Lessons from the ghosts of Christmases past

How to avoid getting Scrooged by your employees

"Drinking makes such fools of people, and people are such fools to begin with, that it's compounding a felony."

— Robert Benchley

Christmas in July has come and gone, marking the end of another round of workplace celebrations, and the slow march back from solstice to silly season. During this intervening period of calm it is perhaps timely to remind employers and employees alike of the perils and pitfalls of the infamous work Christmas party.

Such events are intended to allow staff to mix and mingle while celebrating all that was achieved over the course of the year. Yet often it is also used as an excuse to take advantage of a bottomless bar tab, and an excess of social lubricant has been known to cause some slip-ups.

The recent case of *Keenan v Leighton Boral Amey Joint Venture*[1] provides a stark illustration of what can happen when an employer fails to take the proper precautions before, during, or after a Christmas work party. Some may also learn lessons from Mr Keenan's conduct.

The *Keenan* case involves an employee who helped himself to the unlimited supply of alcohol at a staff Christmas function before embarking on what could be described as a "rampage" of misconduct, swearing at managers and making overt sexual advances to female colleagues. The employer dismissed Mr Keenan in the New Year, but the Fair Work Commission (FWC) ordered his reinstatement on the basis that much of the conduct occurred "out of hours".

The facts

Mr Keenan was a 'Team Leader' for his employer, Leighton Boral Amey Joint Venture (LBAJV), a company which carries out road maintenance work in Sydney under a contract with the NSW Roads and Maritime Services.

LBAJV held a Christmas Party at a hotel between 6pm and 10pm in December 2014. Before the party, the employees were warned that LBAJV's policies and procedures were to apply during the function.

During the party (which was not supervised by any LBAJV manager), the hotel staff were obliged to serve alcohol in compliance with their responsible service of alcohol requirements. However, in practice, the service of alcohol was not appropriately restrained or regulated, to the point where later in the night the attendees were simply left to help themselves.

Mr Keenan certainly did "help himself", downing around ten beers and one vodka and coke between the hours of 7pm and around 11:15pm.

Over this period, to summarise the conduct in brief, an intoxicated Mr Keenan:

1. told a director to "*f— off*" when he attempted to join a conversation;
2. called a manager a "*c—*";
3. asked a colleague "*Who the f— are you? What do you even do here?*";
4. aggressively and repeatedly requested a female colleague's phone number and said to intervening colleague, "*I'm talking to her now f— off*";
5. called another female colleague a "*b—*";
6. told another female colleague "*my mission tonight is to find out what colour knickers you have on*"; and
7. grabbed the face of another female colleague to plant an unprovoked and unsolicited kiss on her mouth.

A number of employees complained about Mr Keenan's conduct on the following Monday, and LBAJV carried out a cursory investigation of the incidents. LBAJV then had a meeting with Mr Keenan to discuss the allegations, although none were put to him in sufficient detail to allow him to properly respond. In the New Year LBAJV terminated Mr Keenan's employment, citing only two of the incidents — the requests for the phone number, and the unsolicited kiss.

Mr Keenan applied to the FWC with a claim that his dismissal was harsh, unfair, or unjust. Despite finding that each of the allegations had in fact occurred, the FWC still held the matter in Mr Keenan's favour, granting an order for his reinstatement.

This startling result was based predominantly on the FWC's finding that much of the conduct did not occur "within the course of Mr Keenan's employment".

So where does that distinction lie?

The Christmas party

It is well established that conduct at a work party itself (be it for Christmas or otherwise) constitutes conduct that is in the course of employment.[2] Moreover LBAJV gave prior notice to the employees that its standards of conduct would apply at the function (being an admissible practice for those not already in the habit of doing so).

The FWC found the function's "temporal and physical boundaries" to be between

the hours of 6pm and 10pm, within the confines of the function room. The problem for LBAJV, as I elaborate upon below, was that most of the incidents occurred *after* 10pm, when a number of staff (including Mr Keenan) moved to the upstairs bar to continue socialising.

There was one incident occurring before 10pm that the FWC did consider would have been a valid reason for dismissal — the "*Who the f— are you? What do you even do here?*" comment to a colleague was found to be aggressive, intimidatory, and bullying behaviour. Yet because the substance of the allegation was not communicated to Mr Keenan prior to his dismissal, he did not have a proper opportunity to respond to it and so it could not form a valid basis for the dismissal.

The FWC held that the other incidents occurring at the function itself were not sufficiently serious. Those incidents included Mr Keenan's repeated request for the phone number of a female colleague (which was one of the two incidents cited in his letter of termination).

Kick-ons

The remaining incidents, including the unsolicited kiss, occurred after 10pm at the hotel's upstairs bar. To determine whether Mr Keenan's conduct after that point still constituted conduct "in the course of his employment", the FWC looked to common law principles, which have been formulated in a way that restrain employers from intruding too far into the personal lives of their employees.

In holding that these "kick-ons" did *not* occur "in the course of Mr Keenan's employment", the FWC considered that they were not in any sense organised, authorised, proposed, or induced by LBAJV. Nor was there anything in LBAJV's policies that suggested they applied to social activities of that nature. Nor was there evidence that LBAJV notified their employees that the policies would continue to apply until all employees were safely at home.

Therefore everything that happened after 10pm outside the function room was merely "incidental" to Mr Keenan's employment — it occurred in a "private social setting", albeit involving persons sharing a common employer who had just attended an official Christmas function.

Nevertheless, "out of hours" conduct can still form a valid basis for dismissal if it is sufficiently serious. The threshold is that the conduct must be of "such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee".[3]

To clarify that test, the common law has established a set of *exceptional circumstances*, under which any such conduct must fall. Those exceptional circumstances are trifold:[4]

1. "*a breach of trust and confidence*" — that is, the conduct is objectively likely to cause serious damage to the relationship between employer and employee;
2. "*a breach of the employer's interests*" — that is, the conduct damages the employer's interests; or
3. "*a breach of duties*" — that is, the conduct is incompatible with the employee's duty as an employee.

LBAJV argued the point on the basis of the second set of circumstances — that Mr Keenan's conduct opened them up to vicarious liability for sexual harassment under the *Sexual Discrimination Act 1984* (Cth) (SD Act), and therefore had significant potential to damage their interests.

The FWC accepted that where an employer is vicariously liable for the conduct of an employee outside of working hours, that does create a significant connection between the conduct and the employment.

Under the SD Act, it is "unlawful for an employee to sexually harass a fellow employee,"[5] and the FWC agreed that Mr Keenan's conduct in giving his female colleague an unsolicited kiss did constitute sexual harassment.

However for LBAJV to be vicariously liable under the SD Act for that conduct, where it occurs *outside* of working hours and outside the workplace, there must be some "connection" between the circumstances of the harassment and the employment[6] — it is not enough that the common employment is unrelated or "merely incidental" to the circumstances of the incident.

The following cases give guidance as to when an employer *was* found to be vicariously liable for the sexual harassment of its employee:

1. for conduct occurring in an apartment made available to two employees while they attended a work related conference (the situation in which they were placed provided the opportunity for the conduct);[7]
2. for conduct occurring at accommodation provided by, and under the exclusive control of, the employer, as an incident of employment;[8] and
3. for conduct occurring at a private home, where the incident occurring there was the culmination (i.e. extension or continuation) of a series of earlier incidents that took place in the workplace.[9]

The test in the SD Act, "*in connection with* the employment of the employee", is clearly wider than the common law test of "*in the course of* employment". Even still, the FWC considered that Mr Keenan's conduct was not "in connection" with his employment for the same reasons — that is to say:

- there was an absence of any organisation, authorisation, or inducement by LBAJV to engage in the kick-ons;
- it was in a public place; there was nothing in the policies to say that they applied to social activities of this nature; and
- LBAJV failed to communicate to the employees the expectation of adherence to the policies until they were home that night.

Essentially, the kick-ons were a "private social setting", and the fact that the attendees were all there because they had all just been at the work Christmas function together was not enough for it to be considered "in connection with their employment" for the purpose of the SD Act. If LBAJV could not be vicariously responsible for sexual harassment occurring there, then Mr Keenan's "private" conduct could not damage its interests, and so it could not form a valid basis for his dismissal.

The FWC said that the conduct *could* have damaged the employer's interests if the sexual harassment affected the victim's capacity to perform their duties,[10] but LBAJV did not submit any evidence showing any actual or potential adverse workplace effects resulting from Mr Keenan's conduct.

In considering why the dismissal was harsh, unjust, or unfair, the FWC saw that there were a number of alternative disciplinary measures available to LBAJV that would have been equally effective.

Furthermore, the presiding member, Vice President Hatcher, felt compelled to address a particular "exacerbating factor":

> "In my view, it is contradictory and self-defeating for an employer to require compliance with its usual standards of behaviour at a function but at the same time to allow the unlimited service of free alcohol at the function".

What can an employer do to avoid a similar result?

1. Amend their policies so that they expressly cover events following work functions;
2. Notify their employees that such policies will apply to that extent prior to each function;
3. Notify their employees that any "kick-on" events, whilst not prohibited, are not endorsed by the employer;
4. Limit the dispensation of alcohol, or taking into account the practicalities of the festive season, at least have some system in place to sensibly regulate the ability of employees to abuse the system;
5. Delegate a supervisor for the function;
6. Properly particularise any allegations of misconduct, and put them to the offending employee;
7. Provide evidence of the effect of any misconduct on the victims' work; and
8. Properly consider other disciplinary alternatives to dismissal.

Following these simple processes may go some way to ensuring that after the next work Christmas party, coal will be the only thing at risk of being 'sacked'.

John Wilson, Managing Legal Director, Bradley Allen Love

Endnotes

1 [2015] FWC 3156.

2 *Thomas & Westpac Banking Corp* (1995) EOC 92-742.

3 *Rose v Telstra Corporation Limited Print Q9292* [1998] AIRC 1592.

4 *Rose v Telstra Corporation Limited Print Q9292* [1998] AIRC 1592.

5 *Sex Discrimination Act 1984* (Cth), section 28B(2).

6 *Sex Discrimination Act 1984* (Cth), section 106.

7 *Leslie v Graham* [2002] FCA 32.

8 *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130.

9 *Lee v Smith & Ors* [2007] FMCA 59.

10 *McManus v Scott-Charleton* (1996) 70 FCR 16.