

## Article Information

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# Don't tell me the party's over: The Fair Work Commission considers the physical and temporal limitations to managerial intervention into the office Christmas party

**The decision in *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156 found it to be unfair to rely upon multiple instances of misconduct occurring after the official end of an office Christmas party in dismissing an employee.**

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As many managers would be aware, the traditional office Christmas party, if not carefully controlled, can get a little out of hand.

Leighton Boral Amey NSW Pty Ltd (**LBA**) will be all too aware of this now that its 2014 Christmas party has been subjected to significant scrutiny by the Fair Work Commission in determining an unfair dismissal application by Stephen Keenan. Mr Keenan was employed as a Team Leader at LBA until he was dismissed as a result of his conduct at the 2014 party.

Employees of LBA converged upon the Novotel Sydney Brighton Beach Hotel on 12 December 2014 from 6:00 pm for their annual Christmas function. A function room had been hired by LBA between 6.00 pm and 10:00 pm that evening, and hotel staff served beer, wine, some mixed drinks, soft drinks, finger food and canapés during the function. It was intended for only the hotel staff to be able to serve drinks. However, at some point during the night, the guests were able to serve themselves bottled beer from a large container.

While at the function, Mr Keenan became very intoxicated. Over the course of the evening, he consumed 13 alcoholic beverages, including two beers before he arrived and a vodka and coke after the party finished at 10:00 pm.

### Incidents of Misconduct

Mr Keenan told the company director to “f\*\*k off” when he attempted to join a conversation, said the same to a senior project manager, and asked a female employee for her phone number.

He also demanded to know who a younger female colleague was in an “aggressive, intimidating and bullying” manner, asking her, “Who the f\*\*k are you? What do you even do here?” when she said she disagreed with Mr Keenan’s offensive opinions about members of the LBA management.

As can often happen, when the party ended at 10:00 pm, a group of LBA colleagues, including Mr Keenan, moved to the public bar at the hotel. Whilst there he continued to drink, called a female colleague a “b\*\*\*h” and suddenly, and without invitation, kissed another, later saying that he was going to go home and “dream” about her.

When the remaining LBA colleagues were ready to leave for another venue, Mr Keenan told yet another female colleague that it was his “mission” to find out the colour of her underwear that night. When the group arrived at the new venue, he was refused entry and went home.

### Investigation

Human Resources became aware of the incidents when LBA employees returned to work the next week. Unsurprisingly, it was determined that the incidents needed to be investigated further.

Mr Keenan was invited on 18 December 2014 to respond to eight allegations concerning his conduct during, and after, the Christmas function. Whilst a decision to terminate his employment was effectively made that day, LBA waited until Mr

Keenan returned from leave over the Christmas and New Year period on 20 January 2015 to advise him of their decision, to not ruin his Christmas break.

### **Unfair Dismissal Application**

Mr Keenan made an application for an unfair dismissal remedy in the Fair Work Commission, seeking reinstatement. Vice President Hatcher agreed that the eight incidents on 10 December 2014 did in fact occur, but concluded that for the purposes of determining whether Mr Keenan's conduct warranted dismissal, the Commission could only consider those incidents occurring in the hours during which the room within which the party was held.

The circumstances in which "out of hours" misconduct may constitute a valid reason for dismissal can be found in the leading decision of *Rose v Telstra*, which includes:

- conduct that, viewed objectively, is likely to cause serious damage to the relationship between the employer and employee
- conduct that damages the employer's interests
- conduct that is incompatible with the employee's duty as an employee.

Vice President Hatcher rejected any notion that Mr Keenan's conduct following the Christmas function could legitimately constitute a valid reason for dismissal in accordance with the principles in *Rose v Telstra*. This was because he found that the incidents occurred in "*essentially a private social setting, albeit involving persons sharing a common employer who had just attended an official Christmas function, it was not conduct which could be regarded as indicative of a rejection or repudiation of Mr Keenan's employment conduct*".

He noted that there was nothing in LBA's Code of Conduct or relevant policies which suggested that they had any application to social activities of the nature of an unofficial after-party, and that there was no evidence that any expectation that the LBA standards of behaviour would apply beyond the time and physical constraints of the Christmas party were communicated to LBA employees.

Vice President Hatcher therefore only considered the allegations which related to Mr Keenan's conduct at the Christmas function proper. He concluded that the only incident which was capable of being a valid reason for the dismissal was the "aggressive, intimidating and bullying" exchange with the more junior female employee where Mr Keenan demanded to know "Who the f\*\*k are you? What do you even do here?"

However, Vice President Hatcher concluded that this allegation was not properly put to Mr Keenan, and that the procedural failure resulted in the dismissal being unfair.

At the meeting with Mr Keenan on 18 December 2014, LBA sought Mr Keenan's responses to the eight allegations. Vice President Hatcher found that LBA failed to identify the factual content of most of the allegations in a way which would have allowed Mr Keenan to give an informed response. The allegation concerning the "Who the f\*\*k are you?" statement was, the Commission found, misrepresented. Mr Keenan was asked if he had "described certain managers in offensive terms" and then asked if he remembered "any other interactions" that made the female employee "feel uncomfortable". This method of questioning was found by Vice President Hatcher to not allow Mr Keenan any proper opportunity to respond to the allegation.

Further, Vice President Hatcher stated that he considered the service of alcohol at the function to be a "mitigating factor", although he stressed that his comments did not mean that Mr Keenan could "divest himself of responsibility for what occurred because of his state of intoxication". What was important for Vice President Hatcher was the *manner* in which alcohol was served at the function, where people were able to freely help themselves to beer. The Commission concluded that the role of alcohol at the function weighed "at least in a limited way" in favour of the dismissal being harsh.

Having found Mr Keenan's dismissal to be unfair, Vice President Hatcher invited the parties to make submissions as to the appropriate remedy. As at the date of writing, no final orders concerning remedy have been made.

### **Guidance for employers**

While this decision generated some significant media attention because of some of Vice President Hatcher's comments concerning the role alcohol played in the incidents and where the lines between "at work" and "not at work" can be drawn, the key issue here was in fact very different. What made the dismissal unfair was a failure by LBA's management to make it abundantly clear what standards were expected during and after the function, and the flawed method of investigating the incidents.

The lesson for employers in this decision is that management should make it very clear to employees what standards of

behaviour are required at work functions, and that they are expected to continue to behave in accordance with the employer's standards after the function finishes.

Employers also need to be mindful to properly particularise allegations when investigating any incidents, so that it cannot be argued that the employee could not properly respond to any allegations later.