



Risky Business

The legal hazards of relationships in the workplace

“Employers cannot stop their employees forming romantic relationships.” — Senior Deputy President Jonathan Hamberger, Fair Work Commission¹

Since there have been workplaces, there have been workplace romances. Given many workers spend more waking hours each day in the office than anywhere else, it is only natural that relationships blossom around the water cooler. Yet as a slew of scandals over the past year have demonstrated, love in the workplace can have considerable adverse consequences for employers and employees alike.

In the most recent of these, two senior AFL executives resigned — perhaps following some persuasion — after having affairs with younger colleagues. But unlike another notorious scandal of late, involving a relationship between Seven boss Tim

Worner and his executive assistant Amber Harrison which ended in litigation,² the AFL saga is unusual.

Neither of the AFL executives, Simon Lethlean and Richard Simkiss, supervised or otherwise exerted direct influence over their workplace lover, such that the usual conflict of interest concerns were absent. While both were married, infidelity does not provide grounds for dismissal. Nor were there any suggestions of sexual harassment, an all too frequent conclusion to unrequited desires in the workplace. Finally, AFL CEO Gillon McLachlan admitted that the relationships had not impacted on productivity: “They are both high-performing executives.”³

Why, then, were they shown the door? What was so “inappropriate” (in McLachlan’s words) that the

two men lost their jobs? Of course, Lethlean and Simkiss in fact quit, such that the AFL is not in need of legal justification. But whatever one thinks of the scandal — a *Guardian Australia* columnist described it as “patronising moralism” from the AFL⁴ — it raises interesting legal questions.

This article will begin by considering the proposition that an employer has limited ability to regulate the out-of-office activities of an employee. It then reviews the areas in which workplace relationships legitimately attract the attention of employers: conflict of interest, sexual harassment and reputational damage. It concludes by contemplating two unresolved questions: what disclosure demands can be made of staff, and could an employer prohibit relationships between employees?

Out-of-hours: The rule in *Rose v Telstra*

There was a time when employers exercised almost total control over the lives of their employees, when the predominant employment paradigm was that of master and servant.⁵ Evelyn Atkinson writes: “Like wives and children, servants in early modern England were subject to their master’s authority in exchange for his care, and had limited legal personhood in their own right.”⁶ Until the end of the 1700s, an employer could even assault an employee for misconduct without legal ramifications.

By the early 19th century, Enlightenment concepts of freedom of labour and freedom of contract led to the emergence of a contractual employment model.⁷ An employer could no longer, “by way of correction, even moderately beat his servant”.⁸ While vestiges of the master and servant approach persisted — some argue traces are still present today⁹ — employees gained a host of rights, including to a private life.

Of course, the dividing line between areas in which an employer can and cannot regulate their employee is imprecise. Courts have recognised that, even in 2017, employers retain a degree of legitimate interest in what employees do in their own ‘free’ time. To suppose otherwise would lead to workplace anarchy: employees could moonlight for competitors, publicly criticise their employer and otherwise misconduct themselves with the protection of an ironclad out-of-hours defence.

In the 1999 decision of *Rose v Telstra Corporation Ltd*,¹⁰ Vice President Iain Ross expounded what

has become the accepted test for determining when an employer can encroach on an employee’s private life. The appellant in that case was on work-related travel when, one evening, he became involved in a serious altercation with a colleague. The scuffle led to a broken hotel window, and the colleague was even convicted of assault. Concerned about its reputation, Telstra dismissed Mr Rose.

After tracing the historical development of workplace regulation, Vice President Ross observed that the “shift in the nature of the employment relationship has implications for an employer’s capacity to discipline an employee in respect of out of work conduct.”¹¹ He then offered a three-part test for determining whether an employee may be dismissed for conduct occurring outside the workplace:

- the 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 duty as an employee.

“In essence,” Vice President Ross continued, “the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.” On the facts, Mr Rose’s conduct did not fall within one of these categories. Vice President Ross thus concluded: “I do not doubt that the applicant’s behaviour on 14 November 1997 was foolish and an error of judgment.

He made a mistake. But employers do not have an unfettered right to sit in judgment on the out of work behaviour of their employees. *An employee is entitled to a private life.*”¹²

The *Rose* test has since been applied in a range of out-of-hours contexts, from employees being fired for expressing job dissatisfaction on social media to termination due to a domestic violence conviction.¹³ It is also apposite in cases involving an employer’s attempt to pre-emptively regulate workplace relationships or respond to their consequences.

Employer concerns

Notwithstanding the words of caution in *Rose*, there are several situations where employers may have legitimate grounds to intervene in office romance. This section will consider three areas of heightened concern.

Conflict of Interest

Workplace relationships often raise the spectre of a conflict of interest. In the employment setting, a conflict exists where an employee has a duty to the employer and a competing private interest that is, or might be, incompatible. As employees owe obligations of loyalty and fidelity to employers, and many organisations have explicit conflict of interest contractual clauses or policies, the presence of an undisclosed conflict may have considerable adverse ramifications. These issues were central in *Mihalopoulos*, a Fair Work Commission case involving a workplace relationship which soured to such an extent that an apprehended violence order (AVO) was taken out against the applicant.

Senior Deputy President Jonathan Hamberger began his consideration by stating the obvious: “Employers cannot stop their employees forming romantic relationships.” He continued, though, that “in certain circumstances, such relationships have the potential to create conflicts of interest. This is most obviously the case where a manager forms a romantic relationship with a subordinate — especially where the manager directly supervises the subordinate.” The vice inherent in such a situation is similarly self-evident: “It is virtually impossible in such circumstances to avoid — at the very least — the perception that the manager will favour the subordinate with whom they are in a romantic relationship when it comes to issues such as performance appraisals, the allocation of work, and promotional opportunities.”¹⁴

Mr George Mihalopoulos was Westpac’s bank manager in Wollongong. He became romantically involved with a direct subordinate, and the relationship progressed to the stage where they were living together. Mr Mihalopoulos gave his partner positive performance reviews, recommended her for promotions and lobbied for her to receive a salary increase. Rumours eventually circulated around the office, and when asked explicitly by a supervisor the applicant denied any tryst. After the relationship broke down, he admitted the truth and was also charged with breaching an AVO. Westpac subsequently terminated his employment.

Senior Deputy President Hamberger rejected Mr Mihalopoulos’s unfair dismissal application. He found that the relationship “had the potential to create a conflict of interest”, and

his failure to disclose it — along with “subsequent (and repeated) dishonesty” — amounted to a valid reason for firing the bank manager.¹⁵

While conflict of interest cases will often be factually dependent, with much turning on the wording of policies or contractual clauses and the particular facts, *Mihalopoulos* demonstrates that undisclosed workplace relationships can end in tears and termination. The key factor, though, was the lack of disclosure (and concomitant dishonesty), not the relationship itself. As Senior Deputy President Hamberger noted: “Employers have a reasonable expectation that employees will disclose any potential conflicts of interest, so that they can be appropriately managed.”¹⁶

Sexual harassment

Another risk is that of vicarious liability for sexual harassment, whether occurring when the affections of one staff member are not reciprocated or after a relationship goes sour. The Australian Human Rights Commission advises: “As an employer, it is important to ensure that [attraction in the workplace] do[es] not lead to incidents of sexual harassment ... The fact that two individuals have been in a consensual sexual relationship does not mean that sexual harassment may not occur following the end of the relationship.”¹⁷

Section 106 of the *Sex Discrimination Act 1984* (‘SDA’) provides that, where an employee acts contrary to the legislation in connection with their employment, their employer is vicariously liable unless they took ‘all reasonable steps’ to prevent the employee from acting in that manner.

Sexual harassment is an often-litigated form of sex discrimination prohibited by the *SDA*.

Over the past decade, several landmark decisions have amplified the threat of vicarious liability claims against employers. Firstly, a series of cases, beginning with *Leslie v Graham* and culminating in the judgment of Federal Magistrate Michael Connolly in *Lee v Smith*, have applied an expansive approach to the *SDA*’s scope.¹⁸ As Brook Hely writes: “[T]he federal authorities have adopted a consistently broad approach to the nexus requirement ... [and] have not confined the scope of s 106(1) to conduct occurring whilst employees are ‘on-duty’ or on work premises.”¹⁹ The consequence for employers is that they may be held liable for sexual harassment that occurs in a private setting, provided the conduct “can be seen as an extension or culmination of events occurring within the workplace”.²⁰ These authorities have evident applicability in the workplace relationship context.

Secondly, the Full Court of the Federal Court’s seminal decision in *Richardson v Oracle Corporation Australia Pty Ltd* has greatly increased the likely damages available in sexual harassment claims.²¹ While between \$10,000-\$20,000 might once have been commonplace for general damages in successful suits, *Richardson* elevated that range to six figures. The financial risk employers now face is therefore considerable.

Short of prohibiting workplace relationships (a topic discussed below), employers can protect themselves from liability by introducing an appropriately-tailored

policy, providing training and being responsive to concerning conduct. While the courts have stressed that what constitutes ‘all reasonable steps’ will always be circumstance-specific, these measures would provide a strong defence.

McManus v Scott-Charlton offers guidance as to how an employer might appropriately manage sexual harassment allegations.²² In that case, a public servant was directed to stop contacting a colleague outside of his official duties after complaints had been made. The employee disobeyed, leaving a memorable message on the colleague’s answering machine: “I’ve always sort of fancied you so I [thought] I might as well tell you that ... um ... if you’re ever free I wouldn’t mind marrying you.”²³ Graham McManus was disciplined, and subsequently contested the validity of the direction, suggesting it impermissibly intruded on his private life. Justice Paul Finn rejected the application, holding that “once an employee’s conduct can be shown to have significant and adverse effects in the workplace ... that conduct becomes a proper matter of legitimate concern to an employer.”²⁴

Reputational damage

Finally, a savvy employer might rightly harbour concerns that workplace relationships could end up in the headlines, with reputational consequences for the organisation. Recent history suggests this fear is hardly unfounded. Such concerns might help justify a stringent employment policy regarding workplace romance, or motivate disciplinary actions when soured office relationships impact the employer.

However, case law suggests that courts and industrial tribunals will be cautious to accept reputational risk as a free-standing ground to justify dismissal. In one infamous case involving the viewing of pornography at work, the employer (Australia Post) argued that the threat of reputational damage was a valid ground for dismissal. The Full Bench of the Fair Work Commission (Vice President Michael Lawler and Commissioner Anna Cribb; Senior Deputy President Hamberger dissenting) held that the mere risk of harm was insufficient.

“There was no evidence of any reputational damage,” the judgment stated. Moreover, the employer’s conduct will also be a relevant factor: “Australia Post’s reliance on the risk of reputational damage needs to be addressed in the light of its apparent failure to monitor compliance with the relevant policies”.²⁵

Even when the threat of reputational harm constitutes a valid reason, a dismissal may still be harsh, unjust or unreasonable. In *Anderson v Thiess Pty Ltd* the applicant was terminated after sending an email that spoke of Islam in disparaging terms. At first instance Deputy President Ingrid Asbury agreed that the respondent had a valid reason: “The email had real potential to damage Thiess’ reputation in Australia and internationally”.²⁶ The Full Bench agreed: “[The email,] if publicly exposed, had the potential to damage Thiess’s reputation as a company with a multicultural workforce and international operations which extended to Indonesia, a Muslim-majority nation.”²⁷ Nevertheless, Deputy President Asbury held that the dismissal was harsh, and this was not challenged on appeal. In another

case, the spectre of reputational damage arising from public urination similarly did not prevent a finding that the dismissal was harsh.²⁸

The takeaway message from these cases is that *potential* reputational damage as a reason for dismissal will rarely survive challenge.²⁹ Employers must ground termination for reputational harm caused on real evidence, rather than mere concern. Of course, such issues apply to employees earning below the unfair dismissal cap (\$142,000 until 30 June 2018). For high-earning executives, contractual considerations will apply.

Two thorny questions

Lastly, this article considers two vexing issues: can an employer demand employees disclose workplace relationships, and could an employer institute a complete prohibition on office flings? There is of course nothing to prevent an employer including express contractual clauses to either effect. However, in the absence of contractual obligations, both questions proceed from the same starting point. Whether universal (located within a non-contractual workplace policy) or specific (a command to a particular employee), a direction will be valid if it is A) lawful and B) reasonable.³⁰

Disclosure

In Australia, requiring employees to disclose relationships with a workplace connection is lawful. In other jurisdictions, such disclosure obligations might sometimes offend privacy rights and thereby be invalid. However, a right to privacy

does not yet exist in Australian jurisprudence.³¹

Whether a direction to disclose is reasonable will be context-specific. As Justice Owen Dixon wrote in *Halliday*:

...what is reasonable is not to be determined, so to speak, *in vacuo* [in a vacuum]. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument ... governing the relationship, supply considerations by which the determination of what is reasonable must be controlled.

For present purposes, this means that the position of the involved employees, the nature of their professional relationship and the risk of a conflict of interest may all be considerations. However, in light of an employer's vicarious liability risks, onerous sex discrimination duties and other relevant obligations, it is probable that a universal disclosure obligation satisfies the reasonableness test in almost all circumstances. Even in large organisations where conflict of interest risks for cross-departmental relationships are low, the practical advantages of requiring complete disclosure would likely convince a judge of such a direction's reasonableness.

A complete ban

While a prohibition on workplace relationships would also face no hurdles satisfying the test's legality limb, the question of reasonableness is more difficult. The pro-employer argument would suggest that it is simply impracticable for an

employer to adequately satisfy their numerous obligations and protect their reputation in the absence of a complete ban; in other words, the risks are too great for anything but. The employee advocate would retort that this is another classic case of employer overreach, this time right into employees' bedrooms.

Unfortunately, there is no Australian case law directly on point. In the United States, "[c]ourts have demonstrated sympathy for the plight of employers facing problems arising from fraternisation between employees."³² One survey of recent American jurisprudence concluded:

The privacy rights of employees typically do not prohibit employers from acting as the dating police by implementing or enforcing a policy against romantic relationships in the workplace. In many, if not most instances, the employer's legitimate business interests in maintaining a peaceful and productive work environment and avoiding liability outweigh an employee's right to privacy.³³

Both this question and, to a lesser extent, that above illustrate the central challenge in regulating office romance: the spectrum of possible cases is too wide for blanket rules to be entirely effective. The reasonableness of a prohibition may differ depending on the circumstances: what is justified for senior executives dating junior subordinates may be unreasonable for a low-level employee romantically attached to a colleague at another office of the same large organisation.

While a complete ban may sit right on the edge of what is reasonable, and its ultimate validity could depend on the disposition of the

judge as much as anything else, American case law does provide helpful guidance. Although the constitutional underpinnings of the right to privacy in the United States makes direct comparison dangerous, "the proposition that employers must act reasonably and consistently, both in the implementation and the execution of anti-fraternisation policies' is sound."³⁴

Conclusion

It is not difficult to feel a degree of sympathy for employers when it comes to workplace romance. On one hand, organisations have onerous legal duties to protect their employees from a range of ills, and those obligations have spread beyond the office. The hefty increase in damages available in sexual harassment cases post-*Richardson* provides considerable financial incentive for employers to minimise risk at all costs. And, as recent scandals demonstrate, headline-hungry journalists are hardly going to consider the nuances of employment law before damaging corporate reputations.

But unnecessary intrusions into the private lives of employees are equally problematic, in this context and elsewhere. Employees like being treated with respect, and infantilising diktats about what staff can and cannot do out-of-hours will hardly boost morale. Overzealous regulation also comes with its own legal risks, as *Rose* and many other unfair dismissal cases since have demonstrated. The rock and hard place cliché is apt.

These competing concerns suggest a nuanced approach to workplace relationships is necessary. A blanket

prohibition may be ineffective and possibly unlawful, while turning a blind eye is not a wise strategy either. Instead, the sage words of Justice Finn ring true.

“I am mindful of the caution that should be exercised when any extension is made to the supervision allowed [to] an employer over the private activities of an employee”, the Federal Court judge wrote in *McManus*. “It needs to be carefully contained and fully justified.”³⁵

John Wilson

MANAGING LEGAL DIRECTOR,
BRADLEY ALLEN LOVE

Kieran Pender

LAW CLERK, BRADLEY ALLEN
LOVE

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Endnotes

1. *Mihalopoulos v Westpac Banking Corporation* [2015] FWC 2087 (15 May 2015) [87] (*Mihalopoulos*).
2. See, eg, *Seven Network (Operations) Limited v Amber Harrison* [2017] NSWSC 129 (22 February 2017).
3. Stephen Drill, ‘AFL’s toxic culture: Sleazy “Top 10” list ranked women by looks’, *Herald Sun* (online), 15 July 2017
4. Gay Alcorn, ‘This is what the AFL calls respecting women? Looks like patronising moralism to me’, *Guardian Australia* (online), 17 July 2017.
5. See Evelyn Atkinson, ‘Out of the Household: Master-Servant Relations and Employer Liability Law’ (2013) 25 *Yale Journal of Law and the Humanities* 205.
6. *Ibid* 219.
7. *Ibid* 220. See also John Howe and Richard Mitchell, ‘The Evolution of the Contract of Employment in Australia: A Discussion’ (1999) 12 *Australian Journal of Labour Law* 1, 2; Mary Gardiner, ‘His Master’s Voice? Work Choices as a Return to Master and Servant Concepts’ (2009) 31 *Sydney Law Review* 54, 67–70.
8. Joseph Chitty, *The Practice of Law in All its Departments* (Henry Butterworth, 1833) 72.
9. Gardiner, above n 7, 80–1.
10. [1998] AIRC 1592; (4 December 1998) (*Rose*).
11. *Ibid*.
12. *Ibid* (emphasis added).
13. *Fitzgerald v Smith* [2010] FWA 7358 (24 September 2010) [52]; *Public Employment Office Department of Attorney General and Justice (Corrective Services NSW) v Silling* [2012] NSWIRComm 118 (31 October 2012) [29].

14. [2015] FWC 2087 (15 May 2015) [87].
15. *Ibid* [101].
16. *Ibid* [90] (emphasis added).
17. Australian Human Rights Commission, ‘Dating in the Workplace’, <<https://www.humanrights.gov.au/quick-guide/12014>>.
18. [2002] FCA 32 (4 February 2002); *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402; [2007] FMCA 59 (23 March 2007).
19. Brook Hely, ‘Open All Hours: The Reach of Vicarious Liability in “Off-Duty” Sexual Harassment Complaints’ (2008) 36 *Federal Law Review* 173, 180.
20. *Ibid*.
21. [2014] FCAFC 82 (15 July 2014) (*Richardson*). See John Wilson, ‘Damages for Sexual Harassment: A New Era?’ (2014) 233 *Ethos: Journal of the ACT Law Society* 20, 20–1.
22. (1996) 70 FCR 16 (*McManus*).
23. *Ibid* 30.
24. *Ibid* 28.
25. *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 (28 August 2013) [91].
26. [2014] FWC 6568 (19 September 2014) [54].
27. [2015] FWCFB 478 (30 January 2015) [28].
28. *Walia v Citywide Service Solutions* [2016] FWC 7814 (9 November 2016).
29. But see *Applicant v Employer* [2015] FWC 506 (16 February 2015) [92].
30. *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601, 621–2 (Dixon J) (*Halliday*).
31. See, eg, *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
32. Rebecca Wilson, Christine Filosa and Alex Fennel, ‘Romantic Relationships at Work: Does Privacy Trump the Dating Police’ (2003) 70 *Defense Counsel Journal* 78, 85. See also C Boyd, ‘The Debate Over the Prohibition of Romance in the Workplace’ (2010) 97 *Journal of Business Ethics* 325.
33. Wilson, Filosa and Fennel, above n 32, 87.
34. *Ibid* 85.
35. (1996) 70 FCR 16, 29.



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