

FACT SHEET DECEMBER 2019

'Tis the season for misconduct: The employer's survival guide for the work party season

December is known as the silly season for a reason. Mixing alcohol with workplace celebrations can often lead to incidents of employee misconduct, but not every episode justifies termination of employment.

Here's our guide to keeping your end-of-year celebration nice, not naughty, and how to avoid any legal issues arising.

Lessons to learn from case law

Case law usually gives us the best pointers about how functions should (and shouldn't) be conducted.

Keenan case

The *Keenan* case involved an employee dismissed for misconduct due to his behaviour at a work Christmas party and after-party. After drinking excessively, it was alleged that he'd **behaved aggressively**, abused many co-workers and managers and sexually harassed some female staff members.

The employer terminated his employment for serious and wilful misconduct, but the Fair Work Commission (FWC) found his termination was harsh and **ordered his reinstatement**.

One of the key findings was that the employer had served **unlimited alcohol** to guests, which was at odds with its expectation that staff should behave themselves. The employer ought to have known that bad behaviour would follow excess alcohol consumption, and so the dismissal was found to be harsh.

Puszka case

The *Puszka* case involved an employee who was working at a client's worksite. She attended an after-hours function hosted by the client, **drank excessively**, vomited on the floor and was assisted from the venue. There was an allegation that she'd made **inappropriate comments** to both the client's staff and the venue's staff.

After an investigation, her employment was terminated for serious and wilful misconduct. The employer's finding was based on her drunken behaviour and the allegations of inappropriate comments.

On appeal, the FWC said that even though the woman's intoxication was inappropriate, it was a **one-off event**, and **hadn't harmed the employer's business or reputation**. It said the allegations about inappropriate comments **weren't substantiated**, so the employer shouldn't have relied on them as a reason to terminate.

The appeal was dismissed and the employee won the right to reinstatement.

The difference between misconduct and serious misconduct

One of the biggest lessons for employers is that **incidents at work functions can't always be categorised as serious misconduct** justifying summary dismissal.

If the employee has committed an act of misconduct, some other sanction may be more appropriate. **Acts of misconduct aren't as serious**, so the disciplinary action should be less severe. For example, a written warning.

The distinction between these concepts isn't always obvious. It always depends on the unique circumstances of the situation.

However, in either scenario, it's essential to **conduct a proper investigation** into the incident: suspending the employee with pay, collecting evidence, interviewing witnesses, interviewing the employee, giving an opportunity to answer your concerns and keeping an open mind throughout the process so as to not pre-determine the outcome.

Remember, there's **no such thing as an informal complaint** in these situations. You need to investigate everything.

Once you've finished investigating, you need to **weigh up all the evidence** and only then can you make a decision about whether the conduct justifies termination of employment or some other disciplinary action. This is a critical stage of the process, and it's essential to **seek our legal advice**, especially when weighing up whether the incident amounts to misconduct or serious misconduct.

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Consider your organisation's actions

Before you take action, turn the mirror on yourself and your company. As the Keenan case demonstrates, **employees can't be entirely responsible for their actions if their employer was complicit in the conduct.**

For example:

- Serving unlimited drinks does nothing to encourage employees to go easy on alcohol consumption
- Failing to remind employees of their obligations while at the function
- Failing to conduct a proper investigation after an incident

When investigating a grievance or incident, and when considering termination, be sure to **follow your workplace procedures**. Check any relevant policies and use them as a checklist to ensure you've done everything you're obliged to do.

Investigate the allegations **as soon as possible** after the incident.

Taking action in the lead-up to the function

Even when your workplace event is in the planning stages, it's a good idea to **seek legal advice**, so you know how to deal with any issues.

In the lead-up, remind all workers in writing:

- The function is a work function – it has a start and an end time!
- Usual policies, procedures and expectations of appropriate behaviour apply
- Intoxication isn't an excuse for misconduct
- For Kris Kringle or Secret Santa gift exchanges, there will be zero-tolerance for inappropriate gifts or gifts of a sexual nature
- Of transport arrangements to and from the venue
- Driving to work on the day of the function is discouraged. Consider providing taxi vouchers or reimbursement for Uber fares as an incentive for workers not to drive

Taking action during the function

During the function, you should ensure:

- Service of alcoholic drinks ends at a specific time
- There are plenty of non-alcoholic drinks and food
- Supervision of workers' alcohol consumption
- Workers understand that any after-party isn't sanctioned by your organisation
- The bar tab is finalised when the function ends
- Workers are told the function has ended
- Any intoxicated workers are escorted into safe transport by supervising staff

Keeping it real

It's possible for office parties to be fun celebrations without scandal or incident. But some **risk management and good communication** is always a good idea to ensure things run as smoothly as possible. And one final note of caution: if you're thinking of wearing a Santa suit and directing employees to sit on your lap, think again. Bad idea!

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