

# CAN YOU SUMMARILY DISMISS AN EMPLOYEE FOR CONDUCT WHICH OCCURRED WEEKS AGO?

**Employers often ask whether they can terminate an employee for serious misconduct for issues which occurred in the weeks prior to the proposed termination**

In short, whilst the conduct may be serious, it is not serious misconduct under the Act because it was not acted on immediately and consequently, does not meet the threshold. This point was dealt with in the recent case of *Wong v Taitung Australia Pty Ltd (Wong) 2016*.

## What happened in Wong?

The employee (Wong) was stealing produce from the employer (Taitung) and selling the goods to third parties for his own benefit.

After becoming aware of the criminal activity and involving the police, Taitung were encouraged (by the police) to allow Wong to continue working so that evidence could be collected.

Several months later, Wong was dismissed for serious misconduct without notice or payment in lieu of notice. Wong commenced an unfair dismissal application before the Fair Work Commission (FWC).

## What was the outcome in Wong?

The FWC held that if an employee is permitted to continue working after the employer becomes aware of the serious misconduct, the employer is prohibited from summarily dismissing the employee.

The FWC based this decision on an inconsistency that arose between allowing Wong to continue working after learning of the serious misconduct and the purpose of a summary dismissal.

The FWC held that instead, Wong should have been dismissed with notice (or payment in lieu of notice).

Although the FWC held that the dismissal was unfair, Taitung was not ordered to pay any compensation to Wong because of the seriousness of the criminal activity.

## What can an employer take away from this case?

Serious misconduct warranting instant dismissal must be acted on immediately.

This means that as soon as the employer becomes aware of the serious misconduct, investigations must be carried out and the employer must obtain a response from the employee without delay.

A decision immediately needs to follow as to whether termination is appropriate in the circumstances. If a delay is unavoidable before the dismissal, contact Employer Assist to seek advice about ways to protect your business and prevent an unfair dismissal claim.

It is important that terminations on the basis of serious misconduct are undertaken giving due consideration of the requirements around procedural fairness under the *Fair Work Act 2009* and Regulations.

It is extremely important to seek advice before you decide whether to terminate the employee on the basis of any behaviour – including serious misconduct.

As a side note, any suspicion of theft within the workplace should always be reported to the police.

## General information - what amounts to serious misconduct?

Serious misconduct occurs when an employee conducts themselves in a way that is so bad it is 'inconsistent with the continuation of the contract of employment'.

In other words, the employee has acted in a way which makes it impossible for them to continue working for their employer. If an employee engages in serious misconduct, then an employer is entitled to summarily terminate the



employment of that employee with immediate effect.

Serious misconduct is defined in Reg 1.07 of the Fair Work Regulations 2009. Theft, fraud, assault and intoxication, if committed in the workplace by an employee, are likely to be considered serious misconduct. Serious misconduct can also occur where an employee causes serious and imminent risk to the health or safety of a person, or the reputation or viability of the business.

For specific advice as to whether certain behaviour amounts to serious misconduct, please contact Employer Assist.

## Important News

Compulsory Family and Domestic Violence Leave for Modern Awards will soon be implemented! Keep an eye out for our upcoming article or contact Employer Assist for further details.

*This article is intended for information purposes only and should not be regarded as legal advice. Please contact Employer Assist for specific advice.*



## AAAA Member Benefits

Employer Assist provides AAAA members with advice regarding all aspects of your workplace and employment law. It can provide advice in regards to serious misconduct and how an employer should deal with the investigation and dismissal of an employee.

Please contact Employer Assist on 1300 735 306 or [aaaa@employerassist.com.au](mailto:aaaa@employerassist.com.au) if you have any questions about the content of this article or if you require any assistance with your business.

Emma Dalley and the Employer Assist team.