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THE ADVOCATE

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Skirting Around Suppression

A recent decision of the Supreme Court, ***ASG v. The Vice-Chancellor of the University of Otago*** [2017] NZSC 59, has determined that an employer has the right to know about criminal charges that are relevant to an employee's job even if the employee has been granted name suppression.

The primary issue before the Supreme Court was whether the Vice-Chancellor of the University of Otago had breached an order made during the course of a criminal proceeding which prevented "*publication*" of the employee's name. The facts giving rise to this matter involved an employee who pleaded guilty to wilful damage and assaulting a female. The employee was discharged without conviction and the Judge made an order suppressing the employee's name and all details relating to the employee and the offending in accordance with section 200(1) of the Criminal Procedures Act which provides that the Court may make an order "*forbidding publication*" of the name and other details of persons charged with, convicted or acquitted of an offence.

The Deputy Proctor of the University was in the Dunedin District Court the day the employee was sentenced and made notes during the hearing. Once the sentencing was completed, the Deputy Proctor sought advice as to the implications of the suppression order, the advice received was that the Deputy Proctor could discuss the charges against the employee and the outcome of the case with the appropriate personnel in the University.

The Deputy Proctor subsequently disclosed the employee's name and the details about the charges to the relevant Divisional Human Resources Manager, the Proctor and the employee's immediate manager. The information was then passed on to the Vice-Chancellor, the Director of Human Resources and the Proctor's assistant.

As a result of the advice from the Deputy Proctor the employee was suspended and was subsequently issued with a final written warning. The employee took a personal grievance claim alleging he had been unjustifiably disadvantaged, both by the suspension and also the issuing of a final written warning.

The Employment Relations Authority found the employee had been unjustifiably disadvantaged by the final warning however not the suspension, and reached the view that the University had breached the name suppression order and its actions were not those of a fair and reasonable employer.

The Employment Court concluded the University's actions both in regard to the suspension and the issuing of the warning were justified and that there had been no breach of the name suppression order. The Court of Appeal subsequently dismissed the employee's appeal and held:

1. That "*jurisprudence was seen as supporting the view publication encompassed "dissemination to the public at large rather than to persons with a genuine involvement in conveying or receiving the information*".
2. The Court of Appeal took the view that the employee had breached his duty of good faith by not informing the respondent of his offending.

On appeal the Supreme Court determined that whether or not there had been a breach of the non-suppression order depended upon whether the University's actions amounted to "*publication*" of the suppressed information. In this regard the Court noted:

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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**, or **Peter Zwart**.

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"[24] . . . As counsel for the respondent submits, it is possible to identify at least three possible interpretations of the phrase "forbid publication" in the context of a report or account of the proceedings: namely, suppression of any disclosure beyond the courtroom; suppression of disclosure to the public or to a section of the public; or prohibition of disclosure beyond the courtroom except that the "bare communication" to persons with a genuine interest, assessed objectively, is permitted."

"[26] Both the Employment Court and the Court of Appeal have adopted the third of the approaches. After considering the relevant case law and the legislative history, the Employment Court concluded that given the "special nature of an employment relationship which requires employers to have trust and confidence in their employees", the term "publication" should be interpreted to exclude communication of information to "genuinely interested people". The Court considered an employer will have the requisite interest, that is both legitimate and objectively justifiable "where there is a potential nexus between the circumstances relating to the charge or charges faced by the employee and the obligations of the employee to his/her employer."

After reviewing the legislative history of s.200 of the Criminal Procedures Act and the relevant decisions on the issues the Supreme Court noted:

"[66] . . . It is clear from the materials we have discussed however that the purpose of the prohibition is now not solely directed to publication in that wider sense but is also intended to capture word of mouth communications. . . there will be situations where a single disclosure to one person or disclosure to a small group of persons may undermine the very purpose of suppression. . ."

[67] . . . the development of the internet and of social media raise different issues than will have been the case at the time the first predecessor to s 200 was enacted. That development too is a reason a more flexible approach to interpretation may have been seen as appropriate."

"[70] First, the matters we have discussed do not support the view that any disclosure beyond the courtroom is prohibited . . . That leaves what Mr Harrison QC called "the middle ground", that is, the approach broadly speaking adopted by the Employment Court and the Court of Appeal under which the meaning of "publication" does not include bare disclosure to those who have, objectively assessed, a genuine interest."

"[79] Drawing these threads together, the focus in s 200 is, generally, on publication beyond the courtroom to the public or a section of the public at large. We say "generally" because it is necessary to ensure the passing on to one other person or to a small number of persons (including dissemination by word of mouth), in the situation where that will undermine the very purpose of the suppression order, is captured by the section. The section does not encompass the dissemination of information to persons with a genuine need to know or, as the Court of Appeal put it, "a genuine interest in knowing", where the genuineness of the need or interest is objectively established."

"[82] . . . It is, in any event, apparent to us that. . . his employer had a genuine interest in knowing he had pleaded guilty . . . It is also relevant that rather than working for a one-person company or similar small enterprise, the appellant worked for a large entity in which a number of people had a legitimate interest in work-related issues raised by his conduct. The disclosure was limited to a small group, all of whom can fairly be said to have a need to know this information. We add that there would be a level of artificiality if the present dissemination of information was punishable. At least in theory, the Vice-Chancellor could have sat in the courtroom herself and then undertaken her own investigation without disclosing information to persons other than the appellant. The fact that she necessarily delegated functions relating to the over-sight of employees and investigation of possible misconduct does not materially change matters."

The decision therefore allows employers access to, and use of, information that has been suppressed by the Courts.

It is however important that employers are mindful that the Supreme Court has made it clear that employers will have a right to know and communicate details subject to suppression orders only to the extent where the criminal charges against an employee are relevant to their employment and that the distribution of the information is limited only to those individuals to whom it is necessary.