Out of hours conduct - when is it a workplace issue?

17 DEC 2013
By: Rick Catanzariti | Carly Traeger

The line between conduct that may be said to have taken place within or outside the workplace is often quite blurry. While the conduct of an employee in any part of their life has the potential to affect the reputation of their employer, at what point does their out of hours conduct constitute a workplace issue?

A valid reason for dismissal as a consequence of an employee's misconduct may exist if there is a connection between the out of hours misconduct and the employment. In the seminal case of Rose v Telstra¹, it was held that such a connection will arise when the employee's misconduct is so serious it indicates that the employment contract simply cannot continue.

On the other hand, employers may also be vicariously liable for the out of hours misconduct of their employees in circumstances where complaints are made under anti-discrimination law.

**When is dismissal justified?**

For dismissal to be justified in connection with out of hours conduct, an employee's conduct must have an adverse impact on one or more of the following:

a) the relationship between the employer and employee;

b) the employee's performance of work; and

c) the interests of the employer.

The recent case of Bell & Mackay v Boom Logistics² involved out of hours conduct which included an employee taking and cooking food in the house of a co-worker and leaving the kitchen in a mess after he was asked to leave the house. This conduct did not meet the test in Rose v Telstra because it did not seriously damage any of the three factors listed above even though it may have damaged workplace relationships.

In another recent case, a senior correctional officer was dismissed after he was convicted of assaulting his wife and daughter for a third time³. However, the dismissal was held to be 'harsh, unreasonable and unjust' because there was no evidence that the officer's out of hours conduct had affected his work-related performance or the reputation of the public service.

Employers can legitimately assert authority over any out of hours conduct that threatens the efficient operation of
the workplace. A case in point involved circumstances whereby an employer directed its employee to cease the sexual harassment of a co-worker outside of the workplace and disciplined the employee when he breached that direction. The Federal Court considered that the employer's actions were reasonable and lawful because:

a) the harassment was a consequence of the relationship of the parties as co-workers; and

b) the harassment had a substantial and adverse effect on the workplace and on the productivity of the harassed person.

In addition, out of hours misconduct can include comments made by an employee on social media. In one case, an employee posted insulting and threatening comments aimed at his employer and a female co-worker on Facebook. This was found to have amounted to serious misconduct and was a valid reason for termination, despite the comments being posted from the employee's home computer outside of office hours.

**When is vicarious liability an issue?**

Under state and federal anti-discrimination law, conduct is only required to be 'in connection with' employment, which is broader than the test referred to above in relation to dismissal. This means that, if an employee makes a complaint to the relevant anti-discrimination body, their employer may be held vicariously liable for the offending conduct of its employee, unless the employer can demonstrate that it took all reasonable steps to prevent the conduct from occurring.

An illustrative case involved the rape of an employee by a co-worker at his private residence following after-work drinks. The alleged sexual harassment (being the rape) was found to be 'in connection with' the employment, as it was a culmination and continuation of earlier incidents of sexual harassment which had clearly occurred in the workplace. The co-worker had previously sexually harassed the employee during a training course. It was held that the employer had failed to follow its own policies and codes of conduct and its investigation of the employee's complaints was "almost farcical". The employer had not therefore taken all reasonable steps to prevent the conduct, and was consequently found to be liable for the sexual harassment.

This case can be contrasted with a recent case in Queensland in which sexual harassment was made out against a co-worker but no liability was attributed to the employer. The employer was found to have taken all reasonable steps to educate its workers about sexual harassment, including providing training courses and a handbook containing guidance about how employees should manage a situation where they received unwanted attention.

**Lessons for employers**

Before proceeding to dismiss an employee in connection with out of hours misconduct, employers must first consider:

a) whether the conduct is such that it is incompatible with the employee continuing to perform their duties effectively;

b) whether the conduct has adversely affected the workplace, including the reputation of the business or efficient operation of the workplace;

c) whether the conduct is so serious as to irreparably damage the relationship between the employer and employee; and

d) whether dismissal is the most appropriate disciplinary outcome.

To defend a claim of vicarious liability for the actions of one of its employees, an employer must be able to demonstrate that it took reasonable steps to prevent the employee from committing acts of discrimination or harassment and that its response to any complaint was appropriate. This is a very high threshold to meet.
Importantly, for an employer to successfully demonstrate that it has taken "reasonable steps", its policies need to include:

a) a statement that sexual harassment and discrimination is against the law;

b) Identification of the relevant legislation; and

c) clear words that the employee may be subject to disciplinary action for sexual harassment or discrimination and that this will be also be the case if it occurs at certain work related events or activities related to the employment.

Please contact a member of the DLA Piper Employment group for more information.

1) [1998] AIRC 1592.
2) [2013] FWC 81.
4) McManus v Scott-Charilton (1996) 70 FCR 16,

AUTHORS

Rick Catanzariti
Partner
Melbourne | T: +61 3 9274 5000
[email protected]