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Employment Law Update

November 2017

Two of my employees are in a close personal relationship. Is it any of my business?

Two recent situations which gained a lot of media attention have raised the question of whether an employer can intervene in such a relationship, or even forbid personal relationships between employees. These cases also highlight some of the employment and management risks arising from relationships between colleagues.

Seven

In the case concerning Amber Harrison, Tim Worner and Seven West Media, a consensual relationship of about 18 months' duration between Mr Worner, the CEO, and Ms Harrison, an executive assistant, soured. The relationship had been private, not open, since Mr Worner was married. When the relationship soured, Ms Harrison made complaints to Mr Worner, Seven West Media raised complaints of misuse of expenses against her, and an agreed settlement was negotiated, providing for payments to Ms Harrison, and Ms Harrison left Seven. Mr Worner continued in his position, although, when the issue went viral on social media, he issued a public apology, and missed out on a bonus.

The case raised questions about whether or not Ms Harrison had complied with the terms of the settlement deeds requiring the return of confidential information, and therefore whether the rest of the money Seven had agreed to pay her was in fact payable. Ms Harrison took the "nuclear option" of sharing information on social media, and it turned into very public litigation, which Seven "won," but at substantial cost and reputational damage.

AFL

In the AFL case, two senior executives departed their employment with the AFL after each had a consensual, private relationship with a junior female employee. Again, the executives were married, so the relationships were not open. The end of their employment gave rise to media discussion as to whether the AFL had any business interfering in consensual relationships and whether, in doing so, it was adopting the role of moral watchdog, because the main offence seemed to be dishonesty and betrayal of family values by the male executives, the relationships being consensual and there not being any publicly apparent complaint from the female employees.

Is an affair any business of an employer?

It is true that, generally speaking, an employer isn't a moral watchdog, and it is not feasible to forbid close personal relationships between employees. However, it is legitimate for an employer to regulate relationships between staff, both because of the possible abuse of unequal power relationships between the parties to the relationship, and also because of the effect of a close relationship between two staff, or the perceptions that arise from that relationship, might have on other staff.

Where employees having an affair are at different levels of seniority, the risk of perceived favouritism and conflict of interest, and potential lack of fairness to others in the workplace, is obvious, and this is even more obvious where one indirectly or directly supervises and manages the other.

Two of my employees are in a close personal relationship. Is it any of my business? cont.

And where there is a disparity in power the risk of a sexual harassment claim, or a claim of discrimination, even in cases which began as a consensual arrangement, is real.

The risks of conflict of interest are substantially heightened when the relationship is clandestine. In the case of an open relationship, of which work colleagues are aware, potential conflicts of interest will be obvious, and can be dealt with. When the relationship is secret, the potential conflicts will not be transparent, but may well become the basis of gossip or resentment from other staff where there are rumours of a relationship, and a perception that there is favouritism, or that the senior employee is not impartial, or forms a unit with the junior employee who therefore has an unfair degree of influence.

Whether either or both of the parties are cheating on their other partners is not generally the business of an employer, but the existence of a secret relationship which raises actual or potential conflicts of interest is definitely a legitimate concern for an employer.

The risk of claims of harassment also increases when the relationship is secret, particularly if the relationship unravels, and there are recriminations. In the absence of demonstrable fault, the departure of the junior (often the female) employee while the senior (often the male) employee stays on, is bound to look discriminatory. In considering action against either party, the focus needs to be on the way in which the conduct actually prejudices the interests of the employer or damages the employment relationship - such as the undisclosed conflict of interest - and not on the mere fact of the relationship. It should not be assumed that the senior employee is more valuable to the business, so should be kept on, whereas the junior employee is not so important, and should move on.

In the Harrison/Worner/Seven West Media case there were issues about misuse of expenses, and misuse of work time, that related to the undisclosed conflict of interest. Any actual or apparent misuse of position or discrimination against other employees, may all be reasons for disciplinary termination, but consider both sides of the coin.

Do you have a policy about this?

The answer is probably “no,” so far as consensual personal relationship themselves are concerned. Apart from the usual harassment and discrimination policies, if something is to be regulated by policy to deal with these issues, it should be conflict of interest obligations, and an obligation to disclose any potential conflict of interest, so that it can be appropriately managed. This might fit within, or be covered by, an employer’s code of ethics or code of conduct.

If you need any assistance with developing policies to deal with potential conflicts of interest within the workplace, please contact Stephen Booth or Dominic Russell in our Employment Law Team:

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'It's my birthday and I'll drink if I want to.' Was the dismissal harsh?

At 4:46pm on 25 April 2017, Avril Chapman, an employee of Tassal, left a phone message for her manager:

"It is Avril, one of your most loved pains in the ass. Um, it's Anzac Day, my birthday, and I admit I have overindulged so I am taking into account one of the golden rules to be fit for work and I am not going to be fit for work so I will not be there, but love ya."

Ms Chapman did not attend for work on 26 April. When she arrived for work on 27 April, she was asked to show cause why her employment should not be terminated, since it appeared that she had deliberately consumed alcohol, to reduce herself to a state unfit for work.

Ms Chapman disputed that she had acted deliberately. She said friends dropped by unannounced, and she became aware it was *"going to be a long night."* She emphasised that it was her birthday (texting *"IT WAS MY BIRTHDAY!"* when Tassal questioned her actions, as if that were a sufficient explanation), and otherwise accepted no responsibility for her absence. She said that she could have simply claimed to be sick on the morning of 26 April, and there would most likely have been no consequences. She claimed that showed her responsibility and respect by doing *"the honest thing."*

She accused Tassal of turning molehills into mountains, and *"going in for the kill,"* and arguing that after-hours overindulgence was none of Tassal's business.

Tassal terminated Ms Chapman's employment because she had deliberately rendered herself unfit for work, she had shown no contrition about it, and because she had received a warning in 2016 for leaving a message, laced with swearing, to say that she could not come into work because she had been drinking (the context being that her brother had been diagnosed with late stage cancer).

The Fair Work Commission (FWC) found Tassal did have a valid reason for terminating employment, because voluntarily becoming incapacitated for work was akin to "taking a sickie" without being ill. It was plain from the evidence that Ms Chapman had the opportunity to go to bed early and be fit for work the following day, but chose not to do so. While this was out-of-hours conduct, it had a sufficient link with her employment, and indeed she was aware of that when she left the message.

However, although there was a valid reason for dismissal, the FWC nevertheless concluded that it was harsh, because the offensive feature of the 2016 conduct was the swearing, not the fact that she had been drunk or absent because of the serious illness of a close relative. The basis of that warning was therefore different from the Anzac Day conduct. That conduct could have justified a warning, perhaps a final warning, but was not converted into a reason for dismissal by a prior warning for a different type of conduct, in the context of five years', otherwise warning-free, service.

The FWC accepted that the employee was responsible for the loss of trust and confidence by her combative response, and refusal to accept that there was any wrongdoing on her part, but nevertheless as the termination was harsh, ordered compensation of $8,229.

‘It’s my birthday and I’ll drink if I want to.’ Was the dismissal harsh? cont.

So, what can we draw from this?

Firstly, positively for employers, the case confirms that making yourself unfit for work is not a valid basis for being absent, and is a breach of trust. Putting it another way, deliberate out-of-hours conduct, with the knowledge that it will impact on ability to work, can be a valid basis for termination.

Secondly, with respect to the harshness finding, employers have to be sure that any prior warnings, relied upon to bolster a termination decision, are indeed relevant to the incident at hand, or for such serious conduct that they amplify the seriousness of the incident. A warning for inappropriate language is not usually, in itself, a high range offence, and will not convert something otherwise fit for a warning into something more serious.

If you need risk management advice in the context of a proposed termination of employment, please contact our Employment Law Team:

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Robbery, but not under arms: did the safety policy apply?

In the recent case of *Mistry v Woolworths* (Fair Work Commission, 2017), Mr Mistry made an unfair dismissal application when his employment was terminated, because when he was confronted by a would-be robber at a petrol station, he failed to follow a policy intended to protect the safety of employees and customers.

Mr Mistry was in sole charge of the petrol station late one evening, when a young male with a backpack approached the counter and said *"Give me the money"* and *"Give me the money or I will jump the counter."* Mr Mistry backed away from the till and said he couldn't. The customer said "Okay, give me the smokes." Mr Mistry was confused about what the robber wanted, but some other customers entered the service station, and the man took some items and left the store. The stand-off lasted about two minutes.

After serving the additional customers, Mr Mistry called his manager, who told him to cordon off the area, press the panic button and contact the police. Mr Mistry never pressed the panic button, and didn't call the police until told a second time, somewhat later.

Woolworths wasn't happy with Mr Mistry's conduct, and terminated his employment because he had failed to follow the A*rmed Hold-Up* procedure when he failed to comply with the offender's demands, and failed to follow the notification procedure and his manager's instructions. Woolworths believed that failure to comply with the procedure exposed Mr Mistry and others to serious risk of harm, and demonstrated a poor attitude towards safety. Mr Mistry had also had a warning a short time before, for a failure to follow food safety procedures.

The *Armed Hold-Up* procedure required employees to do exactly as the offender instructs, and to activate the hold-up alarm, and call the police as soon as safe to do so. There was a more detailed policy dealing with *Armed Hold-Up* and also a policy for D*ealing with Difficult Customers*. Woolworths specifically referred to the *Armed Hold-Up* policy in terminating Mr Mistry's employment.

The Commissioner who heard Mr Mistry's application decided that Mr Mistry didn't follow important elements of the procedures because he did not obey the offender's demands, he tried to outsmart the offender by refusing to give him money and cigarettes when it would have been possible for him to do so, and he did not activate alarms. He therefore upheld the termination.

Mr Mistry appealed to the full bench of the Fair Work Commission, which upheld his appeal, because the policies did not, on their face, apply to the incident. There was nothing to suggest that the would-be robber was armed - he never showed or mentioned a weapon. When asked during the hearing what Woolworths thought about the application of the policies aimed at armed hold-ups, given the apparent lack of a weapon in this case, Woolworths' representative commented that in future they would probably call it a hold-up procedure, rather than armed hold-up procedure. Of course, that may help in future, but not retrospectively. The case was returned to a single Commissioner to take further evidence in relation to the possible application of the policy at the time to the circumstances Mr Mistry faced.

Robbery, but not under arms: did the safety policy apply? cont.

Getting the policy right

The point which can be drawn from this case, so far, is that employers need to take some care with the content and titling of policies, and also to take care with using policies as the standard to judge an employee's conduct or performance. As is often the case, going into too much detail, or too high a degree of precision in policies can leave gaps, as happened in this case between the *Armed Hold-Up* procedure and the *Dealing with Difficult Customers* procedure. On the other hand, something which is expressed too generally to operate as a catch-all policy or procedure may not be sufficiently specific about particular situations. This may be a damned-if-you-do, damned-if-you-don't, situation, and requires some care in drafting policies to cover a range of situations without becoming too vague, while giving sufficiently robust guidance to employees.

In any event, terminating an employee's employment on the basis of a policy which does not actually apply to the actual circumstances is risky. Employers need to focus on the actual provisions of a policy to make sure it does apply before using it as a basis for termination. In cases of doubt, a final warning may be a better option.

If you need assistance with policies or termination decisions, please contact our Employment Law Team:

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Liability for franchisors and holding companies:
Vulnerable Workers Legislation enforced 27 October 2017

The Federal Government's *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* has now passed Parliament. This legislation was promised by the Coalition in the 2016 election.

Some of the legislation, dealing with payslips and record keeping, takes effect immediately. The maximum penalties for offences involving payslips and record keeping have doubled, to $12,600 **per contravention** for individuals, and $63,000 for companies. For serious contraventions (where the offender knowingly contravened the law, and the contravention was systematic), the penalties are 10 times as much.

Employers who fail to provide payslips or to keep records will bear the onus of proof in relation to wage underpayment claims. That is, in the absence of compliant records, the employee's account of how they were underpaid will be accepted unless the employer can prove otherwise.

The new legislation also specifically prohibits employers placing unreasonable requirements on employees to pay money to the employer or a third party. This is designed to deal with the situation which has arisen in a number of franchising situations, where the correct pay is shown in the records, and was in fact paid, but the employee was required to hand some of it back in cash. This will also extend to asking prospective employees for unreasonable payments in order to get a job.

All of these changes apply immediately.

The Fair Work Ombudsman (FWO) has had considerable success in the last two years in expanding the scope of liability for underpayments to accessories, including directors and executives involved in infringements and franchisors, to overcome situations where the franchisee is no longer in existence or is unable to pay. The new legislation applying to franchisors, with respect to franchisees, and holding companies, with respect to subsidiaries, gives firmer legislative footing for pinning liability on companies further up the chain (and their executives) who have not taken reasonable care or exercised due diligence. A franchisor or holding company which infringes these rules, and individuals involved in the infringement, will be liable for the underpayments to workers.

The criterion for liability relates to having a significant degree of influence or control over the franchisee's affairs. Due diligence will be a matter of establishing that appropriate policies and requirements were in place, through the Franchise Agreement and related policy and guideline documents, and that there was appropriate monitoring and oversight to ensure that there is compliance in the body of the franchise network or amongst the subsidiary companies. It goes without saying that franchise models or company groups where the controlling body imposes business models which prevent franchisees or subsidiaries from meeting their obligations are likely to fall foul of these laws.

The legislation also gives the FWO enhanced information gathering powers, akin to those of the ACCC under the Competition and Consumer Act. These include the ability to require production of information and documents and to answer questions under oath, along with protections such as evidence of an individual not being used against the individual personally. The FWO has commented that these powers will be used as a last resort against employers who systematically fail to meet their obligations, so there will be opportunities to comply before these sanctions are applied.

Liability for franchisors and holding companies cont.

It is obvious that in the face of these expanded powers, penalties and liability provisions, franchisors, and those in charge of company groups, need to ensure that compliance with workplace laws is a KPI lower down in the organisation. Turning a blind eye will be fraught with risk. This requires a management focus on compliance, which is refreshed regularly, and monitored by audit or other checks to ensure that the franchisor or holding company deals with risks, or at least can show it did its best to prevent infringements.

If you need any assistance with implementing suitable controls and audits on franchisees or subsidiary companies, please contact Stephen Booth or Dominic Russell in our Employment Law Team:

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