When can an employer pry into an employee's private life?

An employee's conduct outside the workplace can give rise to disciplinary action in some circumstances, but not all. There must be a link between the misconduct and the work environment.

The tricky part in these types of cases is often establishing whether that link exists. Once an employer is notified of a complaint/ incident, they must first turn their mind to whether it is an employment issue.

The Court of Appeal in *Smith v Christchurch Press Company* said:[1]

"… there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way: because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee."

Broadly speaking, some common overlapping areas between an employee's private life and work life can include when the conduct impacts on work performance, impacts the business' reputation, or where an employee discloses confidential information.

Activity on social media can be cause for disciplinary action. The problematic content could be related to the workplace, such as commenting negatively about the workplace online. Alternatively, it could be content that is unrelated to the workplace/ employer, but is objectionable and it is clear who the employees' employer is.

In deciding whether a link exists, an employer must consider each case on its own facts, taking into account all of the context and circumstances. If a link is established, and the employer proceeds with an investigation, as with any employment process, they must act in good faith and within the test of justification (as set out in s 103A Employment Relations Act 2000).

Case examples

Hallwright v Forsyth Barr Ltd

Mr Hallwright was involved in a 'road rage' incident where he, albeit accidentally, drove over another motorist causing him serious injury. He was convicted of causing grievous bodily harm with reckless disregard.

The actions were not carried out in the course of Mr Hallwright's employment, and the nature of his employment, nor his employer were identifiable. However, the information was eventually publicised in the course of significant media attention that followed the incident.

Forsyth Barr initiated a disciplinary process into whether Mr Hallwright's conduct had brought it into disrepute. It raised a number of factors, including the extensive media coverage that described Mr Hallwright as an "investment banker" or a "senior employee" of Forsyth Barr. Forsyth Barr had received queries about how it could employ someone capable of acting as Mr Hallwright had. It was an integral component of Mr Hallwright's job that he be available to make public statements and provide commentary to the media. The integrity and probity of senior employees in the investment industry is of enormous importance, with public confidence being critical to success in the marketplace. Forsyth Barr's reputation had been

[1] CA292/99 at [25]

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damaged, and Mr Hallwright's name and that of Forsyth Barr had been inextricably linked.

Forsyth Barr ultimately dismissed Mr Hallwright for serious misconduct in that his actions amounted to conduct bringing his employer into disrepute, and breached an obligation in his employment agreement not to engage in activity that was likely to compromise his ability to carry out his duties.

Mr Hallwright challenged his dismissal in the Employment Relations Authority (**ERA**), however it dismissed his claim.[2]

Mr Hallwright then challenged the ERA determination in the Employment Court, however it also dismissed Mr Hallwright's claim. It concluded it was open to Forsyth Barr to conclude Mr Hallwright had committed serious misconduct and the decision to dismiss and how Forsyth Barr acted was what a fair and reasonable employer could have done in all of the circumstances.[3]

A v Chief Executive Child Youth and Family

A senior manager (**A**) of Child Youth and Family (**CYF**) was witnessed slapping his son across the mouth following a club squash match. Complaints were made to the police and to CYF's.

CYF's initiated a disciplinary process and ultimately dismissed A. He challenged his dismissal in the ERA. The ERA however found:[4]

- The conclusion that A's actions were inconsistent with the values embraced by CYF, and thus prevented him from leading by example, was a reasonable conclusion in all the circumstances.
- The conclusion that A's behavior constituted serious misconduct was a finding that a fair and reasonable employer would have reached given all the circumstances at the relevant time.
- The conclusion that A's conduct had brought CYF into disrepute was a valid one.
- The conclusion CYF no longer had the requisite trust and confidence in A as a senior manager was a finding a fair and reasonable employer would have reached.
- Dismissal was the appropriate outcome.

Scott v Department of Corrections

Ms Scott was a Corrections Officer who posted a video on her TikTok account in her uniform, holding up handcuffs and mouthing the words "*ima take your man if I want to"*, with the hashtags #thoselooksthoug, #relaxgirlsitsmyjob, #happyinarelationship and #fyp. Text was inserted above the video with the words "when partners come to see the men…"

Corrections received notification of the video from employees and a member of the public whose partner was in prison.

The Acting Prison Director said the ramifications of the video were immediate. She also found another video in which Ms Scott could be seen mouthing the words "*I'm a savage, choke im, shoot im, stab im… what? That's how it goes*" with matching hand gestures. She was not in uniform but is identifiable as a Corrections Officer because other videos show her in uniform.

Corrections conducted an employment investigation and dismissed Ms Scott for serious misconduct. The reasons included that the posting with the text "when partners come in to see their men…" displayed careless and unsafe behaviour that placed Ms Scott and others at risk; that Ms Scott failed to understand the seriousness or the potential and actual ramifications of the posts; and that the videos may have brought Corrections into disrepute.

[2] [2013] NZERA Auckland 79
[3] [2013] NZEmpC 202 at [99].
[4] [2011] NZERA Wellington 125 at [87]-[93]

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Ms Scott challenged her dismissal in the ERA, however it dismissed her claim, stating:[5]

"… despite Ms Scott's intention, and her experience and commitment to the job of a Corrections Officer, she neglected to recognise the inappropriateness of posts she was creating and uploading to TikTok and the likely loss of control of material in an electronic environment. With the consequent actual and potential for reputational damage and the safety risks created by the content and nature of the posts, Corrections had acted as a fair and reasonable employer in all the circumstances."

Dealing with an employees' conduct outside of work can be challenging. The context and circumstances will be relevant in determining whether it is an employment issue. An employers' usual requirements of procedural fairness will apply to any disciplinary investigation. Any decision made should be informed by contractual provisions and/ or relevant policies; a proportionate response; and one a fair and reasonable employer could have come to in all of the circumstances.

Want to know more?

If you have any questions about employee conduct outside the workplace, please contact our specialist Employment Team.

[5] [2022] NZERA 508 at [69]

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