Conduct outside of work hours- can and should an employer interfere?

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Introduction

In 2006, only 13% of workers in the Queensland mining industry were female. Five years on, female workers are still by far in the minority. However, the increased participation of female workers in mining has already created new challenges for employers and their employees. Managing appropriate workplace behaviours between employees at work is a must for all employers to comply with their health and safety obligations. However, in the mining industry, this is complicated due to the provision of onsite living arrangements and shared social areas. Difficult questions arise as to an employer's level of responsibility to supervise and regulate employee behaviour in these circumstances.

This paper explores the issue of employer liability for employee conduct outside of work hours and discusses employers' rights to discipline employees for this conduct.

Unique nature of mining communities

In 2010 a report was published in the British Journal of Criminology which described the social-cultural context of the fly-in fly-out (FIFO) communities within the Australian mining industry as having a work hard/ play hard culture, where male dominance was demonstrated by behaviours which included violent confrontations, drinking and the objectification of women.[1]

Although this may not be an accurate reflection of all FIFO communities (if any at all), the nature of FIFO work provides an environment where the line between an employee's work life and social life can become blurred. This is a consequence of the remote locations in which work is performed, thereby restricting employees' social circles and options, and the facilities that are provided by the employer to attract and retain employees, such as wet bars, pool tables, gyms etc. Of course, these issues are not restricted to FIFO communities. Any small or remote community where employers provide accommodation to its workers, whether through on-site or off-site camps, or employer funded housing is affected by this issue.

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[1] Carrington, K, McIntosh, A and Scott John, *Globalization, Frontier Masculinities and Violence-Booze, Blokes and Brawls* British Journal of Criminology Advance Access, February 9, 2010

When will an employer be liable for an employee's conduct outside of work hours?

Generally speaking, an employer will be vicariously liable for acts committed by an employee in the course of his or her employment to the extent that the employee is acting within the scope of his or her authority and is performing employment duties or is otherwise performing acts incidental to the performance of those duties. This extends to acts committed within the course of an unauthorised mode of carrying out an authorised act[2] (for example an employee having a vehicle accident when they take a diversion for personal reasons).

Risk to employers being liable for sexual harassment that occurs outside work hours

In the *Sex Discrimination Act 1999* (Cth) (**SDA**) an employer may be found to be vicariously liable for an employee's actions which amounts to sex discrimination or sexual harassment if the employee's actions are done in "*connection with the employment*"[3]. To defend a claim of vicariously liability under the SDA, the employer must demonstrate that it took all reasonable steps to prevent the employee from doing the unlawful act.

The liability of employers in relation to sexual harassment occurring outside of working hours in employer provided accommodation was considered in *South Pacific Resorts Hotels Pty Ltd v Trainor.*[4] In that case, Ms Trainor had been employed by South Pacific Resorts in its hotel in Norfolk Island. The hotel supplied a separate building which formed part of the hotel complex for employees to live in; however living in the accommodation was optional. Ms Trainor stayed in the employer provided accommodation, with her room being adjacent to the room of a fellow employee, Mr Anderson.

Ms Trainor made two allegations of sexual harassment against Mr Anderson, both of which occurred in the early hours of the morning in her room, with one of the incidents occurring after a staff function.

The court accepted that the harassment had on each occasion occurred "*in connection with Mr Anderson's employment*", notwithstanding that it had occurred whilst both he and Ms Trainor were off duty.

Key features of the case that led to Mr Anderson's actions being held to be committed in connection with his employment were that:

- the conduct occurred in accommodation which was occupied by Mr Anderson and Ms Trainor because of, and for the purpose of, their common employment;

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[2] Hely, Brook "Open All Hours: The Reach of Vicarious Liablity in 'Off-Duty' Sexual Harassment Complaints" (2008) 36(2) Federal Law Review 173.
[3] Section 106, *Sex Discrimination Act 1984* (Cth)
[4] [2005] FCAFC 130

- the employer had detailed policies relating to who could and who could not enter the accommodation facilities and therefore demonstrated a degree of control in relation to the accommodation;

- the employees' rooms were in close proximity to each other and were accessible, creating an opportunity in which the conduct could occur; and

- it was not relevant that the conduct occurred in the early hours of the morning as the conditions created in connection with the employment allowed for it to occur at any time.

The employer was found to be vicariously liable for Mr Anderson's conduct and was ordered to pay Ms Trainor damages of $17,536.80.

It is clear from this case that merely implementing policies which set standards of conduct while living in employer provided accommodation will not be enough to establish a defence against vicarious liability under the SDA. Employers need to go further, for example, by conducting training in relation to sexual harassment, implementing an employee reporting process for any inappropriate conduct and perhaps having an emergency contact for employees in the event that an incident had or was about to occur.

Probably the most far reaching application of an employer's liability for sexual harassment occurring outside of working hours is the case of *Lee v Smith*[5]. Ms Lee was employed by the Commonwealth Department of Defence in an administrative position in Cairns. Her claim of sexual harassment involved three aspects:

- pornography in the workplace generally;

- a fellow employee, Mr Smith, sexually harassed her during a computer training course provided by the Department in the three weeks leading up to the subsequent rape (e.g. on one occasion Mr Smith wrote a succession of notes to Ms Smith saying that he had a hole in his jeans, was not wearing any underwear and could touch his penis through the hole. He then exposed his penis through the hole in his jeans); and

- Mr Smith subsequently raping Ms Lee at a private residence.

The relevant facts provided to the court were:

- Ms Lee accepted an invitation from a Ms O'Shannessy to attend after-work drinks with some other employees. However, when Ms Lee arrived at the agreed location she learned that the drinks had moved to Ms O'Shannessy's house. Ms Lee then travelled with Mr Smith to that house;

- on arrival Ms Lee learned that the only people who would be attending the drinks were Ms O'Shannessy, her fiancéee (also an employee of the Department) and Mr Smith. They drank wine together;

[5] [2007] FMCA 59

- several hours later, Ms Lee realised how intoxicated she was and after going to the toilet needed help re-dressing herself. Shortly afterwards she passed out; and

- Ms Lee woke in the morning to find that she was being raped by Mr Smith.

The court found that the rape had occurred "*in connection with*" Mr Smith's employment primarily on the basis that "*… the rape was a culmination of the earlier incidents of sexual harassment directly in the workplace…*" and Mr Smith's conduct "*… was an extension or continuation of his pattern of behaviour that had started and continued to develop in the workplace he shared with Ms Lee. The nexus with the workplace was not broken.*"

Other relevant factors identified by the court to indicate that the rape was connected to the employment included that:

- Ms Lee had been invited to attend after work drinks by a fellow employee at the behest of Mr Smith;

- the rape appeared to be a culmination of a series of sexual harassments by Mr Smith in the workplace and the facts demonstrated that there was no doubt that the incident adversely affected the working environment; and

- there had been no relevant training in sexual harassment by the Department and had such training occurred, it may have prevented the matters from escalating to the point of rape if Ms Lee had been aware of her rights to report the earlier pornography and sexual harassment in the workplace.

The decision in *Lee v Smith* demonstrates that an employer needs to take active steps to prevent and to deal with any incidents of sexual harassment in the workplace. If acts of sexual harassment occur at the workplace and then continue outside of the workplace, the employer may be found to be liable for all acts committed by an employee (including criminal acts).

Risk to employers being liable for violence which occurs outside work hours

Employers have a duty to ensure a safe workplace for employees. This involves taking reasonably practicable steps to remove potential risks to an employee's safety at work, including risks created by the behaviour or conduct of other employees. If an employee injures another person, either at the workplace or outside the workplace, the employer may be held liable, either vicariously or in negligence.

For example, in *Sprod BNF v Public Relations Oriented Security*[6], the court found that an employer was vicariously liable for the conduct of its security guards who had engaged in unauthorised criminal acts. In this case, a nearby restaurant, Wagon Wheel Hotel, had an informal arrangement with the security guards whereby they were offered a discount at the restaurant in exchange for their assistance with ad hoc security issues. On this occasion, the security guards (who were wearing the employer's uniform) forcibly removed a patron from the restaurant and then assaulted the patron causing permanent brain damage.

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[6] [2007] NSWCA 319

Even though the security guards were not performing work for the employer at the time, the court found that there was a sufficiently close connection between the actions of the security guards and the acts which their employer had authorised, and thus the employer was vicariously liable for their conduct.

In *Gittani Stone Pty Ltd v Pavkovic*[7] the court found that an employer was negligent in failing to discipline or dismiss an employee in circumstances where that employee later engaged in a serious criminal act outside of the workplace against another employee. In this case, Mr Pavkovic was seriously injured when he was shot three times by Mr Lee outside their place of employment. Mr Lee had a history of violence and aggression in the workplace and had physically and verbally threatened Mr Pavkovic on the day of the incident. The court held that the employer was responsible for its employees' safety and that, in the circumstances of the case, the act of violence was sufficiently foreseeable. On this basis, the court held that the failure of the employer to take steps to eliminate the risk of Mr Lee injuring Mr Pavkovic materially contributed to Mr Pavkovic's injury, notwithstanding that the criminal act was committed outside work hours in a public street outside the workplace.

Risk to employers being liable for injuries which occur outside work hours

From a very early stage in the history of the workers' compensation law, it was recognised that the course of employment covered not only the actual work which a person was employed to do but also the "natural incidents connected with the class of work"[8]. The general principles settled by the High Court in *Hatzimanolis v ANI Corporation Limited*[9] is that if an injury is sustained during an interval in an overall period or episode of work, the injury will ordinarily be seen as occurring in the course of employment when the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or engaged in a particular activity and the injury occurs at that place or during that activity, unless the employee is guilty of gross misconduct.

Some recent case examples of injuries suffered outside of work hours that were held to be compensable include:

- a FIFO worker, who injured his back sleeping at the onsite accommodation;[10]
- a supervisor who suffered a fatal heart attack while snorkelling, after being encouraged by the employer to engage in outside work activities with workers to boost morale; and[11]
- a worker, who sustained a sneeze-induced back injury on a break between shifts at his employer provided accommodation.[12]

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[7] [2007] NSWCA 355
[8] *Charles R Davidson and Company v M.Robb* (1918) AC 304 at p 321
[9] (1992) 173 CLR 473
[10] *Ronald William Keating v Global Insulation Contractors (NSW) Pty Ltd* [2011] NTMC 021 (20 June 2011)
[11] *Kent v Employers Mutual Limited (Kingswood Aluminium Pty Ltd)* [2011] SAWCT 19 (30 June 2011)
[12] *Thiess Pty Ltd and Q-Comp* (C/2010/11) (1 July 2010)

Employers' rights to discipline employees for conduct outside of work hours

An employer can discipline an employee for conduct outside of work hours that is directly linked to employment and which has a serious and significant effect on the workplace or damages the employer's interest[13].

In *McManus v Scott-Charlton*[14] Mr McManus was disciplined, by having his salary reduced, for wilfully disregarding a formal direction not to contact a female work colleague outside the requirements of his formal official duties. The officer who issued the formal direction had reason to believe that Mr McManus had unwanted contact (both workplace and private) with the female work colleague. This direction was ignored by Mr McManus and disciplinary action followed. Mr McManus challenged the employer's right to discipline him in these circumstances. The court held that the direction restraining Mr McManus' conduct outside of work hours was reasonable because:

- the harassment could reasonably be said to be a consequence of the relationship of the parties as co-workers; and
- the harassment had, and continued to have, a substantial and adverse effect on the workplace and performance because of the harasser's proximity to the harassed person.

In *Rose v Telstra Corporation Ltd*[15] the Australian Industrial Relations Commission (**Commission**) considered whether Telstra had a right to terminate Mr Rose's employment after he and another employee had engaged in a serious physical altercation in which Mr Rose was stabbed in the chest with a piece of glass and received 12 stiches. The incident occurred in a hotel room paid for by Telstra in Armidale after the two employees had been involved in an earlier altercation at a night club. Neither employee was wearing a Telstra uniform during this time.

After a failed workers' compensation claim, Telstra terminated Mr Rose's employment for his conduct. The Commission found that in certain circumstances an employer has a right to terminate an employee's employment for conduct outside of work hours if:

- the conduct was likely to cause serious damage to the employment relationship; or
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duties as an employee.

The Commission further held that "*in essence the conduct complained of must be of such gravity or importance to indicate a rejection or repudiation of the employment contract by the employee".* It was held that in this case, Mr Rose's conduct *"lacked*

[13] Lerodiaconou, M, *After-hours conduct* (2004) 78(4) LIJ, p.42
[14] (1996) 140 ALR 624
[15] [1998] IRCommA 1592

the requisite connection with his employment" as the incident did not occur in public, the employees were not wearing Telstra uniforms and neither employee was on-call.

On this basis the Commission held that there was no reasonable basis for concluding that Mr Rose's conduct had damaged his employer's interests and therefore the termination of employment was held to be unfair.

Concluding comments

It is clear, based on the case examples discussed in this paper, that employers have very onerous obligations towards their employees, which can include, ensuring their safety outside of work hours.

It is important that employers have systems in place to prevent or minimise the risk of injury to employees as a result of the behaviour or conduct of others. This includes having systems in place for conduct occurring outside of work hours.

Employers may wish to consider auditing their current systems to satisfy themselves that the risks are being appropriately managed. This may include ensuring that:

- there are adequate policies in place setting out the required standards of behaviour at work and outside of work (for example at camps);

- there are adequate reporting systems in place, which may include emergency contacts as well as a complaints handling system;

- all employees and contractors regularly receive training about their rights and obligations in relation to appropriate behaviour and the employer's reporting system;

- all supervisors and direct line managers are trained in identifying inappropriate behaviour and are equipped to deal with the behaviour before it escalates; and

- safety measures are implemented at employer provided accommodation, for example, ensuring employees or contractors do not have access to other employees' accommodation.