Out of Hours Conduct – What You Need to Know

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Out of hours conduct – what you need to know ...

It is easy to believe that, as employees, the extent of our obligation to our employer is to turn up and do our job. It would follow, then, that what we did as soon as we left the premises of our employer was not only nobody else's business but had nothing to do with any obligations we owed our employer. But this is not the case.

Traditionally the employment relationship was characterised as a 'master-servant' relationship whereby the employer exercised a largely unfettered amount of control over the employee, extending far beyond merely controlling the duties of employment. The employer could, and very often did, control where the employee lived, who the employee associated with and how the employee conducted themselves in public.

As society evolved so did the employment relationship. The modern employment relationship is no longer characterized solely by 'control' of one party over the other but by the express terms of the contractual relationship between the parties. Any control the employer aims to exercise over the employee must not offend the contractual workplace relationship as set out in the contract, workplace polices, any applicable Award or enterprise agreement or any relevant law such as the Fair Work Act and National Employment Standards.

It is very rare that an employment contract will expressly state the types of behavior that an employee should engage in outside of the workplace. However, in the decision of *Rose v Telstra*[1] the Australian Industrial Relations Commission (now the Fair Work Commission) held that the conduct of employees outside of work can be so offensive to the contractual 'workplace relationship' that there may exist a contractual right at common law for the employer to discipline or dismiss the employee. Generally, the

[1] B. Rose v Telstra Corporation Limited [1998] AIRC 1592.

Courts have only upheld this position where the conduct meets any of the following three requirements:

1. The off duty conduct, when viewed objectively, is likely to cause serious damage to the relationship between employer and employee; or
2. The off duty conduct damages the employer's interests; or
3. The off duty conduct is incompatible with the employee's duty as an employee.

In assessing the three requirements above, the Courts also need to determine whether the actions of the employee are merely personal actions or are actions that impact on the employer. As such, the underlying test that is applied is that the conduct of the employee "must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee"[2]. To help illustrate this test we will look at some case studies below.

1. <u>The off duty conduct, when viewed objectively, is likely to cause serious damage to the relationship between employer and employee</u>

In instances where the conduct is too private in nature to be sufficiently connected to the employment relationship, employers have resorted to claiming that dishonesty on the part of the employee during company investigation of the incident is enough to 'destroy the mutual trust' of the employment relationship. However, while 'lying' as to one's conduct may, in some instances, destroy the mutual trust and confidence essential to the employment relationship (*see McIndoe v BHP*[3]), dishonesty which focused on protecting inherently private conduct will generally not be sufficient in and of itself to cast doubt around honesty during work. This was the case in *Streeter v Telstra Corporation Ltd*[4]. In this case an employee was dishonest as to her behaviour at a work party involving sexual conduct in the presence of other employees. The conduct itself was too far removed from employment, being at a Christmas party and in a hotel room, and the dishonesty was said to be directed at her private interests and not at her interests at work. In the first instance the Court held that the dishonesty did not illustrate a 'general dishonesty' that would affect her employment. However, on appeal, it was decided that the employee needed to be honest 'so that Telstra could determine and take appropriate action to deal with the difficulties. Ms Streeter's dishonesty during the investigation meant Telstra could not be confident Ms Streeter would be honest with it in the future. The relationship of trust and confidence between Telstra and Ms Streeter was, thereby, 'destroyed'.[5]

2. <u>The off duty conduct damages the employer's interests</u>

In *Kolodjashnij v Lion Nathan breweries*[6], the Court was of the opinion that an employee who worked at a brewery had been validly dismissed for drink driving outside of work hours. Particular attention was given to the fact the company had a responsible drinking policy which expressly prohibited such conduct. As a result, the conduct was much more readily taken to be as 'an intention, on part of the employee that he no longer wished to be bound by the employment contract'. In coming to this conclusion the

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[2] *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, as cited in B. Rose v Telstra Corporation Limited [1998] AIRC 1592.

[3] A. McIndoe v BHP Coal Pty Ltd *(*PR901846*, 2 March 2001).*

[4] *Streeter v Telstra Corporation Limited*, [2007] AIRC 679.

[5] Telstra Coporation Limited v Streeter [2008] AIRCFB 15, at 17.

[6] *Kolodjashnij v Lion Nathan T/A J Boag and Son Brewing Pty Ltd* [2010] FWA 3258.

high probability of the conduct affecting the employer's product and image as a brewery was relevant. The Court noted that not all policy can be incorporated in this way but it will be far more reasonable where the conduct evidences potential detriment on the employer in terms of their brand, image or consumer confidence.[7] The lesson for employers here is that company policies should be worded to prohibit conduct of employees which flagrantly offends the nature of the business.

In *Fitzgerald v Escape hair design*[8], a hairdresser brought an unfair dismissal claim against her former employer. One allegation made by the employer was that the dismissal was fair on the basis that the employee had posted a public display of dissatisfaction on Facebook. The post in question stated '*Xmas Bonus' alongside a job warning, followed by no holiday pay!!! Whooooo! The Hairdressing industry rocks man!! AWESOME!!*' The post was only accessible by the employee's 'Facebook friends'. The Court accepted that internet interactions outside of work are capable of throwing the employer's reputation into disrepute and can be sufficiently connected with the implied and controllable duties of the employee. On this point, it was noted that the Facebook comments could be seen by potentially an unlimited number of people and that such comments made outside of work hours can remain live during employment hours – that is until it is removed. However, these particular comments lacked sufficient evidence here. This was because it had been limited to friends only. Claims that 10 customers were Facebook Friends who could have seen that comment were not proven, and it remained uncertain as to how long the comment remained online. Regardless of this, the comments were directed at industry matters and there was no identification of the business specifically. The chance that industry is affected by this comment like this is essentially non-existent.

In *Rose v Telstra 1998,* Rose, a technician for Telstra, was asked to assist in taking the workload off another branch by temporarily relocating. Rose accepted and booked into a hotel paid for on travel allowance expenses. One evening Rose was involved in a fight, resulting in him being stabbed in the same hotel room. Rose notified his supervisor of his inability to work. Telstra was of the opinion that the incident amounted to improper conduct and subsequently Rose's employment was terminated. At trial, Telstra's main argument was that Rose's out of duty conduct had been brought into the scope of his employment. The reasoning was that the travel allowance provided for the location of the incident. However the Court did not agree and found in favour of Rose. It was highlighted that the behaviour had no sufficient connection to Rose's employment duties. He had not been wearing the Telstra uniform at the time, he had not been on call and the incident did not occur in a public place. The Court also found any inclination to cause harm to the interests of Telstra was weak. Thus, even though the incident had been reported on, evidence that was led illustrated that the incident was contained as a 'local rumor' and most reports failed to mention Rose's employment status.

3. <u>The off duty conduct is incompatible with the employee's duty as an employee</u>

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[7] There is no need to furnish actual evidence of material detriment on the business, only that it has potential to do so.

[8] Fitzgerald v Dianna Smith T/A Escape Hair Design [2010] FWA 7358.

Unlike the requirements above, this one is relatively clear-cut. Cases that have found conduct as damaging or incompatible with employment performance to the extent that the relationship is irrevocably severed have included:

- ***Orr v University of Tasmania*[9]-** Where a university Professor who was found to be having an affair with a student was held to be engaging in conduct that was incompatible with his role as an educator.
- ***R v Teachers Appeal Board; ex parte Bilney*[10]**- Where a teacher who was convicted of growing marijuana was held to be engaging in conduct that was incompatible with his role as an educator.
- ***In re Wearne* (English Court of Appeal)**[11]- Where a solicitor who established his house as a brothel was held to be engaging in conduct that was incompatible with his role as an officer of the Court.
- ***Allan v Commissioner of Australian Federal Police*[12]** per Neaves J- Where a Police officer who was found to be engaging in criminal conduct was held to be engaging in conduct that was incompatible with his role as an officer of the law.

However other cases show the Court's reluctance to justify out of work constraint where evidence of a private-employment link is thin or where a propensity to affect the employer's interests is minimal. In *Hussein v Westpac Banking Corporation*[13] the Court formed the view that simply because an employee had a criminal conviction did not mean the employment relationship could come to an end – the conviction must have 'a relevant connection with the employment'. Here the employee, who worked for a bank, could be dismissed for committing offences of fraud in their private time. In contrast, convictions for traffic offences, for example, would not be seen to impact on honesty or suitability.

Conclusion

The tension at the heart of regulating the out of hours behavior of employees is the balance between the right of the employee to be free of undue influence or control, and the right of the employer to protect its legitimate business interests. It is only where the conduct of the employee directly and actively impacts on the interests of the employer that an employer will have a contractual right to discipline an employee or terminate the employee's employment.

About the Author

Joseph Kelly has had extensive experience in commercial litigation and workplace law, having advised employers and employees on all issues relating to industrial relations and employment law. Joseph has advised industry bodies, unions, employers and government and continues to run training and information seminars for legal practitioners. Joseph is currently the Principal of Kelly Workplace Lawyers. [Web: www.kwlawyers.com.au]

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9 (1957) 100 CLR 526.

10 *R v Teachers Appeal Board; Ex parte Bilney* (1984) 35 SASR 492.

11 (1893) 2 QB 439.

12 Allan, John Gerrard v Commissioner of the Australian Federal Police & Anor Peter John Hardcastle v Commissioner of the Australian Federal Police & Anor [1983] FCA 204.

13 Hussein v Westpac Banking Corporation (1995) 59 IR 103.