

# Avoiding a legal hangover

## Employer responsibility for intoxicated employees at work events

Whether it's to network, celebrate an occasion or boost office morale, at some point there will be a workplace event at which employers will either directly or indirectly provide alcohol to their employees.

However, alcohol and employment do not always make for an agreeable cocktail. A legal minefield can await when an employee, as a result of consuming too much alcohol, behaves inappropriately either during or in connection to the event. This can leave an employer open to claims such as bullying, discrimination, sexual harassment, compensation, unfair dismissal and health and safety breaches.

This raises the question, how do you ensure everyone has a good time without the legal hangover?

### Responsible service by employer or responsible choices by employee?

In the recent decision of *McDaid v Future Engineering and Construction Pty Ltd* [2016] FWC 343 (*McDaid v Future Engineering and Construction*), an employee of Future Engineering and Construction (Future), Mr McDaid, attended a work event at which alcohol was provided by Future. There were no controls over the amount of alcohol available and it was left up to employees to regulate how much they consumed.

Mr McDaid consumed a large amount of alcohol, became inebriated and began acting aggressively. The general manager of Future intervened twice, advising Mr McDaid each time to leave the function, however he refused to do so. Mr McDaid then harangued another employee about work matters and acted physically aggressively before ultimately pushing the employee into a pool.

Some time after this incident, the general manager again approached Mr McDaid and told him to leave. Both parties swore at each other and were aggressive. Mr McDaid then

initiated a physical fight with the general manager, with both parties pushing and throwing punches at each other.

Mr McDaid attended a meeting shortly after the event and took a leave of absence supported by medical certificates. At a later meeting, Mr McDaid was informed that his employment was terminated as he had provided no satisfactory responses to Future's enquiries about the night of the event. Mr McDaid brought an action for unfair dismissal.

Future's decision to dismiss Mr McDaid was upheld by the FWC, which confirmed the process was fair and that his dismissal was supported by a valid reason.

This case shows that it may be acceptable for an employer to place at least some degree of personal responsibility on the shoulders of the employee to manage their behaviour when consuming alcohol, even if the employer has provided unlimited access to alcohol.

When considering if there was a valid reason for Mr McDaid's dismissal, Commissioner Williams said: "How much alcohol someone drinks is a choice they make and with that choice comes consequences."<sup>1</sup> Luckily for Future, the court viewed the actions of its general manager as self-defence.

The FWC's treatment of Mr McDaid can be seen to contrast with the sentiments of FWC vice president Hatcher in *Keenan v Leighton BAJV* [2015] FWC 3156 (*Keenan*) in mid-2015. In this case, an unfair dismissal remedy was granted to an employee who abused fellow employees and was sexually inappropriate toward various female colleagues, after consuming alcohol paid for by Leighton but served at a bar and later available for self-service.

Vice president Hatcher outlined that it "is contradictory and self-defeating for an employer to require compliance with its usual standards of behaviour at a function but at the same time to allow the unlimited service of free alcohol at the function",<sup>2</sup> and that it "becomes entirely predictable that some individuals will consume an excessive amount and behave inappropriately".<sup>3</sup>

While Leighton's failure to have any manner of control over the service of the alcohol at the event was noted as a contributing factor,<sup>4</sup> the FWC focused on the finding that Mr Keenan's supervisor had only provided a basic reminder of Leighton's behaviour policies before the event and that there were no significant ongoing consequences resulting from Mr Keenan's behaviour.

Interestingly, however, in *McDaid v Future Engineering and Construction*, the FWC did not place the same emphasis on the policies Future had in place before the event, and it appears Future only provided a very brief reminder to workers of their expectations before the event.

The FWC's findings in each of these cases suggest there are no clear-cut rules for the division of responsibility when a worker is consuming alcohol provided by the employer. What is clear is that employers should ensure employees are reminded of their obligations in line with the applicable codes and policies, and to ensure any incident is investigated and appropriate action taken.

### Vicarious liability: What if the party kicks on?

Ultimately, despite Leighton receiving criticism for the uncontrolled manner of supplying alcohol at the event, Mr Keenan's sexually inappropriate behaviour was found not to be the vicarious responsibility of Leighton because his treatment of a female employee at an upstairs bar – removed from the workplace event – was "not in any sense organised, authorised, proposed or induced" by Leighton.<sup>5</sup>

Despite this finding, employers should not just assume they are not responsible for interactions between employees because an event occurs at a time or place that an employer has not specifically organised or sanctioned.

In *Ewin v Vergara (No.3)* [2013] FCA 1311, Ms Ewin's employer was ordered to pay \$476,163 in compensation to her under the *Sex Discrimination Act 1984* (Cth) for incidents of sexual harassment by a colleague employed through a labour hire arrangement. This order was made despite

**Laura Regan** discusses the obligations of employers relating to alcohol consumption at a work-related function.



a finding that the incidents occurred at a bar after work, not during or after a sanctioned function, and then in a hallway near the workplace after a workplace function.

In concluding that these occurrences did occur at a 'workplace', Justice Bromberg outlined that a workplace is "not just the usual place of work, but also a place at which the participants work or otherwise carry out functions in connection with being a workplace participant".<sup>6</sup>

As such, interactions between Ms Ewin and her colleague that occurred in a taxi, at a local hotel and in the hallway leading into the office after a workplace function, were considered to have taken place within a workplace due to the combination of work-related events that led Ms Ewin and Mr Vergara to be present.

Employers should be mindful of the factually specific analysis of how the employees came to be present at the 'workplace' that will occur when the FWC is deciding if the employer is vicariously liable for their employee's actions.

The Federal Court's wide interpretation of what constitutes a workplace could have far-reaching consequences for workplace events, even when an employer is no longer providing the alcohol, such as the event that 'kicks on' beyond the sanctioned party or even just the casual after-work drink between colleagues and/or clients.

### What are the lessons for the workplace social event?

While there are no hard-and-fast rules for differentiating when an employer's responsibility starts and stops if an employee has had too much to drink (whether on the work tab or otherwise), here are some suggestions on what you can do to help keep your employees safe and minimise your legal risks.

- Prevention is better than the cure – ensure your event's purpose is explained, have clear policies and codes of behaviour in place, and ensure that employers and employees are both familiar with them well before the event.

- If alcohol is to be provided, ensure that an exact end time is communicated and even consider booking planned rides home in advance to signal the end of the event.
- Ensure that the events have suitable managers acting in a supervisory capacity and be wary of the quantities of alcohol being consumed and the method of service.
- Be sure that a venue where a function is taking place models the behaviour required and that is set down in the policy.
- Regardless of the purpose or location of the event, supply food and non-alcoholic drink alternatives.
- Don't assume responsibility lies solely with the worker or employee without first investigating. As was the case in *Ewin v Vergara (No.3)* [2013], the 'workplace' may extend further than you think.
- Note the fine line between behaviour that warrants dismissal and that which warrants other sanctions, such as suspension. In *Keenan* it was considered that banning Mr Keenan from future events could have been an appropriate consequence.

And if an incident does occur, there is no guaranteed hangover cure for either an employee, who may face dismissal, or an employer, who may find themselves exposed to possible claims of bullying, adverse action, discrimination, and workers' compensation. Both parties should tread carefully before assuming responsibility lies elsewhere.

Laura Regan is a senior associate at Sparke Helmore Lawyers. The assistance of Emily Smith in preparing this article is gratefully acknowledged.

#### Notes

- <sup>1</sup> *McDaid v Future Engineering and Construction* at [52].
- <sup>2</sup> *Keenan v Leighton BAJV* at [133].
- <sup>3</sup> *Ibid.*
- <sup>4</sup> *Keenan v Leighton BAJV* at [137].
- <sup>5</sup> *Keenan v Leighton BAJV* at [101].
- <sup>6</sup> *Ewin v Vergara (No.3)* at [38].

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