

## “Tis the Season to be Jolly”

While the festive season provides a wonderful opportunity for workplace Christmas functions, it is not uncommon for issues to arise concerning an employee’s “bad” behaviour during these social gatherings. The nature of the conduct can range from physical altercations between workmates after a few beers have been consumed, sexual harassment of one colleague to another, or in the case of a recently reported Employment Relations Authority decision, **Richard Suhr v. Prolife Foods Limited** [2012] NZERA 424, an allegation that the employee (Mr Suhr) had taken 12 cans of beer from the workplace at the conclusion of a Christmas workplace function.

Mr Suhr was engaged by Prolife Foods Limited in a “position of trust”, including having responsibility for some staff and part of the production business.

The facts giving rise to his dismissal occurred on Friday 23 December 2011, the final day of the working year for Prolife. On that day staff attended a Christmas lunch which was held in the staffroom. After the luncheon was over, a number of employees, including Mr Suhr, moved to the carpark area and continued drinking. Mr Suhr and one other employee then drove back to another Prolife site, ostensibly to collect the Christmas presents given to them by their employer. During this visit they also located some beer in a storage cupboard in the administration block and put that into a white plastic bag. A co-worker (Cindy Burke) considered that the employees were behaving suspiciously and she contacted senior managers to ask whether Mr Suhr and his colleague should be in the administration block at that time. Ms Burke, who was viewing this conduct, alleged that Mr Suhr and the other employee appeared to wait until Mr Donovan, a senior manager at Prolife, had left the carpark before they went into the carpark.

One of the managers who was telephoned by Ms Burke was Mr Donovan. Mr Donovan immediately telephoned Mr Suhr and asked him for an explanation. There was a dispute between the parties as to when Mr Donovan had made that call; Mr Suhr alleged it was while they were in the building before the alcohol was taken however the Authority determined that the call could not have occurred until after Mr Suhr had left the building, given the timing of the call to Mr Donovan from Ms Burke, which was after Mr Suhr had left the building. During this call Mr Suhr denied having taken anything and that he had not found the beer he was looking for.

Mr Sean Lambly, the Operations Manager, was also made aware of what Ms Burke had viewed and he subsequently spoke to Mr Donovan who advised the content of his call with Mr Suhr.

Mr Lambly then telephoned Mr Suhr and asked him if he had removed alcohol from the site, at which time Mr Suhr immediately admitted that he had done so. Mr Lambly then required that Mr Suhr return to Head Office for a meeting. At this meeting Mr Suhr was advised that it was alleged that he and the other employee had taken company property without authorisation, that here would be an investigation and a disciplinary meeting the following week when the factory returned to work. At this meeting Mr Suhr was advised to return the alcohol, which he did.

During the course of this discussion Mr Suhr claimed to have obtained permission from Mr Donovan to take the alcohol, during a brief conversation with Mr Donovan during the Christmas luncheon. Further, Mr Suhr also claimed that some weeks earlier Mr Donovan had indicated that Mr Suhr could take the leftover beer. Mr Donovan categorically denied these claims.



A disciplinary meeting was held on 28 December 2011 during which Mr Suhr attended without representation even though Prolife had made him aware of the potentially serious outcome from the meeting and encouraged him to be represented. In the absence of a representative of Mr Suhr’s choice, Prolife insisted that the union delegate (Mr Lui) be present as support for Mr Suhr. During the course of this meeting the explanation advanced by Mr Suhr changed to the extent that he maintained that he had spoken to Mr Donovan, not at the Christmas lunch, but at the warehouse and that it was during this conversation that he was given permission to take the beer.

The Authority noted that the difficulty with this claim “... is that Mr Suhr’s co-worker, in his meeting with the employer, allegedly said nothing of the kind. Indeed, Mr Suhr’s co-worker maintained that they never had any permission for the taking of the alcohol, or at least no permission was granted within his earshot.”

In reaching a decision that Mr Suhr had been justifiably dismissed, the Authority referred to the following evidence:



### Welcome Back to Work !

*We trust you have all had a relaxing festive season. We wish you all the best for a prosperous New Year and look forward to providing you with assistance.*

"[39] Mr Suhr also confirmed that while he had generic permission to remove alcohol, he did not have specific permission to take alcohol from the secure storeroom that he actually removed it from. Nor was Mr Suhr proposing to share the alcohol with anyone other than his immediate co-worker. Mr Donovan had indicated that he was happy to contemplate the leftover alcohol being shared among all the staff, but only on the basis that it was allocated by him personally and certainly never on the basis that Mr Suhr had carte blanche to remove it solely for himself and one other.

...

[43] Perhaps the most graphic evidence before the Authority is that of Mr Lui who attended the final meeting as Mr Suhr's support person, but whose evidence tends to confirm Prolife's conclusion that Mr Suhr was telling a variety of stories about when he got permission to take the alcohol. Mr Lui confirmed that Mr Suhr had offered a variety of different explanations for when he received permission to take the alcohol and indeed his evidence is that he privately (during a recess) challenged Mr Suhr about his inconsistencies but that Mr Suhr's response was to say that his co-worker had been present when Mr Donovan had given permission in the carpark. Mr Lui knew this was untrue because he had already dealt with Mr Suhr's co-worker and been part of his disciplinary meeting when the co-worker had told Prolife that no permission had ever been granted in his hearing. Then, when Mr Lui and Mr Suhr adjourned outside to meet with Mr Suhr's co-worker, Mr Lui says that Mr Suhr changed his position again and indicated that his co-worker was not present when permission was granted."

The primary explanation advanced by Mr Suhr was that he had a "reasonable expectation" that he could remove the alcohol and consume it. In this regard the Authority stated that he had not established that this expectation was reasonable on the following basis:

"[48] . . . First, even on his evidence, the alcohol that he took was from an area that he was not entitled to take it from. Second, there is no evidence at all that Mr Donovan gave any permission for Mr Suhr to take alcohol. At best, all that can be alleged for Mr Suhr is that Mr Donovan contemplated an arrangement where surplus alcohol would be distributed amongst the operational staff. But Mr Donovan told the Authority that his anticipation was that he would physically do that, sharing it out equally, and certainly it was never in his contemplation that Mr Suhr could take it and consume it with one other. Even Mr Suhr acknowledged in his evidence that he ought to have contemplated sharing it with others but did not do so."

The Authority concluded that it was

"[53] . . .satisfied that a fair and reasonable employer could have concluded that Mr Suhr was guilty of serious misconduct in that he removed alcohol belonging to Prolife from the workplace with the intention of consuming it without any permission whatever. Having concluded that it was available to a fair and reasonable employer to reach a decision that this misappropriation of company property was serious misconduct, in view of the company policy identifying theft as serious misconduct and his position in the hierarchy as a manager, a decision to dismiss summarily for serious misconduct was an inevitable consequence."

We trust you are not returning to the workplace to deal with an issue of misconduct arising from pre-Christmas festivities and that you have a positive and productive start to the New Year !!

## Training: Employment Relations Practice Course 2013

Our next Employment Relations Practice Course has tentatively been set down for **Tuesday 9 and Wednesday 10 April 2013**.

Places on this course are strictly limited. Details in regard to the course will be sent out to clients in early 2013.

Further information in regard to the course content can be found on our website – [www.mgz.co.nz/training](http://www.mgz.co.nz/training). If you wish to tentatively book a place for this course please contact us.

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