SQUIRE PATTON BOGGS

WORKPLACE VIEW

October 2014

Employee Pays for Practical Joke

By Kylie Groves, Partner

A Department of Correctional Services employee who used a co-worker's login to send an email as a practical joke not only lost his job but was ordered to pay his 'pranked' co-worker damages for economic and non-economic losses. The decision serves as a timely reminder and warning to employees about the potential for them to be held personally liable for their wrong doing at work.

The Prank

Mr Kirkham, using Mr Tassone's email account, drafted an email above Mr Tassone's electronic signature and sent it to everyone on the Department's electronic distribution lists (over 2,000 people). The email said:

"*Hello people, just a note to say that I am a homosexual and am looking for like-minded people to share time with.*"

Mr Tassone, the brunt of the joke, was not amused and immediately started to suffer some degree of shock, left the workplace and was declared unfit for work. He was later diagnosed with an acute stress reaction and an adjustment disorder and had almost a year away from work on workers' compensation. When he returned to work at the Department on a part-time basis, it was not to the position he occupied before the incident.

The Prankster

While Mr Kirkham initially admitted to sending the email, he later retracted his 'confession' saying he had been coerced by another employee into making the false admission. Before denying his involvement, he had told investigators that sending emails pretending to be someone else was not uncommon among his work mates and that he had never intended to send the email to everyone in the Department.

Following an investigation, Mr Kirkham's employment was terminated. The reasons for termination included his inappropriate use of a work computer and his failure to answer questions truthfully during the investigation. Mr Kirkham brought an unfair dismissal claim, but was unsuccessful with the South Australian Industrial Relations Commission. The Commission found that dismissal was a reasonable remedy for the Department to take. Mr Kirkham appealed the decision but his appeal was not successful.

However, losing his job was not the end of the matter.

Defamation

Mr Tassone brought an action in defamation against Mr Kirkham alleging he had published an email that suggested Mr Tassone was a homosexual trying to solicit sex from his co-workers.

While the email clearly conveyed that Mr Tassone was homosexual, the Court held that, given community attitudes to homosexuality, this was no longer regarded as a defamatory imputation. However, the Court held that the email also conveyed that Mr Tassone was promiscuous, was of loose moral character and that he was seeking to solicit sexual relationships with people he did not otherwise know. Those aspects of the email could be defamatory both within the general community and among the recipients of the email. The Court also held that a further meaning conveyed by the email was that Mr Tassone was using his employment to solicit sexual relationships and was thereby acting in an inappropriate manner in the course of his employment.

Mr Kirkham argued that it would have been obvious to the recipients that the email was sent in jest or that they would have soon known that it was sent in jest.

In deciding whether the "ordinary, reasonable members" of the class of recipients of the email would have imputed any of these defamatory meanings, the Court found that while the subjective intention of Mr Kirkham was probably to make a joke, it was unlikely that the ordinary, reasonable recipient of the email would spontaneously have made the assumptions necessary to render the email harmless. They would not, for instance, have known that it had been sent by someone other than Mr Tassone.

Damages Awarded

The Court found that the effect of the defamation on Mr Tassone was very severe. He not only lost his job which he had enjoyed but also suffered a psychiatric illness as a result of the defamation. Mr Kirkham was ordered to pay Mr Tassone $75,000 for his non-economic loss which included the psychiatric injury and aggravated damages. He will also be required (this amount has not yet been finalised by the Court) to pay Mr Tassone an amount for his economic loss including compensation for lost wages, medical expenses and pharmaceutical expenses.

Implications for Employers

- Employers should take prompt and appropriate action in similar situations to alleviate the traumatic impact on the employee concerned. While the employer was not held liable in any way for Mr Kirkham's action, the Court noted that no statement was issued by the Department to say that Mr Tassone had not sent the email and Mr Tassone described the personal written apology he received from the Department as "cold comfort".
- Employers should remind employees that 'innocent fun' at work could land them in hot water.

WORKPLACE VIEW

Employer Reminder

As a long-serving employee, Len should have known better. He had agreed to be Daisy's support person at a disciplinary hearing on charges against her of 'planking' across the raised tines of the stockroom forklift while on night shift. Management found out about the stunt after Daisy posted photos on Facebook.

During the disciplinary hearing, Len provided support for Daisy and rightly did not intervene as an advocate. But in the lunch room the next day, he told his colleagues what had happened during the hearing and how Daisy had confessed to being 'bored out of her mind that night'.

When management found out, Len was summoned and threatened with dismissal for inappropriately making confidential matters public. But Len was lucky and managed to escape punishment for his gossipy behaviour because the employer's policy said nothing about the duty of support persons to retain confidentiality. The red-faced employer soon issued guidelines for the appropriate behaviour of support persons.

The principle of confidentiality at such proceedings, though not on above facts, was upheld this month in *CFMEU v MSS Strategic Medical & Rescue [2014] FWC 4336*.

Did You Know?

On 10 September 2014 the High Court handed down the highly anticipated decision in *Commonwealth Bank of Australia v Barker* [2014] HCA 32, ruling that there is no term of mutual trust and confidence implied into Australian employment contracts at common law.

The ruling overturned previous decisions of the Federal Court (in 2012) and the Full Federal Court (in 2013) which held that such a term does exist in Australia.

The implied term of mutual trust and confidence requires employers and employees to refrain, without reasonable cause, from acting in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. What this means in practice is said to depend on the nature of the relationship and the facts of the case.

The High Court found that, to imply such a term into all employment contracts, would go beyond the realms of what would be considered an appropriate exercise of the Court's judicial power due to the complex policy considerations and far reaching repercussions involved.

The ruling has not affected the implied duties of good faith, fidelity and co-operation, which continue to apply in the Australian employment context.

Events Update

Squire Patton Boggs Australian Labour and Employment Breakfast Series 2014

Sydney

Level 10, 1 Macquarie Place, Sydney

The Year in Review
Wednesday 22 October 2014
8 a.m. breakfast, 8:15 a.m. seminar commences

Perth

Level 21, 300 Murray Street, Perth

Safety Prosecutions
Wednesday 26 November 2014
7 a.m. breakfast, 7:30 a.m. seminar commences

Client Quiz

The *Fair Work Act* 2009 (Cth) says an employer may request an employee to work on a public holiday if the request is reasonable.

Which two of the five factors below need not be taken into account when assessing if the request is reasonable:

1. The employer's operational requirements
2. The amount of notice provided
3. It was fair to share the obligation and the overtime among the workforce
4. The employee needed the training this would provide
5. Whether the employee was full-time, part-time or casual

The first correct answer emailed to Isla.Rollason@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Legislation Update

Legislation:	Update:	Key Updates:
Fair Work Amendment Bill 2014 (Cth)	Introduced into the Senate on 27 August 2014, awaiting second reading. Will require support of cross benchers to pass the lower house.	1. **Changes to Greenfield Negotiations:** Employers will be able to refer a proposed greenfields agreement to the Fair Work Commission if no agreement is reached within a three month negotiation period. Good faith bargaining obligations are to be imported into Greenfields negotiations. 2. **Changes to Individual Flexibility Agreements:** IFA agreements are to cover a broader range of work related arrangements and require an extensive notice period for termination (13 weeks). 3. **Curtailing the Labor Government's Right of Entry laws** Unions will need to be covered by an enterprise agreement or be invited by one of their members (or an employee they are entitled to represent) before they can enter sites. Officials will no longer be able to claim travel and accommodation expenses from employers. The lunch room will no longer be the default meeting room. 4. **Implementation of Other Review Panel Recommendations:** The Bill also seeks to implement a range of recommendations made by the Fair Work Review Panel, including: (a) a requirement that employers discuss requests for extensions of unpaid parental leave under s 76 of the Act, when requested by their employees (b) clarification that annual leave loading is only payable on termination if specified in an applicable agreement or award (c) amendments that prevent employees from accruing or taking annual leave whilst on workers compensation (d) a removal of the requirement for a transfer of business order where an employee moves between associated employers on a voluntary basis (e) amendments that grant the Fair Work Commission greater powers to dismiss certain unfair dismissal claims without holding a hearing

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