



## November 2020

THE BUSINESS NEWSLETTER FROM AUSWILD & CO  
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## LET'S NOT DRINK TO THAT!

Well, here we are at that time of the year again – albeit a little bit different this year due to the coronavirus. Nevertheless, with Christmas just around the corner, and with lockdown restrictions easing somewhat, businesses everywhere must be considering how to celebrate the festive season and to thank their staff and customers for their support during a very difficult year.

The topic of this month's newsletter is a timely reminder for business owners and employers to ensure that control measures are implemented so that their staff understand what behaviours are acceptable – in the context of an event or function organised by the company – even if the event or function is not on work premises or during ordinary business hours. It is therefore imperative for employers to educate staff as to what constitutes acceptable behaviour, and what kinds of conduct may give rise to disciplinary action.

Careful planning, management and control of venue are vital in mitigating an employer against the risks of litigation. When organising such events, employers should ensure that alcohol is served responsibly, employees are supervised and they are clear on when the event concludes. Employers also need to remind staff and clients to keep their behaviour in check – otherwise they could end up facing the fallout from claims of sexual harassment or unfair dismissal.

In the recent decision of *Drake & Bird v BHP Coal Pty Ltd [2019] FWC 7444*, one employee's termination was upheld while another was reinstated after a physical altercation at a Christmas event. The employees believed they were at a 'pyjama night' – an event organised by BHP mineworkers to mark new rosters – and were thus not attending a "workplace" function. Nonetheless, there were some 60 employees of the company, including family members, attending the function, allowing the Commission to conclude that the event was sufficiently work related as to be covered by BHP's code of business conduct and charter values.

Uncontrolled and excessive consumption of alcohol was the principal driver in causing the altercation where an uninvited supervisor decided to belatedly attend the event and was attacked by two employees, one of whom punched the supervisor. The Commission upheld the termination of the employee who punched the supervisor but reinstated the other. Despite the conduct of both employees running counter to BHP's conduct policies, the event was poorly managed and controlled by BHP and they were thus exposed to unfair dismissal litigation with mixed results.

To further highlight the different outcomes that can arise based on the planning, management and control exercised by an employer (or lack thereof), it is worthwhile to compare the well-documented *Keenan v Leighton Boral Amey NSW Pty Ltd [2015] FWC 3156* and the more recent *Vai v ALDI Stores (A Limited Partnership) [2018] FWC 4118*.

In *Keenan*, an employee who sexually harassed colleagues and told his bosses to "f--- off" at a Christmas party was found by the Fair Work Commission (FWC) to have been unfairly sacked partly because the company had supplied him with a free flow of alcohol.

In *Vai*, the employee threw a glass of beer over the heads of colleagues at a staff Christmas party. This incident occurred after the employee had been counselled by managers to settle down or leave. ALDI was able to demonstrate that the termination was reasonable and in line with its policies on workplace behaviour because it had taken steps to show that it was maintaining its code of conduct, such as through the limited service of alcohol, and the hiring of security guards at the Christmas function.

Although the *Keenan* matter appeared more serious, the Commission found that the termination of Keenan's employment was unfair. This was because employees were able to serve themselves alcohol and no one was given the task of supervising the function – whereas Vai's termination was upheld because the work function was at a hotel where the serving of alcohol was controlled and where there were senior staff present to supervise.

This case is a win for ALDI and employers who ensure that they put in place measures to ensure staff comply with their organisation's code of conduct. It also a win for employers because it reminds employees of the need to ensure that they maintain a safe workplace – even out of hours, and especially in relation to their behaviour towards fellow employees.

## Tips for Employers

However, this "win" for employers does not change best practices for employers holding Christmas functions –

- You should already have in place policies concerning bullying, harassment and discrimination;
- It doesn't matter whether the event is held on work property or not – as the function is work related the usual rules and policies that apply at work also apply at the party;
- Communicate with all employees in a friendly manner prior to the party reiterating that unacceptable behaviour could result in disciplinary action;
- Serve alcohol responsibly, and provide low alcohol drinks, soft drinks and water;
- Restrict the amount of alcohol available (if held at a club or hotel, perhaps have the employees pay for mixed drinks);
- Ensure waiting staff are well briefed on limiting alcohol to people who are intoxicated;
- Appoint a few guardian angels who will not be drinking and who are ready to step in or report if something goes awry;
- Keep a close eye out for office juniors – if they are under 18, they are not allowed to drink alcohol – no exceptions;
- Ensure that employees understand their right not to feel pressured if they choose not to drink;
- Ensure that employees do not resume work after drinking (particularly if the work involves tools and/or machinery);
- Provide plenty of food at the function – not just nibbles;
- Try ending the party before public transport stops running and/or consider providing transport home. Make sure everybody is sent off safely on their way home;
- Restrict the time limit of the function;
- Ensure that you have a grievance handling procedure; train managers, supervisors and employees to recognise possible conflict situations and how to diffuse a "heated" and alcohol fuelled conversation; and
- If the party is held mid-week and employees are expected to be at work the next day, ensure that all employees are aware that disciplinary action would be taken if they fail to turn up for work because of over-indulging. Again, no exceptions

Work functions are a great opportunity to have fun with colleagues, employees and customers. However, our recommendation to surviving the silly season is to be honest with yourself as to whether everything reasonably practicable has been done to ensure all employees are safe and without risk of being subjected to offensive behaviour.