

Scrutinizing Conduct Outside the Workplace

Is it unreasonable and unfair to discipline an employee for misconduct outside of the workplace? How far can the employer go in drawing a connection between the conduct of employees in their personal time and the workplace?

It is well-established that misconduct outside of the workplace may justify dismissal if the conduct undermines the employer's trust and confidence in the employee to such an extent as to justify dismissal and/or the conduct brings the employer into disrepute.

Is there a connection/nexus?

The starting point is the connection between the work environment and the environment in which the misconduct occurred. Incidents occurring between employees at work related functions held outside the workplace fall quite clearly into the domain of the employment relationship as the employee is attending in their capacity as employee. What about misconduct between two employees which occurs away from the workplace?

In the case of **Smith v Christchurch Press** CA [2000] 1 ERNZ 624 an incident of sexual harassment occurred between two employees from the same workplace during a lunch break at one employee's house. After a complaint by the woman and an investigation into the matter by an independent investigator the employer dismissed the male employee for serious misconduct.

The Court of Appeal upheld the dismissal and stated:

"It is not so much a question of where the conduct occurs but rather its 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 the employer and employee".

Impact on Business/ Disrepute?

Going a step further, the following is an example of a situation between an employee and a client of the employer. In **DB Breweries v Hodgson** 14/10/96 EMC Auckland Mr H, an employee assaulted the manager of a customer of DB's for whom he delivered DB products during worktime.



There was held to be an adverse impact on DB's reputation and business as a result of the employee's actions. Although the assault took place away from work and in the employee's personal time, the potential serious negative impact the incident would have had on the business of DB justified a dismissal.

Actions of an employee which bring your business into disrepute may be sufficient to justify dismissal even if there does not appear to be a particular connection between the workplace and the actions of the employee. The situation in **Homan v Dunedin Fire District A Division of the New Zealand Fire Service** (6 May 2008 ERA) is such an example. The employee was based in Dunedin and attended an employment-related training course in Rotorua. After having a few drinks out one evening with colleagues he then went off on his own to another bar, and was subsequently involved in an altercation. He was then arrested and later pleaded guilty to two charges of assault. In the period between the assault and the appearance for sentencing he was suspended and after an investigation by his employer, he was summarily dismissed.

The employee argued that his actions had not brought the Fire Service into disrepute, the incident had occurred away from the region within which he was employed, and further had occurred outside of work hours. The employee also claimed that the incident had not affected his ability to successfully complete the training course, nor his ability to do his job.

The Authority upheld the dismissal. It referred to the fact that the issue of the employee bringing the NZFS into disrepute was a factor in its deliberations, but this was added to the loss of trust which had occurred as a result of his actions. The Authority found that this concern of loss of trust was reasonable given the high standard of personal integrity demanded of members of NZFS.

Of practical application the Authority also noted that the NZFS did not seek to rely on the Police prosecution charges but undertook its own investigation ensuring that the employee had representation and communicated its proposed course of action by way of formal letter at each stage of the process.

Loss of Attributes Essential To The Job

In the case of **Smith v Christchurch Press** the Court stated "...conduct outside work may demonstrate that the employee had lost the attributes essential to the job".

An example of this is the case of **NZ Bank Officers IUOW v Databank Systems Ltd** [1984] ACJ 21 The employee was dismissed as a trainee programmer following a conviction for possession of cannabis for supply. The employer maintained that the employee was dismissed as he had become an unacceptable security risk due to the nature of his work. The Court upheld the employer's decision that the confidential nature of the employers business was such that the nature of the conviction, and the nature of the conduct upon which the conviction was founded, provided sufficient reason for the employer to say that the employee was an unsuitable person to be retained in his employment.

In another scenario also involving cannabis, an entirely different outcome resulted, highlighting the important of assessing such misconduct on a case by case basis.

In **Wilkinson v. Saxon Appliances Ltd** [Unreported ERA 21 December 2009], Mr Wilkinson away from work and outside work hours sold two 'tinnies' to another employee. The employee at a later date left a message on Mr Wilkinson's work phone asking if he could supply some drugs. Mr Wilkinson did not call back. A manager later heard the message and confronted Mr Wilkinson who initially admitted the supply of the two 'tinnies' but later retracted the statement to some extent.

The Authority found "that there is no good evidence about Mr Wilkinson's conduct outside of work having an adverse consequence for his work or his employer's business so as to bring it within the ambit of cases such as *Smith v. Christchurch Press Company Limited*."

It was noted also that it an employer cannot justifiably dismiss an employee simply because of actions by them that may amount to criminal offending.

It is important to also remember the overall test to be applied in relation to dismissals of this (or any other) nature is that which is set out in s103 of the Employment Relations Act 2000. This requires determination as to whether a dismissal (or other action) was justifiable on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances.



Minimum Wage Increase

New minimum wages came into effect on **1 April 2010**.

The **minimum wage** increased from \$12.50 to **\$12.75** an hour before tax. That is \$102.00 for an eight hour day, and \$510.00 for a 40 hour week. This applies to all employees aged 16 and over, who are not new entrants or trainees.

The **training and new entrants'** minimum wages increased from \$10.00 to **\$10.20** an hour before tax. That is \$81.60 for an eight hour day and \$408.00 for a 40 hour week. The new entrants minimum wage applies to employees aged 16 and 17 except for those who have completed 200 hours or three months of employment, whichever is shorter; or who are supervising or training other workers, or who are trainees. The training minimum wage applies to employees aged 16 and over who are doing recognised industry training involving at least 60 credits a year.

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, Peter Zwart or Sarah Bradshaw.

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