiss Ms Hoff was not made in good faith and was therefore unjustifiable.

Ms Hoff was awarded lost remuneration of more than \$8,500 and \$18,000 for hurt and humiliation and costs.

### **How can we help?**

Are you concerned about how your employee is working out in the job? Has your employee done something that you believe justifies dismissal? Do you wish to terminate an employment contract? Has your employer dismissed you from your job? Do you have another employment issue?

Graeme Withers and Julie Withers of Graeme Withers Law are highly experienced lawyers we can help you get it right. For personal, prompt and professional advice please call us (04) 478 4888; (027) 7155421 or email us [info@witherslaw.co.nz](mailto:info@witherslaw.co.nz)  
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