

Employment Law Update

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Out of Hours

An employer may fairly take disciplinary action when an employee conducts himself or herself inappropriately at work. For example, Employment Relations Authority determinations confirm that excessive internet use by an employee during work time may justify disciplinary action, so long as a fair process is followed.

But what about employee misconduct outside of work? To what extent can an employer take action when an employee misbehaves in his or her own time? This update discusses two determinations showing the way the Employment Relations Authority deals with the issue of "out of hours" misconduct generally.

We conclude with a discussion of a relatively new form of "out of hours" activity - the publication of derogatory comments on blogs and social networking sites such as Facebook. Whether discipline (including dismissal) may be justified in such circumstances is an untested issue in New Zealand employment law, however an overseas case suggests employers may well be justified in disciplining employees for their "out of hours" online activity.

WHEN IS DISCIPLINARY ACTION JUSTIFIED?

It may initially seem unfair to allow an employer to discipline an employee for conduct off the job, especially when the employee's actions have no apparent impact on performance at work. However, past cases suggest the two spheres are not so easily separated.

Strictly speaking, out-of-work activities for many employees will already be restricted to some extent by the terms of their employment agreements - for instance, by the obligation of confidentiality or a restraint of trade, designed

to prevent employees from acting in ways that might damage the employer's business.

However, an employee's actions need not pose a *commercial* threat in order to justify disciplinary action. Regardless of the time and place in which it occurs, as long as an employee's conduct is connected in some way to their employment, the employer may be justified in taking disciplinary action. As the Court of Appeal has stated:

It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason that undermines the trust and confidence necessary between employer and employee (*Smith v Christchurch Press Company Limited* [2000] 1 ERNZ 624).

Two recent examples illustrate this connection in practice.

The Dunedin firefighter

An Employment Relations Authority determination last year demonstrates that a sufficient connection may be established even when there is no apparent connection associating the individual with their employer. The determination concerned the actions of a Dunedin-based firefighter while on an employment-related training course in Rotorua. The firefighter went to a bar one night with his colleagues. He later visited another bar on his own and became involved in an altercation. He was arrested on charges of indecent assault. After a series of investigatory meetings, he was summarily dismissed by his employer.

The employee claimed that the incident had not affected his ability to do his job or successfully complete the training course. Furthermore, he claimed that as his actions occurred outside of work hours and away from the region in which he was employed, they did not bring the Fire Service into disrepute.

The Authority took a different view and upheld the dismissal. Aside from the issue of disrepute, the employer was concerned at the effect of the employee's actions on his relationships within the Fire Service - in particular, the resulting loss of trust held by the Service and the employee's colleagues. This concern was considered reasonable, given the "particularly high standard of personal integrity" required of employees in the Fire Service. (*Homan v Dunedin Fire District A division of the New Zealand Fire Service* Employment Relations Authority, Christchurch, CA57/08, 6 May 2008, Member Montgomery)

The small-town breakfast host

The small size of the employee's community formed the basis for a similar outcome in another Authority determination. A Tokoroa breakfast radio host was dismissed in part for his inappropriate conduct during and after an AGM held by a community-based Trust (an organisation unrelated to his job). At one point during the meeting, the Mayor (who was chairing the meeting) declined to answer a question relating to Council spending. The radio employee loudly and repeatedly called for the Mayor to answer. When he was later reprimanded by his manager (who was also at the meeting) he responded by loudly and angrily calling her "...a joke, just a joke" within earshot of other attendees, including the Mayor.

In his defence the employee claimed to have attended the meeting "in his personal capacity as a citizen of Tokoroa", not as a representative of the station. The Authority disagreed and upheld the dismissal. The employee had attended the AGM wearing clothing with the station's logo and sat with others from the media. More importantly (and as acknowledged by the employee himself) he was a public figure living and working in a small community and in that context it was "not too long a bow for a local person to unwittingly draw" that he was there representing the station. (*Dryden v The Radio Network of New Zealand Limited* Employment Relations Authority, Auckland, AA 9/09, 14 January 2009, Member Campbell).

Blogging - Virtual misconduct?

Many Employment Relations Authority determinations deal with misconduct in the form of excessive or inappropriate use of the internet and email at work. What about internet use outside of work? In particular, can employers discipline employees for comments they post on the internet during their own time?

At times, the line between 'virtual' and 'real' can seem blurry - think of the 43 year-old woman in Tokyo who found herself arrested (in real life) after she "killed" her online husband (in a virtual game world) last year.

Blogging is another (slightly less dramatic) virtual action that may lead to repercussions in the real world. Despite

being a little-explored area in New Zealand employment law, it would seem entirely possible for an employee's blogged comments posted in their own time to damage an employment relationship or bring an employer into disrepute.

The Employment Relations Authority has been willing to allow employers to take action regarding employees' blogging behaviour. A determination released early last year involved a former McDonald's employee who posted disparaging comments on his blog about his workplace, employer and former colleagues. McDonald's sought an injunction and the Authority ordered accordingly, effectively banning him from posting any further comments regarding McDonalds generally, the branch where he worked, the owner and any current or past members of staff. (*Kaikeri Corporation Limited v Davis* [unreported] Employment Relations Authority, Auckland, AA5/08, 14 January 2008, Member Wilson)

An overseas approach

A Canadian decision from the Alberta Arbitration Board illustrates one possible approach to dealing with a blogging-related dismissal. The case involved an employee who was dismissed by her employer for posting derogatory comments online about her workmates and workplace. The comments made included reference to her department as a "lunatic asylum", her supervisor as "Nurse Ratched" and the "lunatic in charge", and management as "imbeciles and idiot savants".

The employee was dismissed on the basis that her actions had damaged the employment relationship beyond repair and potentially harmed the employer's reputation.

Despite the fact that the blog did not identify her co-workers by their actual names, the majority of the Arbitration Board found for the employer, viewing the comments as "inherently destructive to workplace relationships and inimical to the normal expectations of respect and dignity to which people are entitled when they come to work". The Union representing the employee had argued that few in the workplace had even read the blog at the time it was discovered by the employer. However, this was not the issue:

the issue is their content and public access to that content. ... Had management not intervened, there would have been nothing to prevent other Department members from reading them once word of the blog spread. Furthermore, one has no way of knowing how many other people, within the provincial government, in Alberta as a whole, or beyond, had read the blogs. The point is, once the blogs were posted, they were in the public domain and the Grievor lost control over who would read them.

While the employee was entitled to express her thoughts on the internet and hold opinions about her colleagues,

the public display of those comments justifiably brought consequences within the employment relationship. (*Government of Alberta and Alberta Union of Provincial Employees - Grievance of R (Contents of Blog (2008) AGAA No 20)*)

Actions must be justified

Employers will be held to the standard of justification set out in the Employment Relations Act - that is, the employer's actions, and how they acted, must be what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or disciplinary action took place.

While the above discussion concerns the substantial justification (or reason) for disciplinary action, employers must also ensure their actions throughout the disciplinary

process are similarly justified. While misconduct outside work is not necessarily beyond the reach of an employer's ability to discipline, employers should be sure to adopt a fair procedure by thoroughly investigating the suspected misconduct and ensuring the employee is given a fair opportunity to respond to any allegations before any discipline occurs.

If the requisite connection can be found between an employee's misconduct and their employment, through the use of a fair process, their employer will be justified in taking disciplinary action.

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