



Hewitsons Sport

LEGAL UPDATE

Absolute Client Focus

Our Sports Group has a long-established record of advising sports-related organisations including lottery distributors, sports administrators, national governing bodies, sports clubs, charities and trusts.

We work with sports organisations across numerous disciplines including tennis, shooting, ice skating, taekwondo, golf and ice hockey and represent a number of disability and Paralympic organisations.

For information on the many services we provide, please visit our [website](#).

In this issue:



Building and Protecting Your Sports Brand

Hewitsons have pleasure in hosting a seminar on **Building and Protecting Your Sports Brand** on 18th June. The seminar will provide an opportunity for guests to hear from and ask questions of specialist speakers, including [Charlotte Dennis](#) of Curious Consultancy and Brand You: Sport, [Andrew Priest](#) and [Mark Elmslie](#) on the following topics;

- Developing and growing your brand;
- Intellectual property protection for fledgling brands; and
- Enforcing your intellectual property rights

The seminar is free to attend and will start promptly at 5pm (registration and refreshments from 4.30pm). To reserve a place at this seminar, please contact Hewitsons' events team on 01223 447400 or email events@hewitsons.com



Edward Wheen
Partner

Fairness and consistency in disciplinary proceedings brought by sports governing bodies

The Football Association v José Mourinho (case no. FT/TA/18/0404)

It has not been the best of years for José Mourinho. Zinedine Zidane has recently beaten him to the job of Real Madrid manager, following his sacking by Manchester United in December 2018 after a well-publicised poor start to that season. His misery could not have been helped by the decision of the Football Association ("FA") to bring disciplinary proceedings against him for using "abusive and/or insulting and/or improper" language immediately after a match against Newcastle on 6th October 2018 which, ironically, was a game that Manchester United had won.

The language in question was inaudible, and in Portuguese, as was later established by lip-reading from the television footage. The expert evidence was that the contextual translation of what he had said was "f... yeah" or "hell yeah", spoken in a celebratory manner. The literal translation of what he had said was, however, significantly more fruity, and capable of giving offence. Which version should be considered?

The first disciplinary panel found that it should not consider the words used "in a vacuum" and that it should take the context into account. It accepted the evidence "that a typical person fluent in Portuguese colloquialisms would not feel insulted or offended...." but would understand Mr Mourinho's words as indicative of happiness. Mr Mourinho was cleared of the charge.

The FA appealed and its appeal was successful on the basis that, whilst context was important, the "reasonable bystander" test had not been correctly applied. The Appeal Panel found that a reasonable bystander would not have been able to understand Portuguese colloquialisms, or have been able to determine that a literal translation might not properly convey the meaning and intent of the phrase used. The reasonable bystander, in the appeal panel's view, would have found the words used were the literal meanings, which were abusive, offensive or improper.

Having made that finding, a second issue fell to be considered, that of "legitimate expectation", which was remitted back for a fresh disciplinary panel to consider (the first disciplinary panel having not considered it in view of their finding on the first issue). This is a principle of public law under which, amongst other things, it is regarded as inherently unfair for a public authority to change its policy without warning or good reason. While the FA, like other sports governing bodies, is not a "public authority" (as the law presently stands), it was accepted by both parties that the FA is subject to the supervisory jurisdiction of the law and must abide by principles of public law.

The second disciplinary panel found that the FA's practice had been to take no action for swearing alone on or around the field of play, even if inadvertently picked up by live broadcast cameras (since, otherwise, their disciplinary panels would be inundated with such cases!).

The case of Wayne Rooney, who had received a 2 match suspension for swearing at a broadcast camera, was distinguished from Mourinho's as Rooney had deliberately sought out the camera, had used the "F" word audibly and in a manner consciously directed at the viewers. Further, there had been numerous instances where the FA had taken no action in circumstances as bad or worse than those in this case, including the notorious case where Mourinho himself, when manager of Chelsea, had sworn at the club doctor, Dr Carneiro, during a game.

The conclusion was, therefore, that Mourinho had been unfairly singled out for disciplinary action, his defence of "legitimate expectation" succeeded, and the charge was dismissed.

Points to Note

The case illustrates the importance of public law principles in the application of disciplinary procedures by sports governing bodies. Whilst the Courts have traditionally shown themselves to be reluctant to interfere with the internal processes of such bodies, which have a wide discretion in the application of their rules, that is predicated on those bodies applying the law fairly, in the application of their own procedures. Fairness requires, of course, that disciplinary measures are not arbitrarily applied.

Sports governing bodies would be prudent, therefore, to take legal advice in the drafting of such procedures as well as in relation to their application. A "legitimate expectation" defence can be avoided relatively easily by clarity and consistency in any disciplinary action, and by notifying those potentially affected of any changes of policy or procedure.

For further information or advice on any of the matters raised in this article, please contact [Edward Wheen](#) or [Christine Bowyer-Jones](#).



[Kasia Reda](#)
Solicitor

Caster Semenya ruling - a new age for gender categorisation in sports?

Last month, the Court of Arbitration for Sport ("CAS") ruled against Caster Semenya in her long-standing dispute with the International Association of Athletics Federation ("IAAF"). The decision means Semenya has no choice but to lower her testosterone level in order to compete in international mid-distance events.

For further information on the controversial landmark ruling, this article can be accessed [here](#).



[Christine Bowyer-Jones](#)
Partner

Folau on a folly? The importance of a Player Code of Conduct

April saw Australian international and Super Rugby's top try scorer Israel Folau disciplined by Rugby Australia ("RA") for comments posted on social media site Instagram. Folau's multi-million dollar, 4 year contract, agreed only last year, was rescinded as a result of these comments which have raised questions concerning the balance between an individual's freedom of expression and the rights and freedoms enjoyed by others. Folau refused to apologise for his comments or delete the post.

Whilst Folau did not directly contravene any express clause of his employment contract with RA, his comments were deemed to be a high level breach of RA's Player Code of Conduct ("the Code") and RA dismissed him. Folau appealed the initial dismissal and a 3-day hearing was held before an independent panel in early May. The Panel's decision, published on 17 May, upheld RA's decision and confirmed the termination of his contract.

This situation raises concerns for governing bodies relating to the balance between freedom of expression and the ability to hold athletes accountable to the Code of their sport, and emphasises the importance of having a robust Player Code of Conduct. This was the second time Folau had been reprimanded over his comments and RA took the position that they were left with no choice but to pursue the course of action taken.

For further information on this topic, or assistance with drafting Codes of Conduct, please contact a member of our Sports Group [here](#).

For more information on the information shared in this update please contact a member of our [sports team](#).



This Sport E-Update is produced by Hewitsons for existing clients of the firm to provide them with a useful summary of recent developments, cases and matters of interest. It is not a definitive statement of the law in any area. Advice should be sought from a member of the Sports Group in respect of any information contained in this E-Update that affects any matter with which you may be concerned.

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