

NEWSLETTER

DECEMBER 2011

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

Congratulations to team member Lorraine Buckley on her recent wedding to Anthony Zaffiris. On behalf of the E&IR team, we would like to wish them a wonderful future together. We'd also like to wish Louise Houlihan a happy birthday!

This month two new trainees, Matt Foley and Georgia Hunt, commenced with the E&IR team. Georgia completed a double degree at the University of Melbourne in Law and Science, with a major in pharmacology. Georgia is an avid skier and also enjoys yoga and travelling, and in fact completed an exchange in Dublin. She undertook a seasonal clerkship with Cornwalls in 2009. Matt is also a Law/Science graduate from Monash University and completed an exchange in Prato last year. He enjoys travelling and playing football, as well as long walks on the beach.

We would like to take this opportunity to remind you that the next HR Forum will be held in February. David Moore, head of our Intellectual Property team will be leading a discussion on social media and how it is being used and abused by employees. Further information about the forum will be distributed shortly.

We hope you enjoy this month's edition, which focuses on some of the employment issues that commonly occur around the Christmas-New Year period. Have a happy and safe holiday season!

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Bad behaviour

The Christmas party was a big success...drink was flowing and everybody had a great night, but the employer's hangover may be just setting in. An employee uninhibited by alcohol was rude, aggressive, inappropriate, or dangerous. Several employees have submitted complaints. So what do you need to do? Was the employee's behaviour so unacceptable as to warrant termination?

There are many instances of courts upholding terminations following the inappropriate behaviour of employees at work functions, such as the infamous *Telstra Corporation Ltd v Streeter*. In this case, Telstra terminated an employee after allegations that she had sexual intercourse in a hotel room shared with other Telstra employees and had exposed herself in front of them. The Court of Appeal upheld Telstra's decision, but primarily on the basis that the employee had breached her duty of honesty owed to her employer. In this case, it was not the personal situation that provided the valid reason

for termination, but her lack of cooperation with Telstra's investigation. In each case, whether termination is reasonable will depend on the circumstances, including the employment history of the employee.

It is important that employers treat complaints arising from conduct at work functions seriously. Complaints need to be investigated, just as they would if they occurred in the office or on the factory floor. However, our advice is that you tread carefully when it comes to terminating a misbehaving employee. It may be considered harsh if this conduct was a one-off or if the employee had many years of faithful service. It is advisable to seek legal advice before taking such action.

Sexual harassment at Christmas parties

It's that time of year again! With December fast approaching, employers across the country are planning their end of year functions.



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Although such functions can lift morale and foster positive attitudes, they may also expose employers to legal liability if personnel act inappropriately.

End-of-year functions can be incredibly fun. Unfortunately, because they are often offsite, and the alcohol can be flowing, workers may be more likely to engage in conduct that could be classified as sexual harassment. Depending on the circumstances, employers can be liable for the sexual harassment committed by one employee against another.

The effect of inadequate handling of sexual harassment complaints can be dire. Earlier this year a senior sales consultant with IBM lodged a complaint with the Federal Court seeking \$1.1 million in damages. The employee alleged that a colleague made repeated remarks of a sexual nature and subjected her to unwanted touching. This behaviour was ongoing, and instances occurred at the staff Christmas party.



There are two principal pieces of legislation in Victoria that give employees protection from sexual harassment: the *Equal Opportunity Act 2010 (Vic)* and the *Sex Discrimination Act 1984 (Cth)*.

There are two main types of sexual harassment that occur in the workplace:

- harassment accompanied by an employment threat or benefit; or
- where a hostile work environment is created.

Sexual harassment can be physical, verbal or written, and includes unwelcome touching, suggestive comments or jokes, unwanted invitations for dates or sex and sexually explicit electronic communications.

If an employee engages in such conduct, the employer may be held liable if they have not taken proper precautions. This is the case even if the conduct occurs at a work function that is offsite and outside normal working hours. To avoid such liability, employers need to ensure they have taken reasonable steps to prevent such conduct from occurring, and respond appropriately to any claims that do arise.

Employers should have in place clear Sexual Harassment, Consumption of Alcohol and Equal Opportunity policies that provide examples of unacceptable behaviour. These policies should include the procedure to be followed by employees who want to make a complaint. Having such policies in place is not usually sufficient to establish that a business has taken 'reasonable steps' to prevent such conduct. Staff need to be familiar with the details of these policies and should be able to identify and prevent discrimination and harassment. Shortly prior to any function, employers should distribute the policies to ensure that all staff are up to date with their content and have been trained in what is unacceptable behaviour.

Hopefully, your end-of-year function will occur without a hitch, but it is always best to be aware and be prepared.

Work parties and safety

Most employers do not want to do away with the work Christmas party, but workplace parties can be an occupational health and safety (OHS) minefield. The combination of a social setting and alcohol can create high spirits, but it may also lead to the erosion of commonsense. To avoid potential workplace issues and litigation, it is important for an employer to be familiar with the potential liabilities associated with hosting a business party.

Employers are obliged to ensure the health and safety of employees while they are at work, and it is established that an employer's responsibility to ensure safety extends to off-site functions and the trip home.

Employers must do what is reasonably practicable to ensure that work functions are safe and without risks to health. This might include inspecting the venue for possible hazards, designating some managers to remain sober in order to appropriately monitor and supervise the party, ensuring the responsible service of alcohol (which includes serving sufficient food and making sure there are plenty of non-alcoholic options), avoiding menus that may present a high risk of food poisoning (for example, some buffets) and catering for employee allergies, making sure decorations are put up safely and not over emergency exit signs or near sources of heat, ensuring there are appropriate travel arrangements in place prior to the party to get staff home safely, and communicating their OHS policies (particularly with regard to drugs and alcohol) prior to an event.

Managers who 'shout' employees drinks at an 'after party' may be extending the employer's liability. Thus, work functions should have a clearly designated start and finishing time, and after parties should be discouraged.

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The work Christmas party provides an opportunity for a business to celebrate its wins for the year and to make its employees feel appreciated. OHS laws shouldn't take the fun out of the celebration; however, it is important that employers have safety measures in place to prevent incidents occurring, including at off-site functions.

Working on public holidays

Given the number of public holidays spanning the Christmas period, it is likely that many businesses will encounter the issue of whether employees can be required to work on a public holiday. The general rule is that an employee is entitled to be absent from their employment on a public holiday, pursuant to section 114 of the *Fair Work Act 2009* (Cth). An employer may request an employee to work on a public holiday if the request is reasonable; however the employee may refuse the request if it is not so. Similarly, the employee may also refuse if they have reasonable grounds for refusing.

In determining whether a request, or a refusal of a request, is reasonable, the following are examples of what may be taken into account:

- the nature of the business and the work performed by the employee;
- the employee's personal circumstances, including family responsibilities;
- whether the employee could reasonably expect that the employer might request work on the public holiday;
- whether the employee is entitled to receive overtime payments etc or has a level of remuneration that reflects an expectation of work on the public holiday;

- the amount of notice in advance of the public holiday given by the employer when making the request.

What constitutes a reasonable refusal to work on a public holiday was considered in *Steven Pietraszek v Transpacific Industries Pty Ltd t/a Transpacific Cleanaway* [2011] FWA 3698, where Fair Work Australia held that it was reasonable for a driver of a waste collection company to refuse to work on Christmas and Boxing Day.

Commissioner Williams held that it was reasonable for Transpacific Industries to request the driver, Mr Pietraszek, to work the public holidays (per section 114 of the *Fair Work Act 2009*), because their industry was one that was required to operate all year round. Further, Mr Pietraszek was a full time employee, and had been given three weeks' notice that he would be required to work over the Christmas period.

However the Commissioner went on to hold that it was reasonable in the circumstances for Mr Pietraszek to refuse to work on the requested public holidays. In weighing the evidence, Commissioner Williams considered that Mr Pietraszek hadn't properly explained to his employer the reasons for his refusal, a course of action that by itself would have made the refusal unreasonable. He explained that '[w]here an employee does have good reasons for refusing their employer's request to work on a public holiday, but does not explain those reasons to the employer, I do not believe it can be said that the refusal by the employee to work the public holiday is reasonable'.

Nevertheless, other factors led the Commissioner to the conclusion that the refusal was reasonable. These were:

- Mr Pietraszek wished to spend the relevant period at home with his wife, who suffered from poor health and lacked a driver's licence, necessitating him to be present in order for her to leave the house.

- Mr Pietraszek understood that his role was one which did not require him to work public holidays; although this was inaccurate, his understanding had not been corrected and indeed was supported anecdotally because he had not worked any public holidays in the preceding 12 months.
- He had advised his employer in November, before he was requested to work Christmas and Boxing Days, that he would be unavailable to work those days.
- At a toolbox meeting in mid December, where the matter of working during the public holidays was raised, a misunderstanding of what was discussed occurred: Transpacific Industries believed Mr Pietraszek had agreed to work the public holidays; he on the other hand left under the impression that although his employer had expressed such a wish, he had not committed to anything and the issue would be raised at a later meeting.

Having found that it was reasonable to refuse the request, and that there was not a valid reason for dismissal, Commissioner Williams awarded compensatory damages (reinstatement not being an issue because Mr Pietraszek had already obtained new employment).

Please note that the Gazetted public holidays in Victoria for the 2011-12 Christmas-New Year period are:

- *Christmas Day*: Sunday, 25 December 2011
- *Christmas Day additional holiday*: Monday, 26 December 2011
- *Boxing Day holiday*: Tuesday, 27 December 2011
- *New Year's Day*: Sunday, 1 January 2012
- *New Year's Day holiday*: Monday, 2 January 2012
- *Australia Day*: Thursday, 26 January 2012



Christmas close downs

The Christmas period is traditionally a time for festive frivolities, and many businesses compulsorily close down over the Christmas and New Year holiday period. Such close-downs are common commercial practice because, depending on the nature of the industry, the volume of work during this period may be low or a large proportion of the employees may have requested annual leave, making it unviable to remain open.

Nevertheless, the right of an employer to implement the close-down will depend on the applicable industrial instrument. Many modern awards will contain a provision entitling an employer to enforce a compulsory close-down, but may require them to give all affected employees the stipulated period of notice of their intention to do so. Other common conditions in a close-down provision entitle employees who have accrued sufficient annual leave to cover the period (public holidays excluded), to use that leave for the close-down period and be paid accordingly; those employees who do not have such an accrual are allowed unpaid leave for that part of the period for which they have insufficient annual leave.

However, not all modern awards provide for a close-down period; employees employed under such awards cannot be compelled to take annual leave over the period, and instead the employer must obtain the agreement of each of the employees.

For employees who are not covered by an award or agreement, section 94(5) of the *Fair Work Act 2009* (Cth) stipulates that an employer may require them to take a period of annual leave, but only if the request is reasonable. However, the section goes on to provide that a request may be reasonable if, for example, the employer's enterprise is being shut down for a period such as between Christmas and New Year.

For further information on your rights and obligations relating to a close-down period, please contact the E&IR team.

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Disclaimer

This newsletter is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.

Top tips for employers for the holidays

- Be clear about expectations regarding absences during the holidays, particularly after the Christmas party. It may be advisable to circulate your leave policy, including requirements for sick certificates
- Remember that some employees may be unable to eat certain foods or drink alcohol because of their religious beliefs; be sure to avoid disadvantaging those employees by providing plenty of soft-drinks and catering for those employees at your work function (this includes asking in advance about any dietary requirements)
- Make sure your policy on harassment is up-to-date and brought to the attention of your employees. Provide guidelines if you have a 'secret Santa' or 'KrisKingle' about appropriate gifts for the workplace (see article on harassment in this newsletter)
- Do not discriminate; use 'partners' on invitations
- Make sure if you employ temporary holiday staff that you properly induct and train them, particularly with respect to your safety procedures. Also provide extra supervision for these workers over the Christmas period
- Address safety risks that may arise from reduced staff levels
- Know what the prescribed public holidays are, including any days that are proclaimed as a holiday in substitution for a holiday that falls on the weekend, and ensure that you abide by penalty rates for working on a public holiday, and that you pay employees absent on a prescribed public holiday that falls on a normal work day (see article on public holidays in this newsletter)