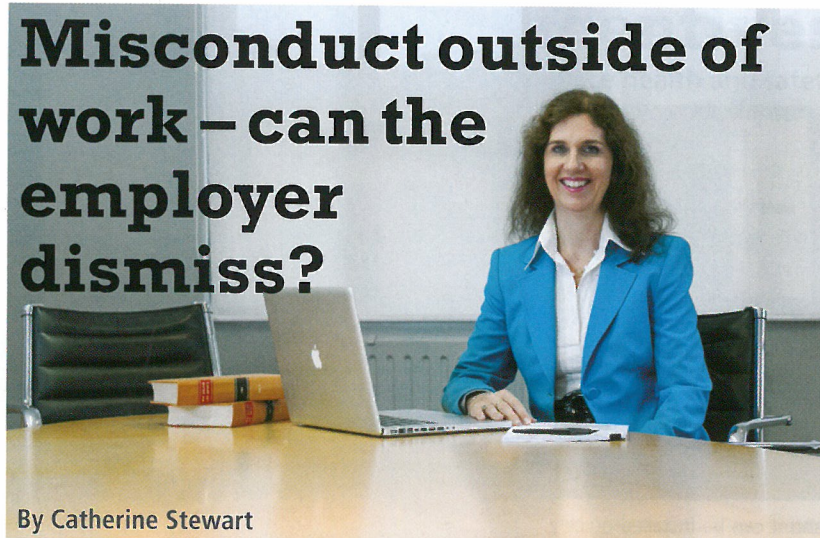


Misconduct outside of work – can the employer dismiss?



By Catherine Stewart

There has been a great deal said and written about accidents, injuries and assaults at work, and the consequences for employees who cause physical injury to others in the workplace. But what if the conduct occurs outside of work, when an employee is acting in their personal capacity and in their own time? Can an employer discipline or dismiss the employee in these circumstances?

This issue was tested in the recent decision from the Employment Relations Authority of *Hallwright v Forsyth Barr Ltd* (March 2013). The facts of the case have been well publicised. Guy Hallwright, a senior investment analyst at Forsyth Barr, was driving his daughter to an appointment when he became involved in an incident with another motorist, Mr Kim. Mr Hallwright's car drove over Mr Kim while Mr Hallwright was manoeuvring into the traffic, causing Mr Kim serious injury. Mr Hallwright was ultimately convicted of causing grievous bodily harm with reckless disregard. After his conviction, Forsyth Barr dismissed Mr Hallwright from his employment.

Mr Hallwright contested his dismissal, seeking not only significant financial compensation but also asking for his job back. He stated that the incident was not work-related and he had already been penalised in another forum by his conviction. He said that his ability to carry out his duties as an employee was not affected and there was no evidence of damage to Forsyth Barr's reputation. In his view the media coverage, which had named Forsyth Barr as his employer, had been sensational and inaccurate and he felt he should not be held responsible for that. He accepted that he had been brought into disrepute, but said that his employer had not.

The Employment Relations Authority disagreed. In their view, Forsyth Barr's conclusion that Mr Hallwright's actions amounted to conduct bringing them into disrepute was a conclusion that a fair and reasonable employer could make.

Pivotal to the Authority's decision was evidence given during the hearing from a PR consultant for Forsyth Barr. The PR consultant said that Mr Hallwright's name being

linked to Forsyth Barr would have caused damage to Forsyth Barr's reputation and that it had the potential to cause significant on-going damage. Her view (and that of Forsyth Barr) was that it was critical for the public to perceive that employees in the finance industry have an ability to exercise good judgment.

The test for dismissing an employee for behaviour outside of work is whether there is a link between the conduct and the employee's employment, and whether the conduct had an adverse effect on the employment. Affirming previous case law, the Authority held that evidence of actual damage was not required to satisfy this test; it is sufficient to show that there is the potential for damage. This is obviously a much lower threshold than proving actual damage. Forsyth Barr acknowledged that it was not able to prove any actual loss to its business, but relied on the constant linking in the media to Forsyth Barr as Mr Hallwright's employer. The Authority also accepted Forsyth Barr's conclusion that Mr Hallwright had breached an obligation in his employment agreement not to engage in any activity that was likely to compromise his ability to carry out his duties. The Authority stated:

"[Mr Hallwright's] duties were carried out at a senior level, in circumstances where his own reputation, integrity and behaviour were relevant to overall perceptions of the way Forsyth Barr Limited conducted its business. The conduct of which he was guilty discredited him personally and tainted his position overall."

Therefore the Authority upheld Mr Hallwright's dismissal and declined to award him any financial remedies or to reinstate him to his former position.

Mr Hallwright has filed an appeal of the Employment Relations Authority's decision in the Employment Court.

In fact, there are numerous cases where an employee's dismissal for misconduct outside of work has been justified. In one case, a pilot was dismissed by Air New Zealand for two incidents of criminal assault at private addresses while he was off duty, leading to multiple convictions in the District Court,



plus a further incident of Civil Aviation Act breaches, while flying in his own time in his own aircraft.

In another case, an employee of Child Youth and Family (CYF) was dismissed after he slapped his son across the mouth following a squash club match. Although the employee was discharged without conviction, the employer concluded that the incident "has the potential to bring the Department into disrepute and reflect badly on CYF and our relationship with the government and the general public."

The *Hallwright v Forsyth Barr* decision will be welcome news for employers who wish to disassociate themselves from an employee

who they consider presents a risk to their reputation and business interests. Employees, on the other hand, should take heed – misconduct in your private life could cost you your job.

Catherine is an employment law barrister who specialises in all aspects of employment law.

This article is general in nature and is not intended as a substitute for legal advice. Please contact Catherine Stewart for advice in any specific situation.

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