



WORKPLACE UPDATE

Volume 2, Issue 2

DISCIPLINING EMPLOYEE OUT OF HOURS BEHAVIOUR: A BLURRED LINE

“...the
boundary
between work
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blurred.”

Not so long ago, there was a clear line between work and play – between conduct at work and employees’ private lives, with the latter being none of the employer’s business.

Now, due to advances in technology (particularly information technology), the expansive reach of social media, and because employees are increasingly working from anywhere, the boundary between work life and private life has blurred.

More frequently, what an employee does outside of the workplace, and outside of work hours, can impact on the employment relationship. When it has a negative impact, employers may be justified in taking disciplinary action for what may have once been considered off-limits private behaviour.

To warrant disciplinary action, the employee’s out of hours conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or

the conduct damages the employer’s interests; or the conduct is incompatible with the employee’s duties as an employee: *Rose v Telstra Corporation Ltd* [1998] AIRC 1592 at [30].

That may include behaviour that impacts negatively on fellow employees, and exposes the employer to vicarious liability. Obvious examples are bullying, harassment and discrimination of one employee by another. Yet, case law shows that what out of hours behaviour may be justify disciplinary action is not settled.

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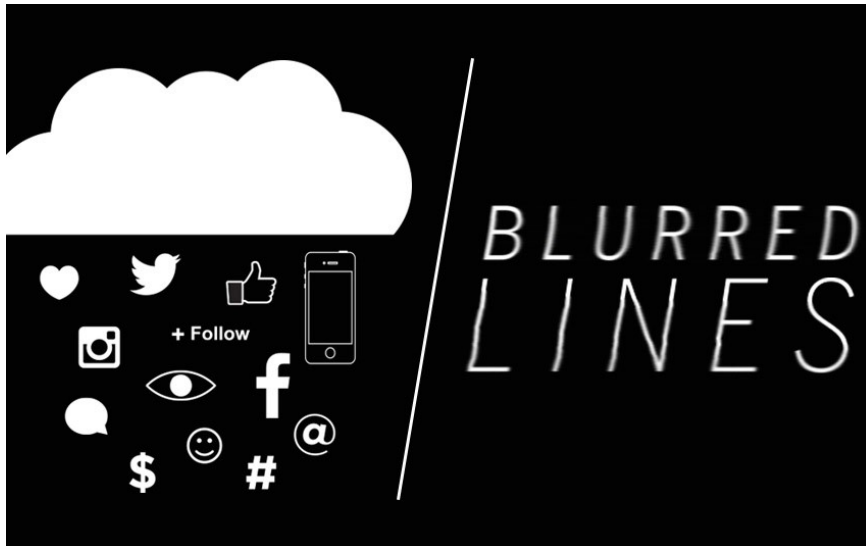
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“...an employee stating where they work on their **Facebook** page could establish the requisite link between employee and employer to justify dismissal for out of hours conduct...”

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Various factors are considered when assessing the reasonableness of the disciplinary action taken. For example:

- an employee dismissed for social media posts calling his employer’s clients “spastics and junkies” was reinstated (despite his conduct being considered a valid reason for dismissal) because the dismissal was found to be harsh in light of a number of mitigating circumstances, including the employees long history of employment;
- an employee dismissed following sexually lewd behaviour at a hotel after a staff Christmas party was found to have been validly terminated because, not only because of the lewd conduct as such, but she was not honest with the employer during its investigation, therefore the employer could not be assured of her honesty in the future;
- an airline employee who purchased drugs on his day off overseas was validly dismissed because of the employer’s continuing

responsibility for its crew throughout the pattern of duty;

- while a criminal offence may not of itself be enough to warrant termination, a public sector employee’s criminal conviction for sexual offences against a minor was found to be a valid reason for termination because the conviction was sufficient to damage the employment relationship and the interests of the employer;
- an employee stating where they work on their Facebook page could establish the requisite link between employee and employer to justify dismissal for out of hours conduct in making derogatory posts, even if the posts do not relate to their employment; and
- an employee who, following a relationship breakup with a work colleague, posts intimate images or sexual videos on social media (an act known as “revenge porn”) may be validly terminated because of the ongoing harm and violation the

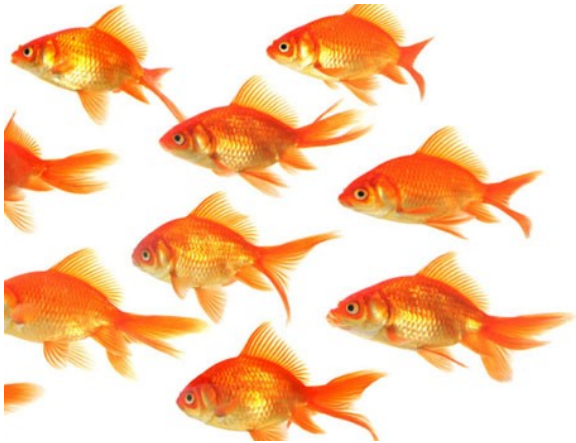
publication can cause to the victim and the effect it may have on her dealings with their other work colleagues.

Whether an employee’s out of hours conduct justifies disciplinary action or termination depends on the circumstances of each case, but the litmus test is whether the conduct is inconsistent with the employment relationship.

Employers can minimise their risk of harm to reputation and brand and risk of vicarious liability for an employee’s out of hours behaviour, by having a suitable workplace code of conduct and social media policy that sets out what is and isn’t acceptable behaviour that may be associated with the employer’s business, employees or workplace. Employees should be informed in clear terms on their rights and obligations and the circumstances under which they may be disciplined or terminated for their conduct beyond the workplace.



EVENTS



MDC Legal Breakfast Seminar

MDC Legal recently held a free breakfast seminar on Avoiding the Pitfalls of Performance Management at the Quest Hotel in May. At the seminar Mark Cox, Director and Nikita Barsby, Senior Associate discussed the trends in recent unfair dismissal cases and gave attendees practical tips on effective performance management. The seminar was attended by representatives of clients in the private sector in businesses of various sizes and not-for-profits.

Our next breakfast seminar on a topical issue of workplace law will be held in **July**. If you are interested in attending this event or any future events, contact us at reception@mdclegal.com.au.



MDC Legal presented on Managing Difficult Employees at the AventEdge HR MasterClass on 11 May at the Four Points by Sheraton Hotel

Aventedge.



Perth Summit



MDC Legal at the HR Summit on the 25th & 26th May at the Duxton Hotel

The Importance of Consistency in Employee Dismissals



The recent unfair dismissal case of *Michael Treen v Adelaide Services Alliance T/A Allwater JV* [2016] FWC 2737 (**Treen**) highlights the need for employers to be consistent in their disciplinary action.

Several cases have highlighted the need to afford procedural fairness, such that even where a valid reason exists for the termination, the dismissal may nevertheless be held unfair because of the lack of procedural fairness. In the Treen case, Commissioner Platt found that Allwater had a valid reason to dismiss their employee, Mr Treen, but in context the dismissal was unfair because it was inconsistent with previous disciplinary action against comparable misconduct by other employees.

Background

In December 2015 some Allwater employees, including Mr Treen, took industrial action. While travelling home from the rally Mr Treen left a message on the mobile phone of another employee who had not participated in the industrial action that said *"Hi mate, just wondering if you are working. If you are, you're a f*****g scab"*.

Allwater investigated this conduct, and then summarily dismissed Mr Treen for misconduct.

Mr Treen brought an action for unfair dismissal against Allwater.

Decision

Commissioner Platt found that Mr Treen's conduct did provide a valid reason for Allwater to terminate him. Whilst singular in nature, the Commissioner held that Mr Treen's misconduct was *"grossly inappropriate"* and *"flew in the face of employees' choice as to their participation in industrial action"*.

"Several cases have highlighted the need to afford procedural fairness, such that even where a valid reason exists for the termination, the dismissal may nevertheless be held unfair because of the lack of procedural fairness."

Further, no issues of procedural fairness arose or were contested.

However, when other relevant matters were considered Commissioner Platt found that the dismissal was *"a disproportionate response"* to conduct that was out of character, and did not take proper account of Mr Treen's good service and work performance. Further, Commissioner Platt found that the disciplinary outcome appeared to be *"inconsistent with other similar matters"*, namely the management of two previous matters, where

employees investigated for similar misconduct were only given a final written warning.

Commissioner Platt considered *"all of the above factors in totality"* with no single factor being determinative. Ultimately, he concluded that the dismissal was harsh, unjust or unreasonable and ordered the reinstatement of Mr Treen.

Conclusion

This case highlights the importance of employers defending unfair dismissal claims being able to demonstrate that they took a thorough and considered approach when dismissing an employee for misconduct. In particular, it highlights the importance of not only affording due process, but also considering the previous conduct of an employee, the proportionality of the sanction to the misconduct, and whether the sanction is consistent with the previous treatment of similar matters.

MDC LEGAL NEWS



MDC LEGAL NEW WEBSITE HAS LAUNCHED!

Check out our new user friendly and easy navigation website!

www.mdclegal.com.au

Welcome to the Team!



Ruth Collins completed a summer clerkship with MDC Legal then joined the team in February 2016 as a part-time Paralegal. Ruth is completing her final semester of a Bachelor of Law/Arts (Politics and International Relations) at the University of Western Australia. Prior to joining MDC Legal, Ruth volunteered at Street Law Community Legal Centre where she worked as a paralegal. At

Street Law, Ruth was responsible for assisting solicitors with providing legal advice to the homeless, as well as general policy research into homelessness in Western Australia. Ruth has also completed clerkships at the Director of Public Prosecutions, and the Department of Aboriginal Affairs.



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WANT TO HAVE A CHAT?

If you would like to get to know us better, contact us today to discuss how we might be able to assist you or your business.



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Joanna Knoth
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