

ALERT

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DRUNKEN AND FOOLISH BEHAVIOUR: IT'S BEGINNING TO LOOK A LOT LIKE CHRISTMAS

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Now is the time of year when many businesses are about to hold their annual work Christmas party to celebrate the end of another year. While such events are often eagerly anticipated and intended to be enjoyed by all involved, the reality is they can give rise to the risk of inappropriate, harmful or otherwise unlawful behaviour by staff and expose the business to legal claims as a result. In a case before the Fair Work Commission last year, an employee who became intoxicated at his work Christmas party and then swore at and sexually harassed a number of co-workers was found to have been unfairly dismissed by his employer. This case serves as a timely reminder for employers of the need to take precautions to properly protect their staff and business from inappropriate behaviour at their end of year celebration.

Background

In the case of *Keenan v Leighton Boral Amey Joint Venture* [2015] FWC 3156, a Team Leader for the employer attended the Company's annual Christmas party. It was reported that the Team Leader consumed a total of 13 drinks on the night, including 2 beers before he arrived at the party and a vodka and coke after the party at a public bar attached to the same venue.

During the function the Team Leader told a Director to "f-ck off" when he attempted to join a conversation, made the same comment to a Senior Project Manager, asked a female co-worker for her phone number and said to another: "*Who the f-ck are you? What do you even do here?*" When the party ended, the Team Leader accompanied some colleagues to the venue's public bar, where he spoke crudely to female co-workers, describing one as a "bitch" and kissing another on the mouth, telling her he was going to go home and dream about her.

When the Team Leader returned to work from annual leave in January, the Company investigated the Team Leader's conduct and then dismissed him for sexual harassment.

In response, the Team Leader lodged an unfair dismissal claim in the Fair Work Commission. The Commission upheld the claim, finding that only the Team Leader's conduct during the official work party was relevant. This was because although employees had been informed in advance that the Company's standards of conduct would apply at the function, there was no suggestion that those standards would apply to behaviour outside of the function. There was also nothing in the Company's Code of Conduct or policies which suggested they had any application to conduct outside of work hours or the official work function. Therefore the Team Leader's conduct after the formal party was irrelevant for the purposes of the unfair dismissal claim.

In addition, the Commission found that although the Team Leader's intimidation and phone number request of a female employee during the party was "boorish", it was not sexual harassment and not a valid reason for dismissal.

The Commission held that the Team Leader's conduct in asking a much younger and smaller female colleague during the function "*Who the f-ck are you? What do you even do here?*" was a valid reason for dismissal. However, since the substance of this allegation had not been put to the Team Leader for a response during the investigation, the Team Leader had not been afforded procedural fairness in the termination process.

The Commission also took into account the Team Leader's "good record of continuous service", the one-off nature of the conduct, and the fact that his conduct was the result of being intoxicated at the function where there was "unlimited service of free alcohol".

Tips for employers

This case serves as a timely reminder for employers that while Christmas parties are to be enjoyed, they can quickly get out of hand and pose a risk to staff and the business. Therefore, employers should take appropriate measures to ensure the party is safe and fun for all.

In particular, before the Christmas function occurs, employers should review their workplace policies in relation to sexual harassment, bullying and discrimination to ensure they are up-to-date, clearly set out the types of behaviour that are unacceptable, and they are expressed apply to the Christmas party and other work related functions.

Once finalised, the policies should be distributed to staff before the function so that they can familiarise themselves with the policies and understand their obligations. You may wish to provide training to staff in relation to the policies.

Employers should also clearly communicate to staff the start and finish times of the work function. Alcohol should be served responsibly during the function, with food and non-alcoholic drinks also available. Employers should ensure that staff have a safe way to get home after the event.

If any allegations of inappropriate or unlawful behaviour at the function are raised, employers should take the necessary steps to properly investigate the allegations before taking any discipline action, including dismissal. Employers may wish to seek legal advice before taking such action.

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