

Plunket Kerplunks

Sean Plunket is the well known presenter of Radio New Zealand's Morning Report. He has been employed by Radio New Zealand (RNZ) since 1997. An issue arose in relation to Mr Plunket's ability to undertake secondary employment. Mr Plunket was subject to RNZ employment principles, including "Standards of Integrity and Conflicts of Interest". This policy included the statement: "If any of your activities have the prospect of falling into one of these categories [NB previously listed areas of conflict] then you have an obligation to obtain your Manager's express approval prior to undertaking this activity". A further Editorial Policies document was issued by RNZ in March 2005. This included a Conflict of Interest section. It included the statements:

"It is important that no off-air activity, including writing, the giving of interviews or the making of speeches, leads to any doubt about [the employee's] objectivity on air"

And

"As a general rule RNZ employees may not work...for organisations considered by the company to be in competition, or associated with competing organisation." The section of the policy on secondary employment stated: "All employees who have any secondary employment outside RNZ...must declare such employment...and gain approval from the Chief Executive. ...Failure to do so could result in disciplinary action."

In August 2005, Mr Plunket joined the EPMU and became covered by the applicable collective agreement. Clause 30 of this agreement stated the particular terms of engagement for the employee were specified under the employee's terms of engagement letter. This meant his initial letter of appointment (which had attached the RNZ employment principles) still applied.

An issue initially arose when in September 2008, RNZ became aware of an advertisement promoting an upcoming election debate, featuring Mr Plunket as a TVNZ host. RNZ advised Mr Plunket his belated request for approval to host the debate was declined due to a direct conflict of interest. On 14 May 2009 at a social event, Mr Plunket advised RNZ's chief executive that he had been approached to write a column for a magazine. He was told to put his request in writing so it could be properly considered. Nothing was received in this regard and RNZ subsequently received a media release from the magazine advising Mr Plunket's arrival as political columnist. The Chief Executive wrote to Mr Plunket reminding him he was asked to put his request in writing. He received a response the same day stating:

"please take this letter as somewhat belated written communication as regards this matter".

RNZ declined this request.

This resulted in Mr Plunket raising an unjustified disadvantage personal grievance, claiming RNZ was purporting to control his spare time and curtailing his fundamental freedoms in breach of contract and the Bill of Rights Act 1990.

The Authority roundly rejected these claims. It found RNZ to be properly concerned regarding secondary employment which resulted in a conflict of interest rather than endeavouring to control his spare time. It was further found Mr Plunket's terms of employment required him to put to RNZ any proposed secondary employment so it could measure the likelihood of a conflict arising and manage that risk. The reasons RNZ had declined to allow Mr Plunket to appear for TVNZ and write for another media outlet included: regard to Mr Plunket's role within RNZ, the likelihood of change in audience perception of Mr Plunket and therefore RNZ, the effects of industry competition and the potential consequences regarding listeners' loyalty. These reasons were considered by the Authority to be coherent and objective. It further found Mr Plunket remained free to exercise his right to freedom of expression under the Bills of Rights Act 1990, subject to his contractual obligations to work towards meeting his and his employer's mutual objectives and not undertake outside interests which might conflict with those of RNZ. Mr Plunket's claims were dismissed.

Christmas Shutdown

We hope you all have a great Christmas and are able to "put your feet up" for at least some part of the break.

Our office will be unattended from midday on Tuesday 22 December 2009 until Tuesday 5 January 2010.

If you require assistance during this period please feel free to contact us on the following numbers:

Neil 0274 387 803 : Raewyn 0274 387 802 : Peter 0274 367 757



A new addition . . .

For those of you who haven't already heard, Sarah Bradshaw will commence parental leave on 10 December 2009, awaiting the birth of her third child, due on Boxing Day. Sarah will be back on deck in mid June 2010. We wish Sarah and her family all the best for the new arrival !



Zion Wildlife Gardens Limited v Busch

The ongoing saga of the employment relationship between Craig Busch (known as 'the lion man') and Zion Wildlife Gardens has a further instalment. Mr Busch was employed from mid 2006 until late 2008, at which time he lodged personal grievances for unjustified disadvantage and unjustified dismissal. His Mother, Patricia Busch, was part owner of Zion Wildlife Gardens. Mr Busch was dismissed allegedly for breaches of safety protocols, inappropriate behaviour in the workplace and performance issues. In response to the personal grievances, the employer made a number of counter claims regarding property it considered Mr Busch wrongfully had in his possession. Mr Busch then withdrew his personal grievances, although a civil claim had been lodged by Mr Busch in the High Court. Zion Wildlife Gardens Limited (ZWGL) continued with its counter claims in the Authority and so it then became the applicant. The claims of the ZWGL related to a number of items of property, including vehicles, guns, tools, equipment, company records, office and filming equipment, which ZWGL claimed Mr Busch had removed from the possession of ZWGL without permission and had not returned. In particular, ZWGL claimed Mr Busch: *"owed a duty not to convert, steal or interfere with his employer's right to possession of any of the Park property in ZWGL's possession during the period of employment and, on termination of the employment, the duty required Mr Busch to return to the employer all of the said property then held by Mr Busch"*.

ZWGL claimed Mr Busch had breached this duty in that *"During the 12 months immediately preceding the date of Mr Busch's dismissal, he unlawfully converted, stole or locked away to deprive ZWGL possession of the property specified in Schedule A...the items of property were usually kept in or around the Park's maintenance workshop or elsewhere within the Park's grounds. All or a substantial number of the items of property converted, stolen, or locked away by the applicant are held by him in the house he was permitted to occupy there while he was an employee."*

ZWGL sought an urgent compliance order pursuant to s.137 of the Employment Relations Act requiring Mr Busch to return the various listed items of property to a manager of ZWGL. An interesting aspect of this case was that ZWGL did not claim to be owner of the various items it sought to have returned. It rather claimed that it was entitled to possession as 'bailee' with the 'bailors' being variously Patricia Busch, staff member John Davis, Country Developments Limited (CDL) or Wildlife Pictures Limited (WPL). A bailor is a person who temporarily transfers possession of property to another (the bailee) under a contract of bailment. Most of the relevant property was owned by CDL for use by ZWGL. WPL was a company set up to undertake the filming of events at ZWGL, for use in the TV series centred around the park etc. Mr Busch claimed he had set up and equipped the Wildlife park in the first place and that a number of the relevant items of property were his personal property.

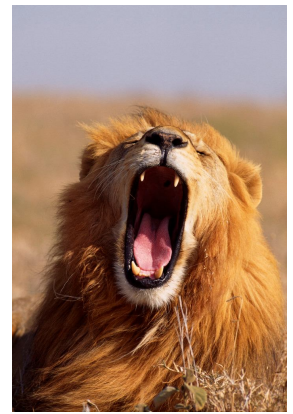
The applicable principles for consideration by the Authority to determine who had the right to possession were set out in the judgement as follows:

- The item of property in question is in fact owned by the purported bailor and not the applicant or any other person or entity;
- There is a valid bailment in respect of the item in question;
- Craig Busch has actually breached the terms and conditions of his employment by retaining that item; and
- Craig Busch in fact has that item in his possession or control such that compliance is impossible.

The Authority held that where CDL was shown to own a relevant item, and where it was used in the operation of the wildlife park, there was a bailment of that item to ZWGL. It was also accepted that any equipment owned by WPL but used in the offices of the park created a bailment between WPL and ZWGL. In relation to filming the TV series, it was noted that WPL used the services of a contracted camera operator, and therefore the filming equipment could not be said to be used by ZWGL and therefore a bailment did not exist in this regard. The Authority member then proceeded to work through approximately 80 separate items to determine whether a compliance order should be ordered and the item returned by Mr Busch. In determining ownership of each item, regard was had to any proof of purchase (such as receipts provided by ZWGL).

The Authority also considered whether the items were listed in the depreciation schedules of CDL. Although such schedules were accepted as indicating only what the relevant company purported to own at the time, at certain times Mr Busch was the sole director of CDL and therefore his signing off of the relevant accounts including depreciation schedules was a strong indicating of CDL's ownership. His claim he had been simply following the instructions of his advisors was not considered credible. With the exception of items which it was accepted were the personal property of Mr Busch and certain equipment not established to be in the possession of Mr Busch, compliance orders were granted requiring Mr Busch to return the various items to ZWGL.

This decision indicates the complexities which can arise in family businesses and establishes that if a director purchases property through its company, even if the property is treated as personal property, it in fact remains the property of the company.



This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, Peter Zwart** or **Sarah Bradshaw**.

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