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When can an employer regulate an employee's out of hours conduct?

The dividing line between an employee's conduct at work and their conduct outside of work is sometimes unclear. Many relevant authorities on this topic have become the focus of renewed attention due to the new positive duty for employers to prevent workplace sexual harassment.

Numerous court and tribunal decisions over the years confirm that an employer does not have the right to regulate out-of-hours conduct unless that conduct is sufficiently connected to the workplace.

The principles enunciated in the decision of Ross VP[1] of the Australian Industrial Relations Commission in *Rose v Telstra* (1998) AIRC 1592 have been cited in numerous later decisions, including in recent decisions of the Fair Work Commission (FWC). This case involved an employee, Mr Rose, of Telstra, who had a fight with another employee in a hotel room. The other employee stabbed Mr Rose with a piece of glass and was charged by the police and ultimately convicted. At the time, Mr Rose and the other employee involved were deployed to work away from home. Telstra terminated Mr Rose's employment for 'improper conduct', which he challenged in an unfair dismissal case. The other employee had already resigned. Ross VP decided that there was no valid reason for the termination, and the decision was harsh. In the decision, Ross VP identified the following principles relating to out-of-hours conduct:

> *It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:*
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> - *the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or*
> - *the conduct damages the employer's interests; or*
> - *the conduct is incompatible with the employee's duty as an employee.*
>
> *In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.*
>
> *Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct.*

A Full Bench of the FWC referred to the above decision of Ross VP at length in *Sydney Trains v Bobrenitsky* [2022] FWCFB 32[2] (***Sydney Trains***) and concurred with Ross VP's analysis of the relevant cases and principles.

With regard to sexual harassment conduct, the fact that two people happen to be work colleagues is insufficient to establish a relevant work connection when the conduct occurs after hours. Hatcher, VP of the FWC (now Hatcher J, President of the FWC), analysed this issue with reference to relevant court and tribunal decisions in *Keenan v Leighton Boral Amey* [2015] FWC 3156

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[1] Justice Ross later became the President of the Fair Work Commission.

[2] The decision of the FWC was the subject of an application for judicial review. In *Bobrenitsky v Sydney Trains* [2023] FCAFC 96, the Full Court of the Federal Court of Australia set aside the decision of the FWC based on a failure by the FWC Full Bench to properly consider the criteria in s 387 of the Fair Work Act. However, the Full Court rejected the judicial review grounds which sought to challenge the FWC Full Bench's reasoning on the out-of-hours conduct issues.

(***Keenan***). This case involved an employee (Mr Keenan) who sexually harassed several female work colleagues at a bar and a taxi stand after a work Christmas party had concluded. No sexual harassment occurred at the Christmas party.

After analysing numerous court and tribunal authorities and the relevant provisions in the *Sexual Discrimination Act 1984* (SD Act), Hatcher VP concluded that *"the mere fact of there being a common employer is not sufficient to render the relevant conduct unlawful"* under the section of the Act (s 28B(2)) which prohibits an employee sexually harassing a fellow employee.

Hatcher VP considered whether the employer was vicariously liable for any of the sexual harassment conduct that occurred in the upstairs bar and at the taxi stand, after the Christmas Party had ended. He concluded that the employer did not have vicarious liability for the relevant out-of-hours conduct because section 106 (Vicarious liability etc) of the SD Act was limited to conduct *"in connection with the employment"*. Hatcher VP also rejected a *"but for"* test applying to circumstances relating to out-of-hours conduct. That is, it is not valid to consider that conduct is work-related just because *but for* the employment, the sexual harassment would not have occurred. Hatcher VP concluded that even though Mr Keenan sexually harassed a number of work colleagues, there was no relevant work connection and the employer did not have a valid reason to terminate Mr Keenan.

Hatcher VP's analysis of the SD Act is of continued relevance, despite the introduction of the positive duty on employers to prevent sexual harassment. Sections 28(2) and 106 in the Act, as discussed above, have not been amended since *Keenan*.

One of the recommendations in the Australian Human Rights Commission's 2020 *Respect@Work Report* was for WHS Ministers to develop a Code of Practice on Sexual Harassment. Consistent with this recommendation, in December 2023 Safework Australia published a Model Code of Practice on Sexual and Gender-based Harassment (National Code of Practice). The terms of the model code were then adopted by SafeWork NSW in a Code of Practice on Sexual and Gender-based Harassment (NSW Code of Practice) which was published in June 2024.

Section 1.2 in the National Code of Practice and NSW Code of Practice provides a number of examples of where sexual and gender-based harassment at work may occur:

> ***1.2 Where may sexual and gender-based harassment occur?***
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> *This Code addresses sexual and gender-based harassment at work. A 'workplace' means a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. This means sexual and gender-based harassment at work can happen:*
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> - *at a worker's usual workplace*
> - *where a worker is working remotely, including if the person's workplace is their home*
> - *in a place where the worker is undertaking work at a different location (such as a client's home)*
> - *where the worker is engaging in work-related activities such as conferences, training, work trips, work-related events or if you, as the PCBU, host a work-related social activity like a Christmas party*
> - *by phone, email or online (such as through social media platforms), or*
> - *at worker accommodation (such as accommodation provided at fly-in, fly-out sites).*

For further advice or assistance about out-of-hours conduct or sexual harassment at work, please contact Justine Smith, Lawyer of Actus Workplace Lawyers on 0414 947 651 or Email: justine.smith@actuslawyers.com.au.