



Beware what you share:
after-hours conduct; the
internet; and related key
employment law changes

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Did you know....

- ◆ You can be fired because of :
- ◆ What you did on your social media
- ◆ How you behaved at a Work-related Christmas Party
- ◆ You can miss out on a job for much the same reasons



Real Friends vs Virtual Friends

Back in my day, people went to coffee together or perhaps Friday night drinks.

If you got carried away talking about how much you are sick of work or how much you hated your boss, who actually knew?

There were the issues of not trusting a gossip who repeats what you say (and not trusting the office backstabber – every office has one), but if you had trusted friends, great

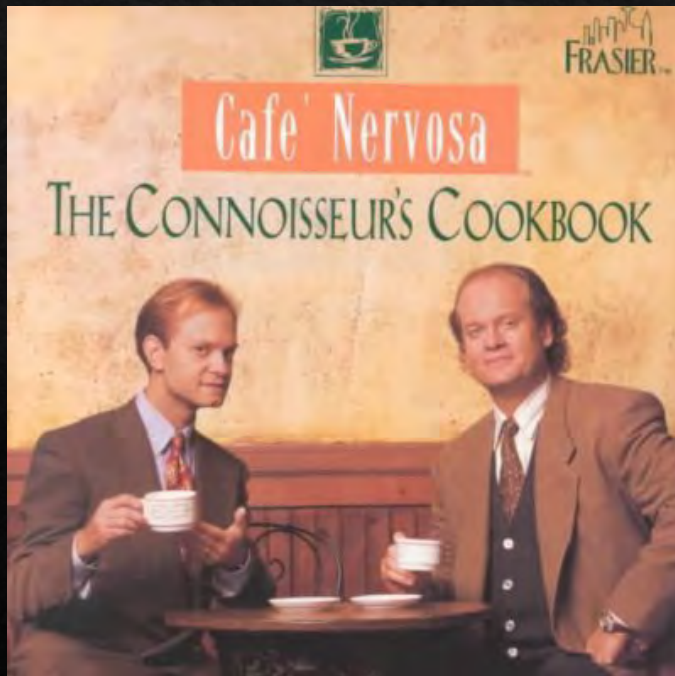
The logo for the TV show 'Seinfeld' is displayed in a red, cursive font. The word is set against a yellow, horizontally-oriented oval background. A small blue triangle is positioned above the letter 'i'.

But these days

Things can go viral –
quickly and for a very, very,
very long time

FRASIER GONE?

SADLY REPLACED BY...



You don't always know who you are sharing
with

You don't always know who others are
sharing with

There is a long-lasting digital footprint



Pros and Cons of being a Digital Native

- ◆ Employers check you out on social media before they hire you
- ◆ What if your opinions change over time?
- ◆ Some potential employers ask to be your Facebook Friend. They probably cannot compel you to before you work for them, but are there potential practical consequences of saying “no” to this? Can you avoid this in a diplomatic way and still get the job?
- ◆ Alias internet accounts are typically not the answer. Yes, they may have a place to avoid eg a violent partner BUT if you are using an alias to try getting away with things yourself, then you are likely in trouble
- ◆ That is because: You are still the author/moderator of the site and is the alias evidence of a guilty mind – deceitful hiding?

It all started with after hours conduct cases

- ◇ *Rose v Telstra* 1998 AILR 45 – you owe your employer a duty of good faith – that is always implied into every contract of employment. If your out of hours conduct negatively impacts your employer (ie) it is linked to them and undermines the employment relationship, you may be in breach and can potentially you can be fired/disciplined. (Fight between two off duty employees.)
- ◇ *Telstra v Streeter* [2008] AIRCFB 15 – after hours sex romp

Principle Extends to Internet Use (a/h)

- ◇ *Linfox Australia Pty Ltd v Glen Stutsel* [2012] FWA 7097 – long standing excellent employee with no knowledge of internet, gets carried away on Facebook account his family set up, thinking he was just talking to friends – he wasn't! His bosses were on there, too!
- ◇ Judge: reinstatement due to genuine remorse, lack of understanding, great track record
- ◇ BUT NOTES THAT AS TIME PASSES, IGNORANCE IS NO EXCUSE
- ◇ ALSO THIS IS DIFFERENT FROM TALKING TO YOUR FRIENDS IN PERSON – MORE DANGEROUS THAN THAT
- ◇ IMPORTANCE OF SOCIAL MEDIA POLICY

Subsequent dismissal for after hours conduct and internet use

- ◇ *O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311 – a Townsville dismissal case, abuse clients on internet
- ◇ Have an internet use policy if you are an employer – make sure it is actually operational and valid – *UWA v Gray* [2009] FCAFB 116
- ◇ READ the policy and follow it if you are an employee

High Court of Australia

- ◇ *Comcare v Banerji* [2019] HCA 23:
- ◇ Government servant
- ◇ Alias blog condemning government policy of relevant portfolio
- ◇ Dismissed – political comment breaches Australian Public Service Code of Conduct
- ◇ No general right of individual freedom of expression – more general systemic freedoms in Australia

THE AGE NEWSPAPER 14 APRIL 2023

- ◇ Somehow people never learn.....
- ◇ <https://www.theage.com.au/national/victoria/uni-professor-sacked-over-late-night-advances-toward-student-20230413-p5d05q.html>
- ◇ Victorian Associate Professor sacked for late night email advances to researcher.

Uni professor sacked over late-night advances toward student



Adam Carey

April 14, 2023 – 5.00am

A Melbourne University associate professor who made persistent advances towards his junior research assistant and former student despite her rejections has lost his unfair dismissal case after the industrial umpire rejected his claim he was just being friendly.

Aaron Harwood claimed his autism – which was undiagnosed when he sent his former student a series of text messages seeking a personal relationship – explained his failure to pick up on her cues she wasn't interested.

Harwood's 20-year academic career at the University of Melbourne was terminated in September, after it found he breached multiple workplace policies and sexually harassed the woman, an international student in the Melbourne School of Engineering and Technology.

Harwood had been promoted to associate professor in the school, on a base salary of more than \$162,000, not long before his employment was terminated.

He wrote an apology letter to the research assistant as his dismissal loomed, stating he knew that pursuing a personal relationship would be in breach of university policies but that "at that time in my life I would have accepted risking my career for you".

The letter, part of a last-ditch attempt to save his job, instead provided proof of his deliberate motives in breaching university policies, according to a Fair Work judgment on his unfair dismissal application.



Former Melbourne University associate professor Aaron Harwood has lost his unfair dismissal case.

TWITTER

Harwood's unwanted advances occurred in 2016. The woman made a formal complaint about him in May last year, which prompted a university investigation.

The Fair Work Commission rejected his application for an unfair dismissal finding on Wednesday. Its judgment noted the university was rightly concerned by the significant power imbalance between academic staff and students and the risk that a student could be subject to unwelcome and inappropriate behaviour.

A series of WeChat messages between Harwood and the woman formed the unchallenged evidence of the associate professor's personal advances. At the time, Harwood's discretionary budget funded her employment.

In those messages, Harwood offered to show the student her exam results before they were released – in breach of university rules – but urged her, "just don't tell anyone. It's a secret."

He also asked when he could meet her cat and texted, "Can I ask you a completely inappropriate question?"

When she later turned down an invitation for coffee, he replied: "Just tell your group members there's a new man in your life and you need to spend some quality time with him."

In a subsequent late-night exchange, he asked her out for a walk, to which she replied, "no no no no".

Harwood replied: "It's just a couple of people spending some time together ... It's only serious if we choose to make it serious."

Later he texted: "Do you [want to] see the new movie *Arrival* coming out Nov 10? I'd like to ask you to see it but you don't think that is appropriate."

The student replied: "Yeah you got it! Inappropriate!"

Harwood conceded under cross-examination that a staff member pursuing a personal relationship could put a student under pressure, and that the university had an obligation to protect them.

According to the university investigation, Harwood also "made a comment to the effect that the university bore some responsibility for his conduct and should have protected him from situations where he would be one-on-one with students".

Harwood was diagnosed with autism in 2019 and claimed his disability led him to misinterpret the woman's responses.

Fair Work deputy president Ian Masson rejected that defence. Masson wrote: "There is simply no medical evidence before me that would allow me to conclude that the applicant's medical conditions stands in mitigation of the conduct."

Harwood's dismissal was not harsh, unjust or unreasonable, Masson ruled.

Four staff members left the University of Melbourne last year due to a finding of sexual misconduct, and two other cases are progressing through disciplinary processes, the university's 2022 sexual misconduct annual report states.

Remember, it started with after hours conduct: Earlier Cairns Case

- ◇ *Lee v Smith* [2007] FMCA 59
- ◇ Sexual harassment/assault
- ◇ Vicarious liability
- ◇ Power relationship
- ◇ Investigation poorly handled

2023 New Laws on Harassment

- ◇ Always have been prohibitions
- ◇ *Respect@Work Changes*
- ◇ POSITIVE DUTY ss47B and C *Sex Discrimination Act*
- ◇ Reasonable and proportionate measures to avoid
- ◇ Australian Human Rights Commission increased role
- ◇ Snapshot, monitoring, measuring, responding, update policies
- ◇ Sex based harassment, hostile workplace

Cyber Bullying

- ◆ Do employers pay enough regard to upstream bullying of staff????
- ◆ EG Teachers.....
- ◆ Workplace health and safety – duty for safe workplace
- ◆ FWC Stop Orders

chatGPT

Banned by ME (Louise Floyd)!

Also JP Morgan, Amazon, BDO, PWC, famous
London law firm Mishcon de Reya

Confidentiality?

Professional Negligence?



Linked-in and CV Checking



- ◇ Linked in – useful, many say important, but self-curated possibly idealized version of self?
- ◇ CHECK REFERENCES/QUALIFICATIONS not just internet image
- ◇ Lady Di was a real Princess but... Remember Queensland Health and the fake Tahitian Prince
- ◇ *R v Morehu-Barlow [2014] QCA 4 (7 February 2014)*

Kylie Minogue - Step Back in Time?

- ◇ <https://www.youtube.com/watch?v=sM3WOavMN6I>
- ◇ STEP BACK IN TIME?????



Or for a more family-based approach....



- ◇ *It's a Wonderful Life* – you are rich if you have true friends
- ◇ Preferably real people
- ◇ Who are your own age
- ◇ & Nurture a life away from work (It's good for your mental health).