

# CASE REVIEW: MISCONDUCT NOT SERIOUS MISCONDUCT

**Before summarily dismissing an employee for misconduct, employers should first satisfy themselves that the conduct amounts to serious misconduct, otherwise disciplinary action may be more appropriate**

Whether misconduct justifies summary dismissal was recently considered in *Trudi Puszka v Ryan Wilks Pty Ltd T/A Ryan Wilks Proprietary Limited* [2019] FWC 1132.

## Background

Trudi Puszka (Applicant) lodged an unfair dismissal application against her previous employer, Ryan Wilks Property Limited (Respondent). The background to the dispute is as follows:

1. The Applicant had worked for the Respondent for about a year as a Project Administrator and had a good work history with no performance or conduct issues.
2. On 20 July 2018, the Applicant attended an afterhours farewell drinks function and had become intoxicated.
3. News of these events eventually filtered back to a Manager for the Respondent who commenced an investigation into the Applicant's conduct on 20 July.
4. The Applicant was sent a letter by email which confirmed that the Respondent had been made aware of her conduct including that she was overheard insulting a colleague and a client's employee; that she had made propositions of a sexual nature to a client's employee; that she had vomited on the forecourt area; and that she was escorted by event members to a taxi because of her intoxication. The Applicant was also sent an electronic meeting request to discuss the matters included in the letter on the next day.
5. During the meeting, the Applicant admitted to and apologies for being intoxicated, vomiting, and being escorted out of the building but

denied allegations about making disparaging remarks and propositioning anyone.

6. The Manager for the Respondent conducted further interviews with other relevant parties before arranging a final meeting with the Applicant.
7. The Applicant attended the final meeting where she was asked if she had anything further to add. The Applicant indicated that she wanted to know the identity of the complainants and that she had witnesses that would support her version of events.
8. The Manager rejected this proposition and proceeded to inform the Applicant that she had been terminated on the grounds of serious misconduct and provided a pre-prepared termination letter.

## Decision

Commissioner Cambridge rejected the Respondent's evidence in relation to the disparaging remarks and propositions stating that the allegations had no basis in fact. However, the fact that the Applicant was intoxicated was not denied.

When evaluating whether this was serious misconduct justifying summary dismissal, Commissioner Cambridge stated:

*'... there would seem to be sound basis for the employer to have implemented some form of disciplinary action in respect to the misconduct of the applicant associated with her drunkenness.*

*...However... a single act of drunkenness at an after work function which did not involve any abusive or aggressive behaviour, and for which no serious risk to the reputation or*



*viability of the employer's business could be established, would not represent misconduct that provided a sound, defensible and well-founded reason for dismissal. Frankly, if one act of inoffensive drunkenness at an after work function provided valid reason for dismissal, I suspect that the majority of Australian workers may have potentially lost their jobs.'*

The following extract from the Judgement of Mr Justice Hungerford in the case of *Pastrycooks Employees, Biscuit Makers Employee & Flour and Sugar Goods Workers Union (NSW) v. Gartrell White (No 3) Industrial Commission of NSW, [Hungerford JJ], 351R* was also relied on:

*...the test comes down to the question whether the employee's conduct has been so inconsistent with his duties under the employment contract that it strikes down any reasonable suggestion that the employer-employee relationship can be continued in the future.*

Commissioner Cambridge found that reinstatement would be appropriate in the circumstances and an order was made for the Respondent to restore the Applicant's lost wages. On appeal the Full Bench upheld the finding that serious misconduct was not established.

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