



# Fact Sheet

## EMPLOYMENT LAW

### Managing the 'Silly Season'

That time of year is fast approaching- it's called the 'Silly Season' for good reason.

While misconduct and serious misconduct, stress claims and allegations of harassment can all occur at any time throughout the year, they tend to be more likely to occur during the festive period. This is often due to the flurry of work related social activities, which are more often than not fuelled by an employer sanctioned use of alcohol!

We have set out below some practical tips which will assist you to manage the 'silly season', including information about what to do in the event that things do not go to plan.

You may think that your employees must act responsibly during the Christmas party and adhere to your Code of Conduct, and that arranging the function at a venue where the host has a legal obligation in relation to the responsible service of alcohol relieves you of the burden of supervising your employees – but if you do – you are wrong.

In a Fair Work Commission decision (*Keenan v Leighton Boral Amey NSW Pty Ltd [2015] FWC 3156*), an employee who was dismissed for misconduct during a Christmas

party and a private after party was ordered compensation because the decision to terminate was harsh in all of the circumstances.

The relevant principles to be taken away from the *Keenan* decision can be simply summarised as follows:

- *employers must take adequate precautions to control the consumption of alcohol at work functions;*
- *in circumstances where unlimited alcohol is provided, an employer will find it difficult to maintain a termination for a breach of a high standard of behaviour, particularly where the employee has not been supervised in relation to alcohol consumption.*

This decision serves as a reminder that employers must have a responsible service of alcohol plan in place to ensure that employees do not behave badly during the silly season.

#### Action required prior to and at the Christmas party:

- You should have in place a well communicated Code of Conduct that applies to all employees, including during the work function. Employees

must be made aware that being intoxicated is not an excuse for misconduct.

- Employees must be instructed that inappropriate, sexually based or offensive Kris Kringle gifts will not be tolerated under any circumstances.
- Communicate your expectations to employees prior to the event, including transport arrangements. You could do this by email or at team meetings.
- Ensure that employees do not drive their own vehicles to work on the day of the function. Instruct them to catch public transport, taxi, Uber or be dropped at work.
- Make it clear to employees that they can seek reimbursement for taxi or Uber charges or provide cash to employees for this purpose.
- Ensure that an adequate amount of food and non-alcoholic drinks are provided during the function.
- Carefully plan the consumption of alcohol and arrange adequate supervision of employees to ensure consumption is not excessive.

*continued overleaf...*

- If employees decide to take the party elsewhere after the closure of the function make it clear that the private function is not connected to work or sanctioned by the employer. Do not party on with them!
- Specify the time when the function will end. Having an open ended function is a licence for trouble. At the closing of the function finalise the bar tab and ensure that employees are instructed that the function has come to an end.
- Despite your best efforts if you notice that employees are intoxicated they should be escorted to a taxi or means of safe transport and not be allowed to wander alone unsupervised.
- If you are thinking of wearing a Santa suit and directing your employees to sit on Santa's lap in exchange for their Christmas gift or bonus – think again! Bad idea.
- Turn your mind to whether you need to properly investigate any complaint you have received or conduct you have observed. Think about the recommendations set out above before jumping to the conclusion to terminate. Have regard for your own conduct before making a final decision.
- Follow your procedures in relation to discipline. If you don't have any – then seek urgent legal advice before taking action.
- Remember - there is no such thing as an informal complaint. If an employee complains to you that he or she has been inappropriately 'handled' or spoken to during a work function, then you must make it clear that it is your duty to investigate. Where possible get the complaint in writing.
- Ensure that you provide the employee who has allegedly behaved badly with procedural fairness. He or she must be given an opportunity to respond to any allegations and those allegations must be appropriately and fairly put to them.

#### What to do when things don't go to plan!

- Deal with any issues that arise in a timely manner.
- Do not wait two or three weeks before dealing with the issue as by that time it may not carry as much significance and it may be too late to do anything about it. If you are in doubt about how or whether to address the issue seek legal advice before 'sweeping it under the carpet'.



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