

# EMPLOYMENT UPDATE

April 11

## WORKPLACE HUMOUR – THE JOKE’S ON WHO?

When humour in the workplace is more than just a joke.

Encouraging a happy and positive workplace to lighten up a sometimes stressful environment is one thing, but allowing employees to engage in inappropriate jokes and humour can expose employers to significant legal risks.

Allowing a culture that includes joking, teasing and making fun of people in jest could lead to possible claims of sexual harassment, discrimination and even breach of workplace health and safety obligations.

*and horseplay*” in the workplace, Member Rheinberger concluded that the culture was no excuse for the conduct of the employee’s manager.

### ► IN THIS ISSUE

What is “appropriate” workplace humour?	1
It only takes one comment	2
What is “procedural fairness”	3
How to deal with inappropriate humour	3

A recent example of alleged workplace humour gone wrong is the case of an apprentice chef who was sexually harassed by his manager over a period of 9 months. In *Connell v Wecker* [2010] TASADT 7, the apprentice was awarded \$8,000 in damages for distress, humiliation and hurt feelings.

### What is “appropriate” workplace humour?

The benefits of humour in the workplace should not be swept aside entirely. To the contrary, it is often prospective employees with a healthy sense of humour that are preferred by employers. However, it is important that employers educate their employees to understand and recognise that not all humour is created equal.

Appropriate humour in the workplace involves anything that is not designed to offend, threaten or humiliate someone. Generally speaking, it focuses instead on common experiences or characteristics among people rather than their differences.

The Tasmanian Anti-Discrimination Tribunal heard evidence that the young apprentice was psychologically and physically harassed by his manager who thought it was funny to make homosexual jokes about him and physical contact with him. Although evidence was lead to demonstrate that there was “*a lot of banter, joking around*

Therefore, humour that contains sexual connotations or is sexually explicit, or that discriminates on the basis of sex, age, race

### ► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment	Employee Entitlements	Contractor Agreements
Redundancies	Employment Contracts	Contractor Issues
Workplace Health & Safety	Enterprise Bargaining	Statutory Leave Issues
Discrimination & Harassment	Enterprise Agreements	Workplace Training
Unfair Dismissal Claims	Employment Policies	Workplace Investigations
General Protection Claims	Misconduct & Poor Performance	Transmission of Business



or disability, is never appropriate in the workplace.

### It only takes one comment

The key risk associated with workplace humour is that in most cases, what one person may find amusing may not be so funny to others. In addition, it may only take one ill-thought comment or joke to lead to serious consequences, both for the victim and the perpetrator.

The case of *Green v MSS Security Pty Ltd* [2010] FWA 1822 is an example of where a single comment gave rise to a valid reason for termination of employment.

In that case, a security officer was dismissed following a remark of a sexual nature to his female supervisor. The Applicant explained that the joke surrounded his recent hair cut which was much shorter than it had previously been.

Whilst it was alleged that the supervisor had laughed and continued the joke, Commissioner Spencer heard evidence from the supervisor that she was *"totally dumbfounded by the inappropriate comment"* and described it to be a *"very offensive remark"*.

Commissioner Spencer accepted the supervisor as a credible witness.

Commissioner Spencer found that *"the Applicant made a sexually offensive remark or request to [his supervisor]. As concluded by the Respondent, the Applicant's conduct was serious misconduct in relation to the inappropriate question of a sexual nature directed at an MSS employee"*.

Commissioner Spencer went on to hold that the behaviour was clearly a breach of the employer's discrimination and sexual harassment policy and provided a valid reason for the dismissal:

*"The Applicant's conduct was a clear and significant breach of the policy. This was not a matter that could have been informally resolved in terms of the policy given [the supervisor's] reaction to the remark and that she would not speak with the Applicant. The option of returning the Applicant to an alternative position or worksite would have communicated to this large workforce an acceptance of the conduct. The conduct was commensurate with the meaning of serious misconduct in that the Applicant's conduct was wilful or deliberate behaviour by an employee that was contrary to the workplace policy, and inconsistent with the continuation of the employment contract."*

Commissioner Spencer had regard to the Full Bench authority of *Woolworths Limited (t/as Safeway) v Cameron Brown* (PR963023, 26 September 2005) regarding termination of employment following a breach of a workplace policy, where it was found that:

*"a breach of an employer's policy*

*involving or amounting to a failure to obey a lawful and reasonable direction of the employer sufficient to justify dismissal at common law will amount to a valid reason for termination of employment in the sense of a reason that is "sound, defensible or well-founded." A failure to comply with a direction to do or refrain from doing something in compliance with an employer's policy will not provide a valid reason for termination of employment where:*

- a) *the policy, or a direction to comply with the policy, is illegal;*
- b) *the policy does not relate to the subject matter of the employment or matters affecting the work of the employee; or*
- c) *the policy, or a direction to comply with the policy, is unreasonable."*

### What is "procedural fairness"?

What is reasonable will depend upon all the circumstances including the nature of the employment, the common practices which exist and the general provisions of the instrument governing the employment relationship.

In applying this decision to the facts at hand, Commissioner Spencer concluded that the Applicant could not establish any ignorance of the policy given he had signed an acknowledgment of his awareness of the employer's discrimination and sexual harassment policy.

The Applicant also could not demonstrate any inconsistent or discriminatory application of the

#### ► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment	Employee Entitlements	Contractor Agreements
Redundancies	Employment Contracts	Contractor Issues
Workplace Health & Safety	Enterprise Bargaining	Statutory Leave Issues
Discrimination & Harassment	Enterprise Agreements	Workplace Training
Unfair Dismissal Claims	Employment Policies	Workplace Investigations
General Protection Claims	Misconduct & Poor Performance	Transmission of Business

policy. As such, the employee was not unfairly dismissed.

### How to deal with inappropriate humour

It is important that employers deal with inappropriate humour quickly and decisively, whilst ensuring that procedural fairness obligations are observed at all times.

All employers should have in place policies that deal with sexual harassment, discrimination and bullying that make it clear regarding the types of behaviour that will not be accepted in the workplace and the possible consequences for anyone who breaches the policy.

Investigations of inappropriate humour should comply with any obligations or requirements outlined in the appropriate policy in order to ensure that the employer has complied with its procedural fairness obligations.

We have canvassed what 'procedural fairness' means in a past Employment Update - *'The Importance of Having a Valid Reason to Dismiss an Employee'*. In summary, procedural fairness in cases where it is alleged that an employee has breached a company policy usually entails a fair process which includes, amongst other things:

- a) investigating the substance of the allegations made against the worker;
- b) identifying whether there is a valid reason to terminate the worker based on the findings of that investigation;

- c) notifying the worker of that reason and providing the worker the opportunity to respond;
- d) allowing the worker to have a support person present; and
- e) making a decision on the disciplinary action to be taken (if any) only once the worker's response has been properly considered.

**Key Points:** In the words of Samuel Butler, *"It is tact that is golden, not silence"*. Humour is a much sought after characteristic in a prospective employee, but it is only the right kind of humour that should be encouraged and accepted in the workplace. Employers should have policies in place dealing with bullying, harassment and discrimination, and enforce them to discourage humour that focuses on discriminatory attributes or that are sexual in nature.

### Mark Bunch

Partner

+61 7 5593 1665

#### ► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment	Employee Entitlements	Contractor Agreements
Redundancies	Employment Contracts	Contractor Issues
Workplace Health & Safety	Enterprise Bargaining	Statutory Leave Issues
Discrimination & Harassment	Enterprise Agreements	Workplace Training
Unfair Dismissal Claims	Employment Policies	Workplace Investigations
General Protection Claims	Misconduct & Poor Performance	Transmission of Business

**AITKEN LEGAL****Sunshine Coast Office**

Level 1, Regatta Corporate,  
2 Innovation Parkway,  
Birtinya Qld 4575

PO Box 256 Wurtulla Qld 4575

Phone: 07 5413 4000

Fax: 07 5413 4099

Email: [info@aitkenlegal.com.au](mailto:info@aitkenlegal.com.au)

**Gold Coast Office**

Level 6, The Rocket  
203 Robina Town Centre Drive  
Robina Qld 4226

Phone: 07 5593 1665

Fax: 07 5593 1668

Email: [info@aitkenlegal.com.au](mailto:info@aitkenlegal.com.au)

**WE CAN HELP YOU WITH**

- ▶ Contracts of Employment
- ▶ Enterprise Agreements
- ▶ Understanding the *Fair Work Act* and other legislation
- ▶ Termination of Employment & Redundancies
- ▶ Employee Misconduct & Performance Issues
- ▶ Discrimination, Harassment & Workplace Bullying
- ▶ Workplace Health & Safety
- ▶ Workplace Policies & Employee Handbooks
- ▶ Employee Entitlements & the Fair Work Ombudsman
- ▶ Reviewing & Appealing Workers' Compensation Determinations
- ▶ Unfair Dismissal & General Protection Claims

**FOR MORE INFORMATION PLEASE CONTACT****LISA AITKEN**

Managing Partner

[lisa.aitken@aitkenlegal.com.au](mailto:lisa.aitken@aitkenlegal.com.au)

**CHRISTOPHER CAMPBELL**

Partner

[chris.campbell@aitkenlegal.com.au](mailto:chris.campbell@aitkenlegal.com.au)

**MARK BUNCH**

Partner

[Mark.bunch@aitkenlegal.com.au](mailto:Mark.bunch@aitkenlegal.com.au)



Disclaimer: The information contained this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Aitken Legal does not accept liability for any errors it may contain. Liability limited by a scheme approved under professional standards legislation. [Contact Aitken Legal here.](#)

**▶ AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:**

Termination of employment  
Redundancies  
Workplace Health & Safety  
Discrimination & Harassment  
Unfair Dismissal Claims  
General Protection Claims

Employee Entitlements  
Employment Contracts  
Enterprise Bargaining  
Enterprise Agreements  
Employment Policies  
Misconduct & Poor Performance

Contractor Agreements  
Contractor Issues  
Statutory Leave Issues  
Workplace Training  
Workplace Investigations  
Transmission of Business