Misconduct outside work hours, 12 May 2014

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To what extent can employers hold employees accountable for their conduct during their personal time outside work? When is it appropriate for an employer to draw the line in scrutinising such conduct?

Conduct occurring outside the workplace can give rise to disciplinary action by an employer. The key is to identify whether there is a sufficient nexus between the employee's conduct and their employment. This article examines several cases where employees have been disciplined for conduct outside work hours. It will also give some practical tips on the process for disciplining employees and the factors which make conduct outside work legitimately the basis for disciplinary action.

Sufficient nexus

In *Smith* v *The Christchurch Press Company Ltd* (2001) 6 NZELC 96,162; [2000] 1 ERNZ 624 (CA) the Court of Appeal confirmed that [25]:

> It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

Mr Smith was dismissed for serious misconduct after making unwanted sexual advances towards a co-worker during a lunch break at his house. The Court of Appeal upheld the Employment Court's finding that the decision to dismiss Mr Smith was justified. Mr Smith's conduct towards the complainant was "between two present employees, arose out of the work situation and, more importantly, had the potential to adversely affect the working environment" [27]. The Court of Appeal said it was "irrelevant" that the actual sexual conduct occurred outside the workplace at lunchtime.

Company social events

In *New Zealand Aluminium Smelters Ltd* v *Kemp ECT, Christchurch*, (15 August 1996, CEC 26/96); [1996] NZEmpC 158 (15 August 1996) Palmer J said, whether misconduct at a social event would justify a dismissal would generally depend on whether the employee attended in their capacity as an employee.

New Zealand Aluminium Smelters Limited (NZAS) held "beer and cheese" evenings as an opportunity for the General Manager to update employees on the state of the business and to build "team spirit".

At one of these evenings, Mr Kemp took forcible physical control of a co-worker, touched her breast and inner thigh, and made aggressively sexual comments towards her. This initial incident was followed shortly after by further aggressive comments directly addressing her status in the workplace.

The Employment Court concurred on page 13 of the judgment with the (then) Tribunal's view that:

> The event has at least several readily identifiable company purposes involving interaction between company management and staff and between one staff member and another. Employees are invited in their capacity as employees, and they recognise that. Attendance is voluntary, and employees accept their invitations in their capacity as employees. Any reasonable person would understand that, in attending a function to which he or she has been invited in his or her capacity as an employee, instances of misconduct would have ramifications for his or her employment, varying in degree in accordance with the extent of the misconduct. On the basis of this reasoning, it seems to me apparent that the incident was work-related, the facts that it was outside work hours and off-site notwithstanding.

The Employment Court found that it was open to a reasonable employer to conclude that Mr Kemp had engaged in misconduct that deeply impaired or was destructive of that basic confidence or trust that is an essential of the employment relationship. Moreover, NZAS was entitled to consider the impact of the incident on the co-worker and on the atmosphere of the workplace where her evidence was that her ability to do her work had been adversely affected by the incident and would be affected by further inevitable interaction with Mr Kemp.

Employees do not always appreciate that their behaviour at company social events could lead to disciplinary action. It may therefore be prudent to advise employees of the expectations of the employer upfront.

Obviously, employees should know not to participate in illegal activities and to refrain from engaging in any violent, abusive and/or harassing conduct. Employers may also vest additional responsibility in management (who should lead by example) or require higher standards of behaviour when clients/customers are in attendance.

Investment analyst loses bid to win job back following "road rage" incident

Background

Mr Hallwright — a senior investment analyst at Forsyth Barr Limited (FBL) — was convicted of a criminal charge after he caused serious injury to another motorist while driving. The incident occurred during his own time when transporting his daughter to an appointment. Mr Hallwright's criminal trial generated a considerable amount of media coverage, much of which drew attention to the fact that he was a senior employee at FBL and characterised his offending as a case of "road rage" and a "hit and run". The District Court Judge imposed a combined sentence of 250 hours of community service, $20,000 reparation and 18 months' disqualification from holding or obtaining a driver's licence.

Mr Hallwright's employment agreement contained two relevant terms, namely, a (non-exclusive) definition of serious misconduct which included "conduct bringing [FBL] into disrepute" and an obligation not to "engage in any activity that is likely to compromise [his] ability to carry out [his] duties". Following Mr Hallwright's sentencing, FBL found that his conduct fell within both of these provisions and he was summarily dismissed for serious misconduct.

The Authority found that FBL had justifiably dismissed Mr Hallwright. He brought a de novo challenge to the Authority's determination.

Employment Court decision (Judge Inglis)

The Employment Court agreed with the Authority's decision and said there was a sufficient connection between the conduct and the employment (*Hallwright* v *Forsyth Barr Ltd* [2013] NZEmpC 202).

In finding that there was a sufficient connection between Mr Hallwright's conduct and the employment, the Employment Court stated that the test is not necessarily whether the conduct itself is directly linked, but whether it has the potential to impact negatively on the employment. The Employment Court said that "an employee can be held to account for what might otherwise be regarded as a private activity, carried out away from the workplace and with no ostensible connection to the employment or other employees" [49]. The focus of the inquiry is on the impact of the conduct on the employer's business.

Mr Hallwright's offending generated a considerable amount of negative publicity that repeatedly linked him to FBL. The Employment Court found that it was reasonable for FBL to be concerned about the impact of this on its reputation both in the marketplace and within its client base.

Actual proof of damage not required

The Employment Court rejected the submission that FBL had to demonstrate actual loss or damage to its reputation. In this regard, the Employment Court stated:

> If [Mr Hallwright] is right, no pre-emptive action could be taken by [FBL] until actual damage had occurred, after the horse had effectively bolted. That cannot have been the intention of the parties, particularly in relation to reputational damage which is notoriously difficult to prove. [59]

And further:

> It is obvious that extensive media publicity focusing on [Mr Hallwright] and his senior and trusted position with [FBL], juxtaposed with the serious criminal charge he was ultimately convicted of, would impact negatively and materially on [FBL's] reputation. [61]

Damage/reasonable belief that damage had occurred

Even if wrong on the above point, the Employment Court was satisfied that FBL did sustain reputational damage. In particular, the Employment Court said that FBL's "genuinely held view that [its] reputation had been damaged…was a view reasonably open to [it] having regard to the circumstances at the time" [67]. For example, FBL received negative feedback from clients, staff and members of the public about Mr Hallwright's conduct. The Employment Court also took into account Mr Hallwright's high profile, trusted senior position within FBL, FBL's dependence on its reputation for integrity and sound judgment and "traditional nature" of some of FBL's clientele.

FBL's failure to mitigate risk of damage

Mr Hallwright argued that FBL had failed to take any steps to mitigate the risk of damage to its reputation, such as by applying for name suppression itself.

The Employment Court found, however, that the situation was exacerbated by Mr Hallwright's failure to be forthcoming about the incident and that this argument did not advance his case.

The Employment Court also condoned FBL's consistent approach throughout in avoiding public comment and making it clear that judgment was being reserved until after the conclusion of the criminal trial process.

Ability to undertake role compromised

The Employment Court was satisfied that an integral part of Mr Hallwright's role involved "extensive media engagement" through providing comment on topical issues and that "implicit in his role was the need to show sound judgement". The Employment Court accepted that FBL held genuine and reasonable concerns about the difficulties that would likely arise should Mr Hallwright continue to undertake his role within FBL against the backdrop of the criminal conviction and the media coverage that had occurred.

Counsel for Mr Hallwright submitted that the fact he continued to work for FBL (during an approximate two-year period after the driving incident) undermined FBL's argument that his ability to perform his role moving forward was compromised.

The Employment Court rejected this submission and said FBL was in a difficult position. Any steps to take disciplinary action against Mr Hallwright pending the outcome of the criminal process might well have led to a grievance, particularly in the context of his assurances that he was innocent and that the truth would come out at trial. On the other hand, in permitting Mr Hallwright to continue in his role, Mr Hallwright could complain that he had been lulled into a false sense of security and/or FBL risked undermining its concerns about Mr Hallwright's ability to do the job.

During the relevant time it was clear, however, that FBL was reserving judgment in terms of employment implications until the criminal justice process had been concluded. The Employment Court said at [77]:

> [FBL] took the step of standing behind [Mr Hallwright] while he vigorously defended the criminal charges, wearing the collateral damage to its reputation in the interim, giving him the presumption of innocence, making it clear that it was reserving judgment and allowing the criminal process to run before reaching a concluded view or taking any disciplinary action. The position changed when Mr Hallwright was convicted…. The delay between the incident and the conclusion of the trial process cannot be laid at the defendant's door.

The Employment Court approved FBL's approach and said that it struggled to see how FBL could be criticised for adopting the course that it did.

Relevance of District Court sentencing decision

Counsel for Mr Hallwright submitted that FBL had erred in reaching a conclusion described as "incompatible" with that reached by the District Court judge in sentencing.

The Employment Court rejected this submission. It found that FBL had taken into account the District Court Judge's observations as part of the relevant circumstances, for example, about the degree of culpability involved in the offending. Further, FBL was not obliged to directly translate the District Court Judge's view as to culpability in the criminal justice context into an assessment of the extent to which Mr Hallwright's criminal offending might impact on his employment obligations.

The Employment Court also found that the fact Mr Hallwright had already been "punished" in criminal proceedings by the District Court "cannot, and does not" mean that FBL was "hamstrung" in terms of the disciplinary action it could take.

Conclusion

The Employment Court found that the process followed by FBL was "fair overall" (in other words that it met the minimum procedural requirements set out in the Employment Relations Act 2000 (ER Act)). The Employment Court also concluded that it was open to FBL to conclude that Mr Hallwright had committed serious misconduct and that the decision to dismiss, and how the defendant acted, was what a fair and reasonable employer could have done in all the circumstances. Mr Hallwright's dismissal was found to be justified and it followed that he was not entitled to any of the remedies he sought, including reinstatement.

The Employment Court also observed that it would not have granted the extent of damages sought by Mr Hallwright because he had failed to adequately take steps to mitigate his loss in looking for alternative employment. Even if the Employment Court had found Mr Hallwright's dismissal to be unjustified the Employment Court said it would not have ordered reinstatement because it was clear that there had been an irretrievable breakdown in the parties' relationship — for example, Mr Hallwright had secretly recorded a conversation between him and the decision-maker and described him in an email to a colleague in "pejorative terms".

Failure to disclose convictions insufficient to justify dismissal

Background

Mr A was employed by B Ltd from 2000 until 2007. In 2007 he applied to be appointed to another role in another part of B Ltd's operations.

As part of the application process for the position to which Mr A was appointed in 2007, Mr A was asked whether he had ever been convicted of a criminal offence. Mr A answered "no" and declared that the information he had provided was true and correct.

In fact, Mr A did have criminal convictions. In 1990 and 1992 he was convicted of serious offences for which he served two separate terms of imprisonment. Mr A was also convicted of drunk driving in 2002 and was disqualified from driving for six months.

In 2012 Mr A was promoted and, as a part of his new role, required to hold a Second-hand Dealers Licence.

The Second-hand Dealers Licence application process involved the Police being asked if they had any objection to Mr A obtaining a licence. Mr A's manager received a letter containing the Police's objection to this and setting out Mr A's three convictions, including the 1990 and 1992 ones for which Mr A had name suppression. Mr A was subsequently dismissed.

B Ltd argued in the Authority that it justifiably dismissed Mr A for lying on his application form and because his offending was of a kind that meant it was impossible to keep him employed as it was greatly at odds with the company's culture and values.

Authority's decision

The Authority found that a fair and reasonable employer could not have considered that Mr A's historical offending would have an impact or a potential impact on B Ltd's business, or that Mr A's offending was incompatible with the proper discharge of his duties, or that it could impact on B Ltd's obligations to other employees (*Mr A v B Ltd* [2014] NZERA 182; [2014] NZERA Christchurch 44).

The Authority distinguished a number of other decisions in which a failure to honestly disclose information to the employer was held to justify dismissal. In those cases the employer had informed the employees that any subsequently discovered false information given by them could be grounds for dismissal and the employees had agreed in writing that they understood that. Moreover, their dishonesty was discovered relatively early on in the employment relationship. By contrast:

- B Ltd did not undertake a criminal record check
- B Ltd did not make the retention of Mr A's employment conditional on satisfying a criminal records check and/or on B Ltd not discovering any false information given by him
- the convictions were uncovered after six years of otherwise satisfactory, even good, service, and
- the convictions were between 15 and 17 years old when Mr A filled in the application form and were over 20 years old when they were discovered.

The Authority also disagreed with B Limited's contention that Mr A's offending had a material link to his work. The Authority stated that [50]:

> If the convictions had been ones for dishonesty there would have been a clear and direct link to the kind of work Mr A undertook for B Ltd. Even in those circumstances I consider the period of time that had passed since his last conviction and Mr A's good work record with B Ltd could have been taken into account and weighed against the revelation of Mr A's historical offending. However, Mr A's offending was not of a nature intrinsically related to his work for B Ltd and was not of a kind that would make it less likely he could undertake his duties in a trustworthy manner.

Despite concealing his convictions the Authority emphasised that Mr A had worked diligently from 2007 until 2012 when he was promoted. It noted in that time there had been no complaints about Mr A, his branch had performed well, and he had maintained an unblemished employment record.

In terms of B Ltd's disciplinary process, the Authority found that the defects were more than minor and were disadvantageous to Mr A. For example, there was no evidence that B Ltd gave Mr A a proper opportunity to explain what steps he had taken to make reoffending of the nature of his 1990 and 1992 convictions less likely and/or that it took into account his understanding from WINZ that he was not required to disclose his convictions.

There was considerable evidence of the effect of the loss of Mr A's job on his mental health. Moreover, despite his depression and anxiety, Mr A adduced evidence that he had applied for 10–15 jobs before becoming employed approximately six months after the dismissal. The Authority considered therefore that he had acted as much as possible to mitigate his loss.

The Authority ordered B Ltd to pay Mr A: $6,750 as compensation for hurt and humiliation; and lost wages for three months (reduced by 25% to reflect his contribution to the situation giving rise to the personal grievance).

Conclusion

It is important to remember that the test to be applied to any dismissal is that in s 103A of the ER Act. Namely, it must be determined, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

As with dismissals of any nature, employers must have clear evidence upon which any reasonable employer could safely rely, or have carried out reasonable inquiries which left them on the balance of probabilities with grounds for believing, and did believe, that the employee has engaged in misconduct sufficiently serious to warrant dismissal. This requires a full and fair investigation process to be conducted before any final decision is made as to the outcome. In the context of conduct occurring outside of work hours, this also requires the employer to consider whether there is a sufficient nexus between the conduct and the employment to warrant disciplinary action.

Remember to provide all relevant information to the employee concerned (for example, copies of the company's Code of Conduct, complaints, etc) and to give the employee a meaningful opportunity to respond to the allegations. It may also be prudent to wait until the conclusion of any criminal trial and sentencing before making any final decision as to what (if any) disciplinary action should be taken.

As with any dismissal, the case will turn on its own facts. Employers therefore need to consider all of the relevant circumstances and weigh up any mitigating factors without jumping to conclusions due to the fact of, for example, a conviction in itself.