Misconduct is defined as any form of wrongdoing that is of a more minor nature. Examples include: lateness, being careless or negligent, using offensive language, being rude to others and less serious breaches of health and safety.

Serious misconduct is offences that are very serious in nature. It consists of situations where an employee’s behaviour is such that you feel threatened, unsafe or the act results in a major loss of trust in the person. Common examples include theft, assault, bullying, harassment, serious breaches of health and safety, using drugs or alcohol at work and wilfully damaging property and equipment.

Minor misconduct offences are usually dealt with at a low level (e.g. lateness or being rude to others). They only become a disciplinary matter if the problem keeps happening. Serious misconduct (e.g. assaulting another staff member) generally goes straight to a disciplinary process.

Misconduct cases are often complex, difficult and stressful for everyone involved. If you are intending to go through a disciplinary process please seek advice from your lawyer or employer’s association.

How do I investigate misconduct?

First you need to determine what actually happened, especially if there are conflicting accounts. This is likely to include a review of the physical evidence available and interviews with the employee’s supervisor, any witnesses and possibly the employee themselves. If you need to speak with the employee, you are required to warn them that the incident may constitute misconduct and what they say could be relevant in a disciplinary process later on.

Now decide whether there are sufficient grounds to proceed to a formal investigative disciplinary meeting, or whether there are any alternatives that may result a better outcome. Sometimes a quiet word with the employee is enough to ensure that the incident won’t happen again.

If you do decide to move on to a disciplinary process, please seek advice from your lawyer or employer’s association. You will need to invite the employee to a meeting where they can give their side of the story. They should be given an outline of your concerns, access to any relevant documents, time to prepare a response and the opportunity to bring a support person or legal representative. Make sure they understand the seriousness of the situation and the possible consequences of this process. During the meeting, ask the employee to share their perspective on
what happened - listen with an open mind. If the employee is silent or reluctant to participate, encourage them to speak up. Ask open questions and emphasise that you are there to listen.

After the meeting, reflect on the employee’s explanation and consider your response. If the employee’s comments indicate there’s more to the matter than first appears, conduct additional investigation.

You now need to decide:

- Whether the employee’s actions constituted misconduct or serious misconduct given the circumstances, and
- What action to take.

You must carefully consider the nature of the offending, the employee’s explanation, all relevant information (e.g. witness reports, physical evidence, the employment environment and mitigating circumstances) and the alternatives available; such as training, coaching or supervision.

You cannot assume that behaviour is ‘serious misconduct’ just because the employment agreement, or code of conduct, lists this offence as an example of serious misconduct. You must take into consideration the actual nature of the offence, the surrounding circumstances and the employee’s side of the story. An offence can only be deemed to be serious misconduct if it is so serious that it undermines the trust and confidence you have in the employee.

You also need to genuinely believe that misconduct has occurred in order to initiate disciplinary or corrective action. This includes having reasonable proof. The more serious the offence or the more serious the possible consequences, the greater the level of proof expected.

Once you have considered the matter thoroughly, meet with the employee again to outline your decision and the reasons for it. In serious or complex situations, it’s a good idea to provide the employee with a preliminary decision and to allow the employee to comment before a final decision is made. The employer must genuinely consider the employee’s comments before making their decision.

Take thorough notes during meetings so there is a record of conversations. It’s worthwhile having a second person to take notes on your behalf – that way you can concentrate on the matter at hand.

Finally, write a letter to the employee confirming your decision, the reasons for this decision, the expected improvement and timeframes (if applicable) and any other relevant information.

Disciplinary action:

Any disciplinary action needs to be fair and reasonable given the circumstances. This means there was a genuine work-related reason for taking disciplinary action, that you genuinely and reasonably believed that such action was required and that you followed a fair process in reaching and implementing this decision.
In cases of minor misconduct (e.g. lateness), the most serious action you can take is likely to be a warning. Remember that a warning is a serious step in itself and must be a decision that a fair and reasonable employer could have made, given the circumstances. Dismissal is only a possibility if the problem is ongoing despite multiple attempts to address the issue, including 2-3 formal warnings.

In cases of serious misconduct (e.g. theft, assault), dismissal is a real option. Sometimes an employment agreement provides for ‘instant’ or ‘summary’ dismissal. However, ‘instant’ does not mean ‘on-the-spot’. You still need to conduct a full and fair investigation before reaching any decision.

Suspension:

In particularly serious cases, an employer may need to suspend the employee (on full pay) while they conduct their investigation. The employer is required to follow a fair process before deciding to suspend the employee, including providing the employee with the opportunity to comment. While an employer can generally only suspend an employee if the employment agreement provides for it, they can suspend in other exceptional situations. An example might be when an employee has allegedly sexually assaulted another employee. In these kinds of situations, please seek legal advice immediately.