



Road Rage Revisited

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In The Advocate No 217 (April 2013) we reviewed the Employment Relations Authority decision **Hallwright v. Forsyth Barr Ltd** considering the consequences of misconduct outside of the workplace. Mr Hallwright appealed that decision and it has now been reconsidered on a de novo basis by the Employment Court.

You will no doubt recall the incident involved. Mr Hallwright was a senior investment analyst for Forsyth Barr. His employment involved occasional media comment on behalf of his employer. In September 2010 he was involved in a road rage incident. While he was granted interim name suppression the incident gained significant national media coverage.

He had an altercation with a fellow driver which concluded with him running the motorist over and then departing the scene. He was charged with causing grievous bodily harm with reckless disregard, carrying a maximum 2 year sentence.

Mr Hallwright did not advise his employer of the incident until late November, just before his interim name suppression was due to be lifted. He did so only in response to questions from them after rumours about the identity of the person reached the employer. Mr Hallwright claimed that he was innocent of the charges and on that basis the employer made it clear that he was reserving judgment until the Court had dealt with the criminal charges.

The matter first came to Court in December 2010. In February 2011 an additional charge of wounding with intent to cause grievous bodily harm was added. Despite a request to keep the employer up to date with the Court process, Mr Hallwright did not advise his employer of this.

On 29 June 2012 Mr Hallwright was convicted of the first charge and dismissed on the second. He advised his employer of his intention to appeal and the employer advised of its intention to address the future of his employment at that time.

There was no appeal and in August 2012 a disciplinary process was initiated claiming serious misconduct being “conduct bringing the Employer into disrepute” and an obligation not to “engage in any activity . . . likely to compromise (his) ability to carry out (his) duties”. The employer made clear their concern at the publicity Mr Hallwright’s conduct had generated:

“ ... It is also clear that there has been extensive publicity about your conduct and the ensuing court proceedings. Almost all of that publicity has been negative and much of it has identified you as an employee of Forsyth Barr. Given the significant media profile that you hold as a result of your position with Forsyth Barr, the degree of media interest and linking in the media reports of the incident and your employment at Forsyth Barr was inevitable. There has been significant client awareness and comment about your actions and subsequent conviction.”

Having considered Mr Hallwright’s input the employer reached a provisional view that two allegations of misconduct were established and that the relationship between the parties was irretrievably broken down. This was based on the following:

- (i) Mr Hallwright was a person of high media interest and was closely associated with Forsyth Barr. As part of his role he had to be available to make media comments.
- (ii) The integrity and probity of senior employees of Forsyth Barr is critical.
- (iii) Feedback from customers and staff indicated that they were disturbed by his conduct and as a result the brand of Forsyth Barr had been unquantifiably damaged.
- (iv) His conduct exhibited a failure to exercise sound judgement.

Mr Hallwright responded asking the employer to delay any decision until after sentencing. This was accepted by the employer on the condition that Mr Hallwright was not to make any public statement on behalf of Forsyth Barr, have any media interaction or interact with any private clients.

He was not sentenced for some 12 months and in August 2013 he was sentenced to 250 hours community work and ordered to pay \$20,000.00 reparation. This was again reported in the media with reference made to his occupation.

In sentencing the Judge made reference to Mr Hallwright’s good character and contribution to the community and further added his view that it would be unfortunate and unfair if this were to result in Mr Hallwright’s loss of employment.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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Concerning the Judge's sentencing notes, the employer wrote to Mr Hallwright concluding that Forsyth Barr had been subject to significant adverse publicity and that his ability to perform his duties had been compromised. He reiterated his earlier findings and determined to dismiss Mr Hallwright.

In concluding that the conduct was correctly found to be serious misconduct the Employment Court considered the law surrounding such external conduct:

"[48] It is well established that conduct that occurs outside the workplace can give rise to disciplinary action. In Smith v Christchurch Press Company Ltd the Court of Appeal stated that:

"Dismissal for serious misconduct cannot be confined to conduct in the course of employment in any but the widest sense. It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal."

[49] It is not necessary that the conduct itself be directly linked to the employment but rather that it have the potential to impact negatively on it. That is why an employee can be held to account for what might otherwise be regarded as a private activity, carried out away from the workplace and with no ostensible connection to the employment or other employees.

"In Smith the Court of Appeal emphasised that

"... there must be a clear relationship between the conduct and the employment. 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 it undermines the trust and confidence necessary between employer and employee."

The Court accepted that Forsyth Barr had genuine concerns that Mr Hallwright's conduct impacted adversely on the company's reputation:

"[53] The required nexus is between the impugned conduct and the employer's business. In the present case the offending generated a considerable amount of negative publicity that repeatedly linked Mr Hallwright to Forsyth Barr, including the headline appeared on the 3 News website following sentencing: "Forsyth Barr analyst sentenced for road rage incident". Given the nature of the company's business, and concerns about maintaining its reputation both in the marketplace and within its client base, there was a sufficient connection between the conduct and the employment."



Mr Hallwright argued that to proceed on the basis that the employer had been brought into disrepute, it was incumbent upon the company to demonstrate actual loss or damage to its reputation. The company was open about the fact that they could not quantify such loss. The Court did not accept this submission agreeing that:

"The employer does not have to wait for a negative impact on the working environment before dismissing an employee when such impact is inevitable. In many situations the potential for such an effect is clear enough."

Mr Hallwright ran a number of ancillary arguments, none of which were accepted by the Court:

- (i) The company failed to take steps to dilute the damage to its reputation by not seeking name suppression. The Court held that by failing to advise the company in a timely manner Mr Hallwright had blindsided them in this.
- (ii) Unbalanced media coverage should not be visited on Mr Hallwright. While it was accepted that some coverage was unbalanced, the Court held that the employer was not required to reach conclusions as to the qualitative or quantitative reasonableness of the coverage.
- (ii) The concerns about his ability to perform his job were impaired by the fact that Mr Hallwright had been allowed to continue with his job in the interim. The Court was clear that it did not accept this. The employer had acted correctly in awaiting the Court decisions at Mr Hallwright's request as an alternative to (for example) suspension. They had initially stood behind him, giving him the presumption of innocence. The delay between the incident and the conclusion of the trial process could not be laid at the employer's door.

In conclusion the Court found that the dismissal was justified, that serious misconduct had been found under the two alleged heads and that the procedures used were reasonable.

The decision provides some clarity to the difficult judgement calls surrounding misconduct outside the workplace.



Christmas Shutdown

We hope you all have a great Christmas and are able to "put your feet up" and relax for at least some part of the break. **Our office will be unattended from midday on Friday 20 December 2013 until Monday 6 January 2014.** If you require assistance during this period please feel free to contact us on our mobile numbers listed in our contact details.