

# 'Misconduct' Outside of Working Hours

We commonly field inquiries from clients who are seeking advice as to whether it is possible to discipline an employee for conduct which occurs outside of the workplace. These inquiries tend to escalate around the Christmas period due to "bad" behaviour by intoxicated employees at Christmas parties.

Whilst not dealing with the Christmas Party scenario a relatively recent decision of the Employment Relations Authority has dealt with an employee of Child, Youth and Family ("CYF") who was dismissed for conduct which occurred outside of the workplace.

The employee was engaged by CYF as a "Team Leader, Approvals" whose role was to "manage a team of 6 employees whose responsibility was to assess CYF standards of compliance by Non-Governmental Organisations to enable them to work with CYF clients ...".

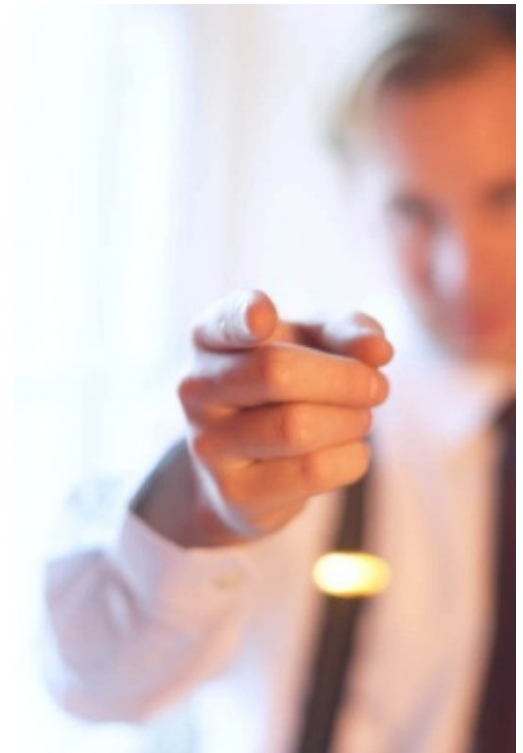
The conduct for which the employee was ultimately dismissed occurred when the employee (Mr "A") accompanied his son ("X") to a tournament at a squash club where the following occurred:

*"Mr A said X, who was losing his match, was behaving inappropriately on the squash court. Following the match, Mr A took X outside the club to commiserate with him for having lost the match and to discuss his behaviour on the squash court. In the course of this conversation Mr A discovered that X had deliberately broken his squash racket. When Mr A reprimanded X for breaking his racket, X had made an insolent and disrespectful comment. In response to this comment, Mr A slapped X across the mouth."*

The employee was observed reprimanding and slapping his son outside of the squash club and there was a subsequent complaint to the CYF Care and Protection Team (CPT) who are obliged to undertake an investigation in accordance with the Children, Young Persons and their Families Act 1989 for complaints of this nature. The Police were also notified and a joint investigation was arranged with the Police's District Child Protection Team. During the course of the investigation, meetings were arranged with the employee, his wife, the son involved in the incident and the employee's two daughters. As a result of this further investigation it was asserted that all three children were regularly hit by both the employee and his wife, including being hit with a broom.

CYF initiated a disciplinary process with the employee in respect to the alleged incident concerning the employee and his son at the squash court including a claim that:

*"The alleged conduct has the potential to bring the Department into disrepute and reflect badly on CYF in our relationship with the Government and the general public."*



At the initial preliminary investigation meeting the employee denied that he had hit his son at the squash courts, claiming that he had only berated him for breaking his racket.

The employer's representatives involved in the disciplinary process then carried out an investigation including:

1. meeting with the people who carried out the CPT investigation who advised that the employee had admitted to them he had slapped his son across the mouth.
2. meeting with the two witnesses to the incident at the squash courts.

The employer's representative reached a preliminary view that the employee's actions amounted to serious misconduct and that the "incident with X was against the fundamental organisational values of CYF, whose rationale was to protect children and support the law against domestic violence."

During the investigation the employee advised that he had been discharged without conviction in respect to the Police charges.

A decision was ultimately made to dismiss the employee with the employer concluding that:

*"... although Mr A's position did not involve him in the hands-on care of children, his position involved him in the management of staff who assessed the suitability of community organisations to work with vulnerable children. Ms Heeney concluded that Mr A's role required him to lead by example internally and externally consistently with the founding principles and values of CYF. Ms Heeney stated that it was her view that physical discipline was contrary to these principles and values."*

In determining that the decision which was reached to dismiss the employee was justified, the Authority referred to the following:

**1. CYF's Code of Conduct which provided the following:**

*"You should not bring your employer into disrepute through your activities, whether inside or outside Child, Youth and Family. Youth and family activities whether inside or outside the Department are not likely to be acceptable if they:*

*...*

*- damage the standing or reputation of Child, Youth and Family because of the position you hold in it. "*

*"You are to avoid any activity, either work-related or private, which could reflect badly on Child, Youth and Family in its relationship with Government and/or the general public. This means that you are to inform your manager in writing if:*

*...*

*:any criminal charges or convictions that may occur while you are employed by Child, Youth and Family are of such a nature that it would be inappropriate for you to continue to be employed in the same capacity by the Department. This may include, for example, charges that involve loss of trust between you and Child, Youth and Family, or charges that damage the reputation of Child, Youth and Family."*

**2. Cases involving conduct occurring outside of the workplace:**

*"The incident with X occurred away from Mr A's workplace and did not occur whilst he was engaged in carrying out his role responsibilities. The CYF Code of Conduct provisions were applicable to activities occurring outside the workplace.*

*The Court of Appeal observed in Smith v Christchurch City Council that:*

*"It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal". The Court went on to clarify 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 employees' 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 action of Mr A in slapping X was seen by members of the public and reported to the Police and the CPT. All three groups became aware that Mr A was employed by CYF.*

*...*

*I also find it relevant that Mr A's role was as Team Leader in the Approvals Team which involved him managing a team that assessed compliance with CYF standards of compliance by non-governmental organisations delivering services to care for and protect vulnerable children, and to champion that work.*

**3. Trust and Confidence Issues**

*"Mr A was a senior employee within CYF, an organisation with values centred around the protection and care of vulnerable children. Mr A was found by CYF to have acted in a way that significantly impacted and undermined CYF's trust and confidence in him.*

*I find that Ms Heeney's conclusion that Mr A's conduct had brought CYF into disrepute to have been a valid one given the above factors. I also find CYF no longer had the requisite trust and confidence in Mr A as a senior manager to be a finding that a fair and reasonable employer would have reached given all the circumstances at the relevant time. In these circumstances, dismissal was the appropriate outcome.*

*I find that the decision taken by CYF to dismiss Mr A was one which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred."*

In summary employers need to be aware that conduct outside of the workplace may provide the basis for disciplinary action and/or dismissal where the conduct has the potential to, or in fact does, impact upon the employment relationship.

## Increase to Minimum Wage



From 1 April 2012 the new adult minimum wage rates (before tax) that apply for employees aged 16 or over will be:

- \$13.50 an hour, which is
- \$108.00 for an 8 hour day or
- \$540.00 for a 40 hour week.

The new minimum wage rates that apply to new entrants and employees on the training minimum wage (before tax) will increase to:

- \$10.80 an hour, which is
- \$86.40 for an 8 hour day or
- \$432.00 for a 40 hour week.