WHO NEEDS TO KNOW?

Paul Robertson takes a look at a case that perfectly illustrates the quagmire that faces an employer when considering how to investigate allegations against an employee subject to criminal charges, especially one who has name suppression. It's important to obtain advice, he warns.

A MEMBER OF STAFF IS CHARGED with a serious criminal offence. A trustee finds out about the charge and is in court when the staff member admits the allegations. The staff member is discharged without conviction and an order suppressing publication of his name is made by the court.

Where does this leave the board of trustees when investigating whether the criminal misconduct is relevant to the staff member's employment?

THE BACKGROUND

The Court of Appeal recently considered the above scenario. The case was an appeal from the Employment Court by a person identified as 'ASG' who was, and still is, a security officer employed by the University of Otago. In 2013, ASG pleaded guilty to one charge of wilful damage, and another of assaulting a female.

The District Court judge hearing the case accepted that a conviction for assault would make ASG's continued employment difficult. This is because ASG works for Campus Watch, a security-type role protecting students on campus as they move about and late at night.

The judge accepted that a conviction for assault would not be compatible with that job and would make it very likely that he would lose his job. For these reasons, ASG was discharged without conviction, and the judge made an order suppressing his name and all details of his offending.

The deputy proctor of the university was in court. He had been told that ASG was being sentenced on criminal charges. That information had not come from ASG who had not mentioned the matter to his employer.

The deputy proctor took legal advice and was told that the suppression order did not extend to the communication of information to genuinely interested people on a person-to-person basis. An employer had a legitimate interest where an employee pleaded guilty to a serious charge relating to precisely the type of behaviour he is employed to prevent.

Provided confidentiality was adhered to, the deputy proctor was advised there was no reason why an investigation could not take place.

Accordingly, the university started an investigation. ASG's union took the view that the investigation involved the university breaching the Court's name suppression order.

For this reason, it advised ASG not to cooperate. The university completed its investigation and issued ASG with a final written warning.

THE GRIEVANCES

ASG raised personal grievances alleging that his suspension was unjustified and that a final warning was a further disadvantage. The Employment Relations Authority held that ASG had not been disadvantaged unjustifiably by being suspended, but had been by being issued with a final written warning.

Both parties then raised challenges with the Employment Court.

The Employment Court reviewed the legislation and concluded that a name suppression order did not restrict the communication of information to "genuinely interested people" such as the employer. ASG appealed.

THE COURT OF APPEAL

The Court of Appeal concluded that:

1. The duty of good faith in section 4 of the Employment Relations Act 2000 required ASG to disclose the charges he faced to the University as his employer.
2. It was appropriate for the deputy proctor to have told others at the university about the convictions.
3. If the university wanted to investigate, then it should have applied to the District Court for an order varying the suppression order to permit publication between responsible staff at the university for the purposes of the investigation.

No application to the District Court was made here but, in the circumstances, the Court of Appeal agreed that the disclosure by the deputy proctor did not amount to a prohibited publication.

The Court also said that name suppression orders should in the future be framed so that an employer could undertake such investigations. That is because it was never appropriate for the court hearing the criminal charges to decide whether the facts underlying the conviction were relevant to the future employment of the person charged.

This case once again illustrates the quagmire that faces an employer when considering how to proceed against an employee subject to criminal charges. As always, it will be important for the employer to obtain advice.

ASG v Hayne [2016] NZCA 203

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