Monday, **4 July 2016**

Suppression not quite what it seems

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Business (/business)

One might think that when a district court judge deliberately discharges a defendant in order to protect his employment and, further, suppresses his name and all details in relation to the offending, the employer would be on shaky ground running a disciplinary process based on information gathered from the employer's representative sitting in the back of the courtroom.

John Farrow.

Not so, according to the Court of Appeal and the full Bench of the Employment Court.

The decision of ASG v The Vice-Chancellor of the University of Otago raises interesting issues, not only in relation to the employer's ability to manage its own workplace risk, but also in relation to the integrity of our district court.

ASG was employed by the University of Otago and was required to interact with students, staff and potentially members of the public.

He pleaded guilty in the Dunedin District Court to two charges and was later discharged without conviction.

The judge made a non-publication order in respect of his name and the offending.

The deputy proctor was present at the district court hearing.

He took notes and, after obtaining advice, communicated this information to relevant university staff.

An investigation was commenced and at its conclusion ASG was given a final written warning.

That warning was challenged unsuccessfully both in the Employment Court and on appeal to the Court of Appeal.

In a nutshell, the courts found that the term "publication" did not include communication of information to genuinely interested people.

The special nature of the employment relationship requires employers to have trust and confidence in their employees.

The university had a duty and entitlement as employer to investigate and, if need be, to take action to address potential health and safety related concerns in relation to its employees.

The university therefore had a "genuine interest" in the subject matter of the offences.

The Court of Appeal focused on the fact that the employee, in breach of his good faith obligations, failed to disclose his offending to his employer.

The court concluded that given this non-disclosure, the deputy proctor had little alternative but to report the events in the district court to interested university staff.

The case highlights an intriguing contest between the right of the employer to regulate its own workplace and the power of the district court (in terms of the Sentencing Act) to exercise its discretion to discharge a defendant without conviction where it forms the view that the consequences of the conviction are out of proportion to the gravity of the offending.

On this occasion the district court suffered a resounding defeat.

The district court judge formed the view that, on the material before him, ASG was likely to lose his employment if convicted and that such a consequence was out of proportion to his actual offending.

In effect, the combination of the discharge without conviction and non-publication order acted to conceal the offending from the employer.

This was compounded by the employee not telling his employer of his offending.

The court stated that ultimately any decision about the consequences of a prosecution will be for that person's employer.

In fact it went as far as urging district court judges, when considering non-publication orders, to be alive to statutory obligations on employers and to the fact that, ultimately, any decision about the consequences for employment of a prosecution will be for the person's employer.

The University of Otago has particular responsibilities under the State Sector Act and (at the time of these decisions) the Health and Safety in Employment Act.

With increased obligations on employers arising out of the Health and Safety At Work Act, which came into force in April this year, we might expect to see less restriction on the employer's ability to regulate its workplace, especially in matters related to health and safety.

The case is scheduled for another round of litigation, with leave being sought to appeal to the Supreme Court.

Whether or not our district court might claw back some of its discretion regarding discharges and suppression orders remains to be seen.

Watch this space.

● **Disclaimer:** The opinions expressed in this article are those of the writer and do not purport to be specific legal or professional advice.●John Farrow is a litigation partner with Dunedin law firm WebbFarry.

- John Farrow

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