MACKINNON & ASSOCIATES

Employment@Work

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Wishing you a very Merry Christmas

For the team at Mackinnon & Associates, 2006 has been an exciting and extremely satisfying year. We've built on our previous successes and have continued providing leading edge employment law and human resources advice. We've been delighted with the feedback we've received from you, our clients. We've also received independent recognition by being named as one of the best seven employment law practices in the New Zealand LawAwards and as being among the recommended employment firms by the AsiaPacific Legal 500. This indicates we're succeeding in providing you with the pragmatic, high quality, proactive advice that we pride ourselves on. We'd like to extend our thanks to you for your support throughout 2006. We hope you all have a wonderful Christmas with your family and friends and look forward to working with you in 2007.

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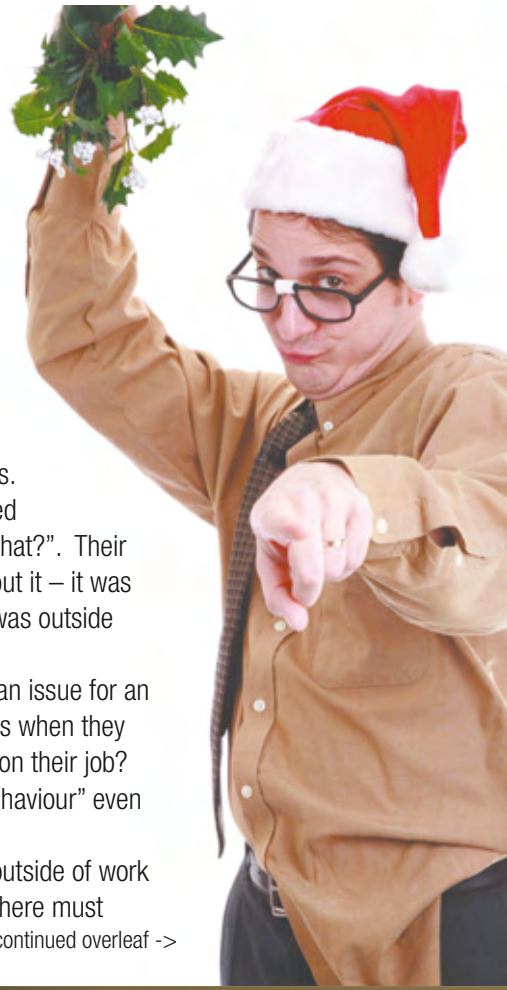
What's done outside work stays outside work... Right?

"Whoa, my head…what a party that was. How much did I drink? Oh … did I really do the "Full Monty" and why did Mary slap me afterwards? I thought I was hilarious trying to dance with her half naked. Anyway, I'm way too sick for work today. Better text the boss - from what I can remember, he was drunk too. He'll understand."



Unfortunately, there are plenty of employees around New Zealand waking up after staff Christmas parties with fuzzy recollections like this. There are probably an equal number of concerned employers waking up, thinking "did he really do that?". Their next thought is often "even so, what can I do about it – it was a party after all. We supplied the alcohol and it was outside work hours."

So when is "misconduct" outside the workplace an issue for an employer? Do employees really have private lives when they can do whatever they want, without it impacting on their job? Or can an employer say "that isn't acceptable behaviour" even if it was in your own time?

Case law has long established that misconduct outside of work hours can justify dismissal. Invariably however, there must

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What's done outside work stays outside work... Right? continued...

be some link between the misconduct and the work environment. This usually happens when the employer can show the misconduct was such that it genuinely undermined the employer's trust and confidence in the employee. Alternatively, the conduct may be so bad as to bring the employer into disrepute. The Employment Court recently dealt with a good example of these principles. In Craigie v Air New Zealand Ltd (AC 16/06), an Air New Zealand pilot had twice appeared in the District Court for criminal assault. Both were at private addresses, were domestic incidents and occurred while off duty. The Employment Court was not convinced that these issues constituted serious misconduct. However, the pilot had also been convicted for Civil Aviation Authority offences while flying in his own aircraft. The District Court judge who had heard that matter had also made adverse comments about the pilot's credibility. The Employment Court considered that those issues, "completely destroyed the relationship of trust and confidence between him and Air New Zealand, and therefore amounted to serious misconduct".

What about work functions?

If an employee misbehaves at a work function, establishing a link between the misbehaviour and the employment relationship is not difficult. The fact that the misbehaviour occurs after work is of minimal relevance because the employee is still attending the event in the capacity of an employee.

However, in cases like this employers must remember that their decisions will be assessed on an objective basis, based on what the Courts believe "a fair and reasonable employer would have done in all the circumstances". (This test of justification is contained in Section 103A of the Employment Relations Act, introduced in December 2004.)

So, in circumstances where an employer has set up a work function, has allowed staff to "party hard" and possibly become intoxicated, how firm a line can an employer take when there is subsequent misbehaviour?

In the above example, the employee seems to have performed a strip tease in front of work mates and possibly sexually harassed his work colleague. Inevitably, the approach of the Courts would be to consider the employee primarily responsible for their own actions. However, the Courts would also expect a fair and reasonable employer to have at least considered the extent to which they contributed to the problem by potentially providing too much alcohol and insufficient controls.

And what about misconduct unrelated to work?

And what if the employee in the above example didn't misbehave at a work function, but instead gave his "performance" at the local bar. Linking that back to the employment environment may be more difficult. However, if the misconduct attracted publicity which reflected poorly on the company or made it difficult for the employee to credibly perform his role, then the link might also be established. Similarly, if Mary was a client or colleague, then the nexus to the work environment might exist.

Summary

There have been many examples in 2006 of "celebrities" and sport stars who have done things in their own time which have attracted media interest, and which have damaged both their own "brand" and also the reputation of their employer.

However, for those who do not quite meet the media's definition of the "A list" misconduct outside of work hours and unrelated to work, will not normally justify disciplinary action.

So, in the case of our "hero", he could be sleeping his hangover off in relative comfort if his performance had happened at a private party with no logical connection to his work. However, in the example above, because his performance occurred at a work do, there is a high chance he will be "stripped" of his job on Monday!

The Christmas Checklist

Just about everybody in New Zealand gets some time off over Christmas be it annual leave, public holidays or "days in lieu". However, this time of year is far from plain sailing for employers who have the challenge of interpreting and applying the Holidays Act 2003 ("the Act"). Hopefully though, the following checklist will assist:

- Over this Christmas period the four public holidays: Christmas Day, Boxing Day, New Years Day and 2 January (imaginatively called "the day after New Years Day!") fall on Mondays and Tuesdays.

- For Monday – Friday workers, these public holidays must be observed on the days that they fall. Employees should receive a paid day off work on each of these days paid at the rate of their relevant daily pay.

- The Act introduced provisions to transfer these days for some staff (commonly known as "Mondayising"). This Christmas season, this 'Mondayising' will have no application, regardless of the shift pattern that an employee works. That means that those who don't normally work Mondays or Tuesdays will not qualify for any of these public holidays this year. Consistent with their normal roster, they will simply receive an unpaid day off.

- Employees can only be required to work on a public holiday if they agree to do so. Some employment agreements provide that agreement. Where that is not the case, then an approach can be made to the employee to see if they will agree to work on that day, but they cannot be compelled to.

- When an employee does agree to work on a public holiday then they are entitled to receive payment at their "relevant daily pay" for the hours that they work, plus half that rate again. While employers can agree to pay more than this rate, the basic entitlement cannot be contracted out of.

- Remember, "relevant daily pay" is often more than just base salary or wages. Instead, it includes the full amount the employee would have received had they worked on the day concerned, which can include commissions, overtime and even some allowances.

- If the public holiday falls on a day that the employee would normally have worked, and the employee agrees to work on that public holiday, then the employee also qualifies for a paid day in lieu (referred to as an "alternative holiday"). The employee must receive a whole day off as their alternative holiday, even if they only worked on the public holiday for a few minutes. The entitlement to an alternative holiday is in addition to the right to be paid at time and a half for the hours worked.

- Casuals who work on public holidays are entitled to the time and a half payment at their relevant daily pay rate. However, whether they qualify for an alternative holiday depends on whether it can be said that the holiday falls on a day that they would otherwise have come into work. This

checklist continued overleaf ->

The Christmas Checklist

depends in part upon what the employment agreement says, but also on the rostering patterns.

- Many businesses that continue to operate during Christmas put staff "on call" or "stand by". The Act provides that if an employee is on call, they may be entitled to an alternative holiday, even if they are not called into work. The key question in determining this will be whether the employee had restrictions imposed on them that meant that "for all practical purposes they did not have a whole holiday". If, for example, an employee must remain within a certain proximity to work, cannot drink, and must carry his/her tools of trade, it might be questionable as to whether the employee has had a "whole holiday". Employers should assess this on a case by case basis.

- Employers can require employees to take annual leave over the Christmas break if they customarily close or discontinue certain work during this time. Employers should give at least 14 days notice of this requirement. The requirement covers both those employees who are entitled to annual leave as well as those who have not yet qualified.

- If an employee becomes sick during annual leave, they can request that the annual leave be converted to sick leave. It is at the employer's discretion as to whether to approve such a request or not. However, if an employee suffers a "bereavement" while on annual leave, then this overrides the annual leave entitlement.

Complying with the Holidays Act is a complex issue for most employers. Hopefully though, by being aware of these requirements employers should be able to plan both a relaxed holiday and a low stress return to work!

90 day probationary period 'sacked'

Many of our employer clients have been interested in the progress of the National Party's probationary employment bill. That Bill aimed to provide a 90 day probationary period of employment, during which new employees would have had no ability to bring a personal grievance under the Employment Relations Act 2000.

That Bill has now been formally voted down during its second reading, meaning that it will not be passed into law.

However, this may not be the last we hear on this issue. The National Party has said that this initiative will still be one of its employment policies if it is elected to Government in the future.

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