



S J SCANNELL & CO

NEWSLETTER - SEPTEMBER-NOVEMBER 2014

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If you have any questions about the newsletter items, please contact me, I am here to help.

Employment investigations – running a sound process

As an employer it is almost inevitable that you will encounter issues with employees that will require an employment investigation. The issues that could arise are as many and varied as the employees themselves, however, some examples are: complaints by an employee against another employee, complaints by clients or customers or accidental discoveries suggesting misconduct or dishonesty by an employee. Any action taken by an employer involving an employee can be scrutinised by way of the affected employee raising a personal grievance, and employment investigations are no exception. If the need for an employment investigation arises, an employer must ensure that the investigation can withstand scrutiny, and that any action resulting from the process was what a reasonable and fair employer could have done in all the circumstances.



When an issue comes to the attention of the employer, the employer should refer to the written employment agreement of the employees involved, and any policy and procedure documents that may set out the process to be followed in an employment investigation. It may be that these documents are silent about process, but if they do set out a process to be followed it is important that it is adhered to for the robustness of the investigation process.

Depending on the nature of the event or incident, an employer may wish to suspend the employee while the investigation is undertaken. If an employer wishes to suspend an employee, the written employment agreement must provide for this. If suspension is contemplated, the employer must obtain the employee's views regarding suspension before making the decision to suspend the employee. The next step is to gather the facts of the event or incident. The employer should carefully consider who needs to be spoken to in the course of the

investigation. For example, the complainant and employee directly involved in the issue would be spoken to, as well as any others involved.

The employer should gather as much detailed information about the event or incident as possible through direct interviews and other information, for example emails, photographs or other documentary evidence. Any interviews or discussions with people involved should be carefully noted, as this information is at the very heart of the investigation process and may well form the basis of any future decisions regarding the employment of the employee under investigation.

Ideally, the person who will make the final decision regarding the outcome of the employment investigation should be actively involved in the investigation process. If the final decision maker is not actively involved, that person should satisfy themselves that they are adequately informed of the details of the investigation process to enable them to make a decision.

Once the employment investigation is completed, the employer will need to make a decision about whether the matter needs to be taken further, or whether the employer is satisfied that no further action is required. Whilst conducting a proper investigation may seem onerous and time consuming, the failure to conduct a fair and reasonable process can cost employers dearly.

Neighbour law part 1 - love thy neighbour

Disputes with neighbours can arise over many things; noise, fences, trees and animals etc. Ideally, you and your neighbour should be able to resolve any problem by discussing it and acting reasonably. However, if this is not possible, the law may be able to help resolve the matter.

Encroachment

When you purchased your property, your lawyer should have shown you a copy of the Certificate of Title for the property. The Certificate of Title records the plan of the property and its boundaries with neighbouring properties that were determined by land transfer survey. It can be disastrous for a land owner to discover that they do not actually own all of the land they thought they did because they relied on fences and natural boundary markers, rather than the boundaries shown on the Certificate of Title.

Encroachment is where you or a previous owner of your property has erected a structure and part of the structure is on a neighbouring property. This is technically a trespass and the encroaching land owner is legally responsible, whether or not they erected the structure. The definition of structure includes any building, driveway, path, retaining wall, fence, plantation or any other improvement.

The Property Law Act 2007 enables a party to seek relief where such an encroachment exists. Whether or not relief should be granted is an exercise of judicial discretion and must be considered "just and equitable" in the circumstances. Relief can be provided by: directing that the structure be removed, granting an easement (or alternatively a right of possession for a specific time) over the land under the structure, or transferring that land to the person who owns the encroaching structure. If the wrongly



placed structure is a fence, no relief may be granted if the dispute can be resolved under the Fencing Act 1978.

Boundary fences

The Fencing Act 1978 sets out the rights and responsibilities relating to fences between neighbouring properties. It provides a statutory framework to resolve disputes that may arise. This includes (but is not limited to) determining what constitutes an adequate fence, the cost of building or repairing a fence, who is responsible for those costs, and who is to do the work. Land owners can enter

into agreements or covenants concerning fencing matters that can be registered against the titles of the affected lands for a period of up to 12 years after registration.

Overgrown trees

The overhanging of branches of your neighbour's trees onto your property is also considered encroachment. You are allowed to cut the branches back to the point where the tree crosses the boundary; however it is a good idea to contact your local council to ensure the tree is not a protected tree or talk to your neighbour about it.

If your neighbour is not prepared to do anything, you are able to apply to the district court for an order requiring your neighbour to remove or trim any tree if it is causing damage or injury, obstructing your view or otherwise reducing the enjoyment of your property or if it is diminishing the value of your house.

If any of these circumstances apply to you, we suggest you seek legal advice regarding your rights and responsibilities. Seeing a lawyer before a problem escalates can save you anxiety and money.

prepared on the assumption that our existing laws do not adequately provide for prosecution of match-fixers.

While the laws we have in place may already cover some aspects of match-fixing, there are likely to be holes in the current framework that could impair prosecution and see match-fixers escape punishment.



SNZ's statement recommended a minor amendment to the Crimes Act 1961 to explicitly cover match-fixing. Accordingly, the Crimes (Match-Fixing) Amendment Bill ('the Bill') was introduced to Parliament on 5 May 2014.

The Bill proposes an amendment to Section 240 of the Crimes Act – "Obtaining by deception or causing loss by deception." The amendment clarifies that "deception" includes an act or omission done with the intent to influence a betting outcome of an activity. The influenced activity can be the overall result, or any event within the activity. The reference to any event within an activity is particularly important for cricket, given that a lot of match-fixing in cricket relates to controlling small elements of the game, for example, the timing of an event such as a no-ball.

There is also an important exception in the Bill, which is that the act or omission in question must be done

otherwise than for tactical or strategic sporting reasons. On past occasions teams in sporting competitions have considered, for example, that avoiding a bonus point would be in their best interests. They have accordingly "under-performed", in the sense that they have played within themselves in order to get the best possible result for their team. This exception appears to acknowledge a team's right to make such a choice, provided it is for tactical or sporting reasons.

The Bill has not had its first reading but given the timing pressures in place, it is expected to receive priority. The Bill anticipates a commencement date of 15 December 2014, reflecting the intent to have the amendment in place in time for the sporting events of 2015.

It will be interesting to see what amendments, if any, are made as the Bill passes through the legislative process, given that meaningful review may be hampered by the objective of having match-fixing criminalised as soon as possible. A potential difficulty for our legislators is that there is no standard international approach to match-fixing. Without a proven international example to follow, New Zealand's response may be a case of drawing a line in the sand and reacting as this issue develops.

Judicial review – the Lucan Battison case

In June this year, Lucan Battison, a 16 year old student from St John's College in Hastings, took his school principal and board of trustees to the High Court for suspending him for having long hair, in contravention of the school's 'hair rule', which requires students hair to be short and tidy.

Although Lucan won the case (*Battison v Melloy & Anor* [2014] NZHC 1462), many condemned his actions as undermining the authority of the school. However, it should be kept in mind that Lucan did not actually appeal the school's decision to suspend him. Rather he asked the Court a far more fundamental question – whether or not the decision to suspend him and the 'hair rule' itself were even lawful.

This type of case is a judicial review, and is distinctive from an appeal in that the merits of the decision in question do not get considered by the Court. Judicial review highlights the critical role the Courts play in New Zealand's constitutional framework by ensuring that the exercise of public power is done in accordance with the rule of law.

The school's decision

The 'hair rule' had been established in accordance with the Education Act 1989 ('Act'), which provides that boards can make rules that they think may be necessary for the control and management of the school.

The principal thought that Lucan's hair contravened this rule. Although Lucan offered to tie his hair up, this was not considered to be an acceptable solution, so he was suspended. The Act enables a principal to suspend a student if reasonably satisfied that the student's conduct is a dangerous example to others.

Lucan challenged the lawfulness of this action. The High Court decided that both Lucan's suspension and the 'hair rule' itself were unlawful. The Court's view was that the Act sets a high threshold and only allows suspension where a student's conduct so seriously impacts on the welfare of other students that the principal is left with no alternative.

The case also decided that the 'hair rule' itself was not lawful, because all such rules by the board are subject to the general laws of New Zealand, which include a requirement for certainty. Lucan had

offered to tie up his hair and there was evidence to suggest that if he did his hair would appear to be short. The Court considered that the rule did not actually require hair to be cut, and there was too much uncertainty about what was meant by the 'short' in order for it to be enforced.

Although Lucan's lawyers made a number of arguments that the 'hair rule' also breached his right to personal dignity and freedom of expression, the Court did not consider it necessary to rule on this point – leaving open whether a new, more certain 'hair rule' could be put in place by the board in

future. The Court was clearly mindful of the significant precedent that would be set.

Conclusion

A claim for judicial review invokes the court's inherent power to supervise the use of public power to ensure it is used appropriately. Although the public may disagree on whether Lucan should have taken his school to court in these circumstances, the fact that he at least had the right to must not become contentious.

Snippets

What is a certificate of acceptance?

In some circumstances a certificate of acceptance may be issued by your local Council for unconsented works that have been completed on your property if the Council is satisfied that those works comply with the building code.



This certificate is issued only if the works comply with the building code at the time the application

is made. So, if you were to apply today, the works would need to comply with the current building code to receive the certificate, not the building code as it was at the time they were completed.

A certificate of acceptance is only available for works done after 1 July 1992, and it is important to note the existence of the certificate of acceptance regime does not alter the requirement for you to obtain a building consent for building works you wish to have done in future.

Psychoactive Substances Act – amendment

Introduced in 2013, the Psychoactive Substances Act ('the Act') prohibited the import, manufacture and supply of psychoactive substances (such as those used in party pills, energy pills and herbal highs) without first obtaining a licence. It also introduced a requirement that those substances must first be approved by the Psychoactive Substances Regulatory Authority before they could be distributed. As a temporary measure interim product approvals and licences were granted to existing products, manufacturers and suppliers.



Following mounting public pressure the Act was amended under urgency on 7 May 2014 ending all interim product approvals and interim retailer and wholesaler licences with immediate effect. The Regulatory Authority then issued an urgent recall of all products that previously enjoyed interim approval.

Individuals can face up to two years in prison and companies fined up to \$500,000 for selling a product containing a psychoactive substance that has not been approved for sale. Individuals can also face up to three months in prison and businesses fined up to \$40,000 for selling psychoactive substances without a licence