

What takes a lifetime to build, but only seconds for an employee to destroy?

To most employers and business owners the public's perception of their company is extremely important and they work hard to generate goodwill and to foster a reputation that reflects positively on their company. It is little wonder then, that when an employee's conduct damages the company's reputation and brings the employer into disrepute that the matter is treated with the utmost seriousness.

But what happens when such conduct occurs outside of working hours, perhaps in a different part of the country when the employee is on holiday?

As it happens one such an example has just reached the Employment Relations Authority where Justine McDonald lodged a personal grievance against her former employer in Nelson, Porse In-Home Childcare, after she had her employment terminated for serious misconduct after allegedly swearing at children and threatening to pour water over a man while she and her family were on a camping holiday. While the substantive hearing is yet to be heard, the Authority has made a decision regarding interim-reinstatement during which the following facts were revealed. Ms McDonald was staying with her children and friends at a camping ground in early January when she allegedly complained to another family camping next to her about the amount of noise the other family's children were making at night. Ms McDonald's complaint was met with disdain by the other family and several other campers and an argument ensued which turned verbally abusive.

At the time Ms McDonald probably did not think about the fact that she was using her company car which was emblazoned with the Porse logo in places. Several days after the incident Ms McDonald's employer received three written complaints about her behaviour. According to one complainant Ms McDonald was "*loudly abusing our children ... using bad language at the children and accusing them of being loud*", told them to "*shut up*" and that she was not going to "*put up with them talking to 4am again*". Further, Ms McDonald was alleged to have threatened to pour a bucket of water over a fellow camper who she was arguing with, and when told to "*f*** off to a motel*" by a camper, she responded by saying "*f*** off to Christchurch*". One of the complainants also told Ms McDonald's employer that they had witnessed her two children in the front passenger seat of the work car with only one wearing a seatbelt when she was driving.



Ms McDonald was given copies of the complaints and a letter from her employer requesting her attendance at a disciplinary meeting, part of which read:

We are very concerned about these issues, you were using the PORSE car and clearly damaging the company's reputation – not only in the area – but in the areas from where the witnessing holiday makers come from.

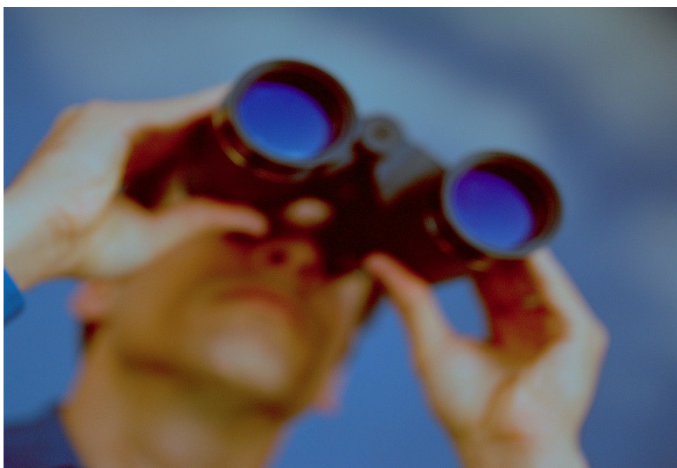
It was revealed during the hearing that at least one of the complainants seemed to have some prior connection with Porse in Nelson and had called one of the managers the night of the incident. This manager subsequently gave her view to the manager in charge of the disciplinary investigation that the complainants were "*credible and trustworthy people*". However, the Authority noted that the three written complaints differed in their accounts of what had occurred.

During the disciplinary investigation Ms McDonald disputed the differing accounts given in the three written complaints. The Authority noted that the names of the complainants, the details of the prior connection with Porse and the circumstances of how they came to put their complaints in writing were never disclosed to Ms McDonald, and it found that it was arguable that this information should have been provided in order for her to be given a fair opportunity to answer concerns about damaging the company's reputation.

Determining what actually happened at the campsite should have been an important part of Porse's investigation. In relation to that investigation the Authority noted that at the first investigatory meeting Ms McDonald's representative told Porse that the group with whom Ms McDonald was camping would all say that the complainants' allegations were "*grossly inaccurate*". However, the manager leading the disciplinary process did not seek comment from these people and did not speak with the complainants, rather limiting her investigation to the written material and the view expressed by the other manager as to trustworthiness. The manager in charge concluded that there was a sufficient relationship between the conduct at the campground and the nature of Porse's business for the conduct to damage or potentially damage the company's reputation, and that Ms McDonald's behaviour amounted to serious misconduct.

The Authority gave its preliminary view that there were elements about the dispute that were at issue in relation to what had actually occurred and that a reasonable and fair employer would not have limited its investigation in the manner Porse did, and that it should have resolved the dispute before dealing with the issue as one of misconduct. However, while finding that Ms McDonald had an arguable case for unjustified dismissal, the Authority considered her arguments for interim reinstatement to be less convincing. Two of Ms McDonald's work colleagues supplied written statements saying that they harboured substantial concerns about whether they could work with her again, not just because of the camping incident but because of other alleged incidents involving Ms McDonald. Noting that Porse could meet the cost of any compensation if it lost the personal grievance case and fearing the Nelson-based Porse staff may leave, it determined that the balance of convenience and overall justice lay with declining Ms McDonald's application for interim reinstatement.

We will be watching this case with interest and will update the outcome in a future edition of *The Advocate*.



As this case demonstrates the concept of bringing one's employer into disrepute includes conduct that has taken place outside of the workplace and not during work time. As long as the behaviour of concern can be linked to the employee's job, then it could bring the employer into disrepute. That causal nexus will depend on the employee's public profile and the type, impact and the extent of publicity given to the employee's bad behaviour. Further, this case shows that the behaviour need not be illegal, but that it needs to be inconsistent with the employee's role or the expectations associated with their job (i.e. a child care worker should not be seen using verbally abusive language at her own or other people's children). Put another way, the nature of an employee's role may prevent him/her from undertaking certain activities or behaving in a particular way which may be acceptable for others in different vocations.

While an employee's conduct may not severely affect the company's business interests and regardless of the time and place it occurs, as long as the conduct is in some way connected to their employment the employer may be justified in taking disciplinary action against them. In *Smith v Christchurch Press Company Limited* [2000] 1 ERNZ 624, the Court of Appeal said:

"It is not so much a question of where the conduct occurs but rather its impact or potential impact on the company'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."

What is clear is that if you have concerns or have received a complaint about an employee's conduct outside of work which has or had the potential to negatively affect the company's reputation and bring it into disrepute, it is crucial to establish what actually took place and to undertake a thorough investigation before reaching a finding based on all the evidence.

As the Authority noted in Ms McDonald's case, the fact that the employer unfairly limited its inquiry when other evidence should have been taken into account and that it did not provide all the relevant information to her could mean that the personal grievance is successful, even if the complaints about her behaviour that day at the campsite have merit.

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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