

After hours conduct and its effect upon employment

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Ewin v Vergara (No 3) [2013] FCA 1311

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Ewin v Vergara (No 3) [2013] FCA 1311 at [38]

“The material sent to employees by the applicant through the use of Messenger as out-of-hours conduct had the likely effect of presenting spillage or potential spillage into the workplace – where the employees would then work cheek-by-jowl together – and this in circumstances where they have received induction and instruction as to the values and culture that the respondent was endeavouring to engender.”

Colwell v Sydney International Container Terminals Pty Limited [2018] FWC 174

It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

- 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 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.

Rose v Telstra Organisation

I discern nothing in the decision in Rose which establishes any principle to the effect that, even where an employee has committed a serious crime out-of-hours and away from the workplace, there needs to be established a direct connection between that criminal activity and the person's employment before the commission of that crime provides justification for the dismissal of the employee...

Hansen v Secretary of the Department of Transport

[43] “I am also satisfied that Legal Aid had a legitimate interest in protecting its reputation. The risks of damage to Legal Aid’s reputation were outlined in the letter from Legal Aid to the applicant dated 1 December 2017. These risks were highlighted in the evidence of Mr Nickols in cross-examination”.

[44] “In the context of Legal Aid’s organisation and activities, the applicant’s conduct had the potential to bring Legal Aid into disrepute given the disturbing criminal acts of which he was found guilty and the serious nature of the crime”.

[45] “I do not accept the applicant’s submissions that the risk of damage to Legal Aid’s reputation was overstated”.

Sandilands v Industrial Relations Secretary

[146] “Allegations of sexual harassment must be taken seriously by employers. Indeed they may be held liable for sexual harassment by their employees even where this occurs out of hours and away from the workplace. That is why I have rejected the argument that there was no connection between Ms Streeter’s conduct and her employment. Moreover there is no real issue that at least some of her behaviour during the night in question was inappropriate and inconsiderate to her fellow employees, especially Ms Andrews, Ms Hyett and Ms Barrett”.

Streeter v Telstra

Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Section 351 *Fair Work Act*

If

(b) the FWC is satisfied that:

(i) the aggrieved person has been sexually harassed in contravention of Division 2 by one or more persons; and

(ii) there is a risk that the aggrieved person will continue to be sexually harassed in contravention of Division 2 by the person or persons;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed

Section 527J Fair Work Act

The first step in the risk management process is to identify the psychosocial hazards which may arise from the work context or work content. This involves identifying the aspects of work and situations that could potentially harm people and why these may be occurring. It should also find where hazards and risks are, why they are not effectively managed, and opportunities to improve the quality of the existing controls.

SafeWork Code of Practice

It never ceases to amaze me that employees often plead a lack of training of self-evident unacceptable conduct, such as bullying or harassment, to justify, in some bizarre way, their behaviour. This is particularly so given the extensive media and community focus on the effects of threatening or harassment behaviour in life generally and the workplace specifically. In my view, an employee does not need training to know that you do not accuse a subordinate of damaging your vehicle, without a skeric of evidence. Further, an employee does not need training to know that you do not scare or threaten a young subordinate by using expressions such as 'Watch out' and 'you don't know how furious John is'. No employee needs training to know that it is wrong, offensive and inappropriate to Facebook friends to accuse a subordinate of malicious damage, without any evidence and refer to that person as a 'little fucker' (knowing that your Facebook friends will know who it is referring to).

(1) An employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.

Section 333M Fair Work Act

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