



Misconduct at work

An employee needs to be aware of the type of behaviour which is unacceptable in the workplace. It is therefore usual for your employer to set out in your contract or staff handbook the types of behaviour which they consider to be misconduct and which they may take formal disciplinary action for.

Definition of misconduct;

Misconduct can be gross or ordinary.

Gross misconduct is something so serious that it fundamentally undermines the employment relationship, such as abuse of a manager, theft or dishonesty. Gross misconduct may justify summary dismissal (see below) but a proper investigation and disciplinary process must always be adopted to avoid the dismissal being unfair. It is rarely, if ever, safe to sack somebody on the spot.

Gross misconduct

It is usual for employers to give examples of gross misconduct within their staff handbook. Generally, gross misconduct is any action which goes to the heart of the employer/employee relationship. Accordingly, to act in such a manner is to undermine that relationship to cause a fundamental breach of contract.

Any list of examples of gross misconduct within your staff handbook or contract is not intended to be exhaustive but is intended to be a comprehensive guide. Its purpose is to highlight the types of misconduct for which an employer will consider terminating your employment.

If you are facing an issue which is classified as gross misconduct it is usually the case that you will be suspended from work on full pay while the matter is investigated.

Most employers would identify intoxication from drink or drugs, fighting or other physical abuse, indecent behaviour, theft, dishonesty, sabotage, serious breaches of health and safety rules, offensive behaviour such as discrimination, harassment, bullying, abuse and violence and gross insubordination as examples of gross misconduct.

Your employer might want to specify other offences, depending on the nature of the business. For example, accepting or offering bribes, downloading pornography, downloading software from the internet or using personal software, misusing confidential information or setting up a competing business. If there are policies covering all or any of these activities, it is possible to specify breaches of all or some of them as gross misconduct.

In deciding if an action (or inaction) can be classed as gross misconduct, your employer will need to consider whether you would have known at the time of the incident that what you did (or didn't) do could be gross misconduct. If you couldn't have known that what you did was gross misconduct, or that you could have been dismissed as a result of that behaviour, it may not be fair to be dismissed for it.

Ordinary misconduct

Ordinary misconduct is something that does not undermine the employment relationship, but is reasonably treated by your employer as misconduct and which, if repeated, may become sufficiently serious to undermine the employment relationship to a point that will justify dismissal. An example is late arrival at work, which on one or two occasions will be misconduct, and on a repetitive basis may justify dismissal. If that is the case it is usual for employers to have a process using a series of warnings, such as a first written warning and then a final written warning.



It is usual for employers to set out the types of conduct which may fall into the category of ordinary misconduct. These may include such matters as failing to follow correct procedures if you are absent, use of workplace facilities and equipment, professional behaviour, personal appearance and sub-standard workmanship.

The definition of misconduct is not straightforward and whether or not a particular act of misconduct is serious enough to result in dismissal depends on the exact circumstances of the case and the nature of the misconduct. It is also important to recognise the difference between misconduct and performance as in some cases these can be very similar. A Tribunal will look at what a reasonable employer would do in the particular circumstances of the case. For any situation there are a variety of different actions a reasonable employer could take. This is known as the reasonable range of responses.

Dismissal

Ordinary dismissal is where an employee is dismissed with notice, usually after a disciplinary hearing and potentially after the breach of a final written warning. The amount of notice required will generally be set out in your contract or be in accordance with your statutory notice entitlement. The minimum notice requirement is one week where you have been employed for up to two years and an additional week for every completed year of service, up to a maximum of twelve weeks.

If you are in this situation, you may not be required to work your notice period, either because you are paid in lieu of notice or you are not required to attend the work place during that time (sometimes referred to as gardening leave). This can be used for all types of

dismissal and is not such a severe sanction as summary dismissal.

An ordinary dismissal most frequently and usually takes place when there has been a breach of a final written warning for a series of misconduct or performance-related issues. This generally means you would have had plenty of opportunity and warning to behave/perform as required and should you not do so you are aware you are at risk of being dismissed on notice.

Summary dismissal means you are dismissed without notice after a disciplinary hearing. In these circumstances, you are required to leave your employment immediately and are not paid for, or required to work, any notice period. Your employment contract is terminated immediately and you only receive pay and benefits to the date of termination. This will include such things as untaken holiday or bonus payments due to the date of termination.

This type of dismissal is used only in cases where an employee has been disciplined and subsequently dismissed for gross misconduct.

Keeping a dismissal fair

A dismissal will be fair if your employer identifies an act as being misconduct or gross misconduct and warns you that a repetition of misconduct or an incident of gross misconduct will put your employment at risk. Your employer must also adopt a proper disciplinary process and act fairly and reasonably throughout.

In considering whether or not to dismiss there are a range of relevant factors including whether:

- the offence was gross misconduct – that is, was it serious enough to destroy the contractual relationship.

- correct procedures were used, taking into consideration the law and the resources and size of your company.
- your employer's response was within a band of responses that a reasonable employer would take.
- your employer considered alternative sanctions e.g. a transfer, demotion or suspension.
- any mitigating factors were taken into account, such as your past history, position, length of service and previous warnings.

So, if you are late, your employer should check if there is a good reason for this the first time. If there isn't they may want to discuss this with you or to issue a formal warning after a disciplinary hearing. If there is no formal disciplinary process the warning will generally not be valid. Any disciplinary process must comply with the Acas Code. Further information about this can be found [here](#).

Suspension

Employees frequently ask if they should be suspended during a disciplinary process. Generally, suspension (with pay) can be used where:

- The employment contract allows this to be done, although sometimes this may refer to suspension without pay.
- The employee is being investigated for actions which may amount to gross misconduct and therefore could lead to a dismissal (see below).
- The nature of the investigation into the misconduct means it is not advisable for the employee to remain in the workplace. This may be because the issues are sensitive or require utmost confidentiality or may prejudice the integrity of the investigation.

If you are suspended (unless without pay) you retain all your contractual employment rights. Any suspension must be confirmed in writing, although the original

suspension can be done verbally. The length of time you are suspended must be reasonable and therefore should not continue indefinitely.

If the issue concerns an incident of gross misconduct it is almost always the case that the employee will be suspended pending the investigation and/or the disciplinary hearing. The essence of gross misconduct is the allegation that an employee has behaved in such a way that the employer believes the contract between them has been fundamentally breached. It would not, therefore, necessarily be appropriate for the employee to continue to work pending the outcome of the process.

Right of appeal

In any case where you are dismissed for any type of misconduct you have the right to appeal as per your company's policy (or five days if there is no policy). In the case of Gross Misconduct, if your appeal is successful you will be reinstated and your pay backdated and reimbursed from the date of dismissal.

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