IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 208
CRC 14/14

IN THE MATTER OF	challenges to a determination of the Employment Relations Authority
BETWEEN	HARLENE HAYNE, VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Plaintiff
AND	ASG Defendant

CRC 15/14

BETWEEN	ASG Plaintiff
AND	HARLENE HAYNE, VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Defendant

Court:	Chief Judge G L Colgan Judge Christina Inglis Judge B A Corkill
Hearing:	3 September 2014 (Heard at Dunedin)
Appearances:	R Harrison QC and F McMillan, counsel for Harlene Hayne, Vice-Chancellor of the University of Otago P Cranney, counsel for ASG
Judgment:	11 November 2014

JUDGMENT OF THE FULL COURT

Introduction

[1] At all material times, ASG[1] was an employee of the Vice-Chancellor of the University of Otago, working in a security position that required him to interact with students and staff, and potentially members of the public, in challenging situations.

[2] ASG pleaded guilty in the District Court at Dunedin to a charge under the Crimes Act 1961 that, being a male, he assaulted a female; and a wilful damage charge under the Summary Offences Act 1981. The Judge discharged him without conviction on both charges and made a non-publication order in respect of his name and the offending.

[3] The Deputy Proctor of the University of Otago (the University) was present in the District Court during ASG's appearance and took notes of the Judge's findings. He obtained legal advice as to whether he would infringe the non-publication order were he to disclose ASG's identity as the defendant in the District Court proceedings, to Human Resources (HR) and management personnel at the University. The University's lawyer advised him that an employer could be said to be legitimately interested in the fact an employee had pleaded guilty to a serious charge relating to precisely the type of behaviour he is employed to prevent; and that such an employer would be free to discuss the employee's conviction with appropriate HR or management personnel, on a confidential basis.

[4] The Deputy Proctor accordingly provided the information he had heard in Court to the Proctor, the appropriate Divisional HR Manager and ASG's immediate supervisor. It was decided that an investigation should be commenced, and this occurred on 19 June 2013. ASG was suspended for its duration. ASG was represented for those purposes by his Union, the New Zealand Tertiary Education Union (TEU). On legal advice, the TEU contended that the University had breached the non-publication order and advised that ASG would not meet University representatives to discuss the employer's concerns.

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[1] This person's identity is recorded thus pursuant to non-publication orders made on 27 May 2014 in CRC 14/14 and 4 June 2014 in CRC 15/14. "ASG" is the same person as is referred to as "B" in the relevant Authority determinations.

[5] On 3 October 2013, the University ended the suspension of ASG, and on 17 October 2013 he was given a final written warning.

[6] ASG raised two personal grievances against the Vice-Chancellor as his employer. First, ASG claimed that his suspension constituted an unjustified disadvantage. His second personal grievance was that the final written warning issued to him by the Vice-Chancellor was a further disadvantage incurred by him in his employment. The Employment Relations Authority (the Authority) found that ASG had not been disadvantaged unjustifiably by being suspended, but had been unjustifiably disadvantaged by being issued with a final written warning. The Authority left the question of remedies to be resolved by the parties, but reserved leave to ASG to have these decided.[2]

[7] Both parties were dissatisfied with those aspects of the Authority's determination which went against them. Both lodged challenges with the Court.

[8] The Chief Judge directed that the challenges be heard together and that the hearing be in the nature of a hearing de novo.[3] It was directed that all issues that were before the Authority would be for reconsideration by the Court. A full Court was convened because the case involved the application and interpretation of a non-publication order made by the District Court and because such circumstances are arising more frequently in employment cases but have not been examined previously by this Court.

Authority's determination

[9] The Authority was required only to consider the issue of whether the employer's actions were unjustified under s 103A of the Employment Relations Act 2000 (the Act). Its conclusions were:

a) Since the District Court had suppressed the name and details of ASG and the offending, the use of the information obtained by the Deputy Proctor was contrary to the District Court's order.[4]

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2 *B v Hayne* [2014] NZERA Christchurch 73 [Authority determination].
3 *Hayne v ASG* [2014] NZEmpC 113 at [17].
4 Authority determination, above n 2, at [14].

b) Alternatively, the information prepared by the Deputy Proctor constituted an "account", the publication of which was prohibited under the Criminal Procedure Act 2011. The account was communicated to others in a formal manner which meant that it was published.[5]

c) It was unreasonable for the University to rely on and use the information contrary to the District Court order. The District Court had concluded the matter warranted no penalty and that ASG's identity should be protected. Despite its awareness of the Judge's comments, there was little evidence that the University considered them; they were ignored. These were not the actions of a fair and reasonable employer.[6]

d) The four months taken to finalise the issue was inordinately long and was also unreasonable.[7] The decision to suspend was not unreasonable.[8]

e) Since the University was unable to justify its actions, the Authority determined there was a personal grievance in that ASG was unjustifiably disadvantaged. It was left to the parties to address remedies if possible.[9]

The pleadings

[10] The University sought a judgment that its actions were justified. It was contended on the Vice-Chancellor's behalf in summary:

a) The Vice-Chancellor was lawfully entitled and/or justified as ASG's employer, upon receiving a report that ASG had admitted certain criminal offending, to investigate ASG's conduct.

b) The Vice-Chancellor's investigation of ASG's conduct and her suspension of him during that investigation were further justified by reason of the Vice-Chancellor's and/or the University's obligations

5 At [19]-[20].
6 At [26]-[27].
7 At [28].
8 At [29].
9 At [30]-[31].

under the Health and Safety Employment Act 1992 and/or common law, to take all practicable steps to provide a safe place of work for persons employed and others at the University.

c) The Vice-Chancellor's concerns and actions in relation to ASG were in all of the circumstances what a fair and reasonable employer could have done.

[11] ASG sought a decision that both personal grievances should be upheld. In summary it was contended on his behalf:

a) The suspension of ASG was an unjustified action.

b) The prolonged continuation of the suspension was an unjustified action.

c) It was unfair and unjust for the plaintiff to receive and act upon the suppressed information.

d) The imposition of a final warning was an unjustified action.

[12] It was common ground between the parties that if the actions were unjustified, then ASG had been disadvantaged in his employment.

[13] At the hearing, counsel for ASG, Mr Cranney, withdrew the allegation that the imposition of the suspension was an unjustified action. Consequently the Court was required to consider:

a) As a primary issue, whether the University breached the non-publication order; and if so, whether its reliance on the suppressed information was accordingly an unjustified action.

b) As a secondary issue, whether the period of the suspension was beyond that which a fair and reasonable employer could impose.

c) Any issues as to remedies.

Relevant facts

[14] Beginning with the sentencing notes of the District Court Judge, it is evident that he considered the charge of "male assaults female" was the more serious of the two offences. However, it was regarded as being towards the lower end of the scale in terms of seriousness. The wilful damage charge was described as a low-level charge.

[15] The Judge went on to consider an application which had been made by counsel for ASG that he be discharged without conviction. This fell for consideration under ss 106 and 107 of the Sentencing Act 2002. Three grounds were advanced:

a) Given the nature of ASG's employment, it was submitted there was a strong likelihood that a consequence of convictions being entered by the Court would be the loss of his job.[10] This was regarded by the Judge as the most significant factor in support of the application.

b) It was submitted that ASG may experience travel difficulties. This was not considered to be a factor entitled to significant weight.

c) The final ground related to the general consequences of conviction. The Judge accepted that ASG would be stigmatised to some extent.

[16] The Judge recorded that ASG had attended a Restorative Justice Conference and was remorseful. The victim, ASG's former partner, did not want him to lose his job and was not concerned if he was discharged without conviction. This factor was assessed as being particularly relevant. Finally, it was noted that ASG was otherwise of good character.

[17] The Judge concluded that the consequences of a conviction would be out of all proportion to the gravity of the offending, so that it was appropriate to discharge him without conviction.

[18] Then the Judge stated:

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[10] ASG's job description required him to have no criminal convictions.

> I am going to make an order for final name suppression. I can see no argument for there being publication of somebody who has been discharged without conviction.
>
> Discharged without conviction pursuant to s 106 and suppression of name and all details in relation to the defendant and this offending.

[19] As already mentioned, the Deputy Proctor, present in Court took a note of the Judge's remarks. He then obtained legal advice from the University's lawyer which was to the effect that the publication restrictions would not extend to the bare communication of information to genuinely interested people on a person-to-person basis.

[20] The lawyer stated that an employer could be said to be legitimately interested in the fact that an employee had pleaded guilty to a serious charge relating to precisely the type of behaviour he is employed to prevent. He went on to advise that the Deputy Proctor was accordingly free to discuss the employee's conviction with appropriate HR or management personnel, with a view to determining whether the employee's plea of guilty would have any impact on the necessary level of trust and confidence in his ability to discharge his duties. He advised that providing principles of confidentiality were adhered to during the investigation procedures, there should be no reason for those discussions to go beyond the bare communication of information between genuinely interested people on a person to person basis. This would not be "publication" for the purposes of the Criminal Procedure Act.

[21] ASG's job description required him to deal with stressful situations in respect of which it would be necessary for him to exercise self-control. It was considered that the facts that gave rise to the charges were potentially relevant to the issue of whether the University could continue to have trust and confidence that ASG would act appropriately in stressful situations.

[22] Accordingly, on 19 June 2013 the Deputy Proctor wrote to ASG referring to his recent guilty pleas. He said there were issues as to whether the University could continue to have trust and confidence in him. If no reasonable explanation could be given, it was possible he would be dismissed. A meeting to discuss the concerns was suggested. It was proposed that he be suspended for the duration of the investigation. ASG was given the option of commenting on this possibility. Three days leave was given to enable him to take advice and respond. He was asked to

respond by 21 June 2013. The letter was handed to him and at the time he was told to "head away". He left the workplace.

[23] On 25 June 2013, an organiser for TEU emailed the University on behalf of ASG stating that the proposed suspension would be unfair. He said the events which had occurred were not relevant to ASG's work, and would not be replicated at work. On 26 June 2013, the Divisional HR Manager said that the Union's submissions did not change the University's view as to suspension, so that it would stand.

[24] There then followed an exchange of correspondence between the parties. No meetings took place to enable information to be provided by ASG, or to enable discussion as to appropriate outcomes. The Union obtained a legal opinion, which suggested that the case law relied on by the University related to legislation which used different terminology to that of the Criminal Procedure Act, namely the Children, Young Persons, and their Families Act 1989. The TEU's lawyer also stated that the exception to disclosing information would, according to the case relied on by the University's lawyer, arise only in a case of necessity and this was not such a case. The parties exchanged their respective legal opinions.

[25] On 5 August 2013 the HR Divisional Manager provided a draft investigation report to ASG for his comment. It summarised the allegations and the exchange of correspondence between the parties, as well as the proposed findings and recommendations. On 16 August 2013, the TEU responded by reiterating its view that the matter that had been considered by the District Court was not relevant to ASG's work, and that there was adequate mitigating information such that a reasonable employer would not move to suspend or dismiss its employee.

[26] The Vice-Chancellor was of the provisional view that a final written warning should be issued in respect of any conduct (whether or not at the workplace) which could reasonably be considered as being inappropriately violent, or which could otherwise damage the trust and confidence which the University needed to be able to place in ASG's ability to respond appropriately in confrontational circumstances.

[27] The suspension ended on 3 October 2013. Arrangements were then made for ASG to return to work. After providing an opportunity to comment on the proposed outcome, the Vice-Chancellor confirmed her preliminary decision. Advice of her

decision to impose a final written warning was given to ASG by email on 11 October 2013; the warning itself was contained in a letter dated 17 October 2013. While the warning was not expressly subject to an expiry date, it is well accepted that the weight that can reasonably be placed on a prior warning diminishes with time.

Relevance of employment factors to a discharge application

[28] Reference has already been made to the statutory provisions which the sentencing Judge was required to consider. The issue was whether he should exercise his discretion to discharge ASG without conviction, because the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[11]

[29] It is evident that courts in the criminal jurisdiction are often required to consider applications for a discharge without conviction on the grounds that the consequences of a conviction on the offender's future employment or career prospects would be out of all proportion to the gravity of the offence.[12]

[30] But a court considering the exercise of such a discretion is usually only undertaking a risk assessment as to the consequences of a conviction on the person's existing or future employment. Often, the Court will be carrying out that assessment without hearing from the employer. Ultimately, any decision about the consequences for employment of a prosecution with or without conviction of an employee will be for that person's employer.

[31] That said, when an order of discharge without conviction is made, it may be useful for an employer to be able to consider the neutral assessment of the facts giving rise to a charge or charges which are before the District Court. For example, the observations of a Judge to the effect that the offending under consideration is at the lower end of the relevant scale may be of assistance to an employer.

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[11] Sentencing Act 2002, s 107; a leading authority on the application of the section is *Z* (CA 447/2012) *v R* [2012] NZCA 599, [2013] NZAR 142.

[12] *Latimer v R* [2013] NZCA 562 at [12]-[13]; *Goggin v Police* [2013] NZHC 2710 at [14]-[16]; *Rodrigo v Police* [2014] NZCA 68 at [16]-[17].

[32] Whether an employer subsequently chooses to consider such a non-binding assessment by a sentencing Judge is a matter for that employer in all the circumstances.[13] Because the focus of the sentencing Judge's assessment is on the consequences of a conviction on employment (where that factor is raised), an employer is not subsequently precluded from considering the underlying conduct which has given rise to the charge if that conduct is relevant to the employee's employment obligations.

Non-publication order under the Criminal Procedure Act

[33] The provision which gave the District Court Judge jurisdiction to make an order of non-publication in this case is s 200 of the Criminal Procedure Act, which relevantly provides:

> **200 Court may suppress identity of defendant**
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> (1) A court may make an order forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence.
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> (2) The court may make an order under sub-section 1 only if the court is satisfied that publication would be likely to–
>
> (a) Cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person.
>
> …

[34] Section 194 provides that "name" in relation to a person means the person's name and any particulars likely to lead to the person's identification.

[35] Section 195 states:

> **195 Context in which publication prohibited.**
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> For the purposes of this sub-part, **publication** means publication in the context of any report or account relating to the proceeding in respect of which the section applies or the order was made (as the case may be), and **publish** has a corresponding meaning.

[36] The section does not provide any further definition of the term publication itself. It simply defines the context within which a prohibited publication will occur.

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[13] *Hallwright v Forysth Barr Ltd* [2013] NZEmpC 202, (2013) 11 NZELR 438 at [78]-[81].

That context is where any report or account relating to the proceeding or order is published.

[37] The absence of definition of the term "publication" in s 195 is to be contrasted with other examples of publication prohibition where, having regard to the particular objectives of a given statute, Parliament has provided an express definition of the term publication.[14]

[38] It has long been the case in statutes of this kind, where the term "publication" has not been defined, that courts have construed the term in particular circumstances as they arise.

[39] The following examples illustrate the interpretation of the term in a variety of situations and statutory contexts:

a) *Re Baird* (1994):[15] Section 68 of the Insolvency Act 1967 prohibited publication of a report of any examination held by the Official Assignee or a District Court Judge. The Court held that the word "publish" meant publication to the world at large.

b) *Ali v Deportation Review Tribunal* (1996):[16] Whether or not a report of proceedings was published under s 27A of the Guardianship Act 1968 was held to be a matter of fact and degree.

c) *Director General of Social Welfare v Christchurch Press Company Limited* (1998):[17] Prohibition of publication of a report under s 438 of the Children, Young Persons, and their Families Act 1989 was not apt to capture the communication of information to genuinely interested people who of necessity must be given information on account of their involvement with a child who is the subject of the proceeding.

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[14] For example, Adoption Act 1955, s 2; Copyright Act 1994, s 10; Patents Act 2013, s 5; Inspector-General of Intelligence and Security Act 1996, s 29.

[15] *Re Baird* [1994] 2 NZLR 463 (HC).

[16] *Ali v Deportation Review Tribunal*, HC Auckland, HC 98/96, 28 November 1996.

[17] *Director-General of Social Welfare v Christchurch Press Company Ltd* HC Christchurch, CP31/98, 29 May 1998.

d) *Re Victim X* (2003):[18] The Court when considering the provisions of ss 139 and 140 of the Criminal Justice Act 1985 observed (obiter dicta) that private citizens exercise a right to come into a court daily, and then go away and talk to any other citizen about what they heard and saw; this was a practical reality which was "as it should be and cannot be ignored".

e) *Solicitor General v Smith* (2004)*:*[19] When considering publication of a report of Family Court proceedings under s 27A of the Guardianship Act 1968, the Court agreed with and essentially adopted the approach which was upheld in the *Christchurch Press* case.

f) *Slater v Police* (2011):[20] For the purposes of determining whether the disseminating of information via a "blog" could amount to publication under ss 139 and 140 of the Criminal Justice Act 1985,[21] the Court held inter alia that the requirement for publication involves making something known to the public, not necessarily via the media.

Word of mouth communications

[40] At least two of the foregoing cases involved no more than the passing of suppressed information from one person to another, which is the nature of the issue that arises for consideration in this case.

[41] The topic of word of mouth communications was considered by the Law Commission in an Issues Paper of 2008.[22] In the course of its discussion the Law Commission stated:

> 8.32 In our view, as a matter of policy the provisions ought to include word of mouth communication. This is consistent with the meaning of publication in a defamation context, where a statement is "published" if it is communicated to a third party. While publication of suppressed

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[18] *Re Victim X* [2003] 3 NZLR 220 (HC) at [45]; upheld on appeal, *Re Victim X* [2003] 3 NZLR 220 (CA).

[19] *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC).

[20] *Slater v Police* HC Auckland CRI-2010-404-379, 10 May 2011. Leave to appeal was subsequently granted, but the appeal does not as yet appear to have been determined, if it is to proceed: *Slater v R* [2011] NZCA 568.

[21] The predecessor provisions of the Criminal Procedure Act 2011, ss199-200.

[22] Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [8.32]-[8.34].

> information by way of broadcast, print publication or placement on the Internet breaches an order on a wide scale, widespread gossip can also undermine a suppression order. Nor does the word of mouth communication need to be widespread to render a suppression order pointless in some cases. For example, one can imagine situations in which breaching a suppression order by telling just one person may cause substantial damage, for example where an accused wishes to avoid an employer learning about pending charges.
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> 8.33 Should the legislation define more clearly what publication means? There are two competing interests to be considered in this regard, clarity and flexibility. Providing a statutory definition has the advantage of legal clarity and certainty. If publication is explicitly defined, for the reasons set out above in our view it would be inappropriate to exclude one-to-one communication from the definition. However, including one-to-one communication potentially extends the ambit of the offence much too far. Technically a person would be in breach of an order if they were present in court, heard the name of a defendant, which was suppressed, and told their own spouse, but no one else. Putting aside questions of proof and enforcement, is it the intention of the legislature that this conduct should breach a suppression order? To avoid the law being brought into disrepute, the system would be reliant on police deciding not to prosecute trivial breaches, or the courts discharging without conviction.
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> 8.34 The alternative is to avoid providing a statutory definition of "publication", and leave it to the courts to make decisions on a case by case basis, and to take a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act. This has the advantage of reducing the risk of people being charged and/or convicted (even if discharged) with trivial breaches of suppression orders. The disadvantage is that there will continue to be a degree of uncertainty about the precise meaning of publication.

[42] After consulting with interested parties on the matters raised in its Issues Paper the Law Commission issued a Report "Suppressing Names and Evidence."[23] It reported that submitters were divided as to whether there should be a statutory definition of "publication", and divided as to whether such a definition should include passing information by word-of-mouth. The Law Commission reached the conclusion that including a statutory definition would create more problems than it would solve. It then said:[24]

> It would be preferable to leave it to the courts to make decisions on a case-by-case basis, taking a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act.

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[23] Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009).
[24] At [7.18].

[43] In the course of reaching this conclusion, the Law Commission specifically referred to *Solicitor General v Smith*,[25] as an example of its opinion that the courts had said that publication involves publicly disclosing or putting material in a public arena. Mr Cranney submitted that the case was incorrectly relied on by the Law Commission. We will return to this case later in this decision but we are satisfied that the High Court determined that the legislation it was considering focused upon the publication of reports, and that the Law Commission correctly summarised the Court's conclusion.

[44] On 15 November 2010, the Criminal Procedure (Reform and Modernisation) Bill (the Bill) was introduced. The Bill was the result of a comprehensive review of criminal procedure, building on work undertaken by the Ministry of Justice and the Law Commission including the Law Commission's Report relating to name suppression.[26]

[45] The Explanatory Note to the Bill as introduced contained the following passage with regard to cl 199, (which became s 195 of the Criminal Procedure Act):[27]

> Clause 199 describes the context in which publication will breach the suppression provision or a suppression order. It provides that publication means publication in the context of any report or account relating to the proceeding in respect of which the suppression provision or order applies. This is not intended to be a definition of the terms publication or publish, as it is considered preferable that the meaning of these terms continue to be developed at common law rather than be specified in the legislation. Instead the clause is designed to clarify that publication of a person's name is not prohibited in any context that is unrelated to a report or account of the criminal proceedings.

[46] This statement of purpose is unsurprising and is consistent with our view as to the meaning of the text in s 195, as discussed above.

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[25] *Solicitor-General v Smith*, above n 19.

[26] Criminal Procedure (Reform and Modernisation) Bill, Initial Briefing, Justice and Electoral Committee, 10 February 2011. The Minister of Justice when introducing the Bill and at the second reading acknowledged this work of the Law Commission: (2010) 669 NZPD 1573, (2010) 676 NZPD 21418.

[27] Criminal Procedure (Reform and Modernisation) Bill (243-1), (explanatory note) at 56-57.

Person to person communications in the employment context

[47] We turn to consider the application of s 195 in an employment context. As already explained, this issue was touched on in cases that preceded the enactment of the Criminal Procedure Act, the most recent of which was *Solicitor General v Smith*. The Court considered that the term publication did not encompass the communication of information to "genuinely interested people".[28]

[48] Because of the special nature of an employment relationship which requires employers to have trust and confidence in their employees, we consider that the principle should apply by analogy to an employment situation, where an order is made under s 200 of the Criminal Procedure Act.

[49] An employer will have a genuine (i.e. legitimate and objectively justifiable) interest 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.[29] An employer will not necessarily have that interest in all circumstances where a non-publication order is made.

[50] An employer will if called upon to do so, have to justify to the Authority or the Court its genuine interest when establishing that it acted in a fair and reasonable way.

[51] Mr Cranney emphasised that the suppressed information should only be passed on in cases of necessity. We do not agree the test is so stringent. The High Court in *Smith* did not limit appropriate person to person communication to instances of necessity. In any event we consider the formulation in the previous paragraphs balances the rights of an employee who is the subject of a non-publication order against the right of an employer to be informed of an to consider information of this type.

[52] Mr Cranney also submitted that Parliament specifically provided for exceptions. He said that s 209 supports this conclusion. Section 209 provides that in

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[28] *Smith*, above n 19, at [62].

[29] The concept of nexus was considered appropriate by the Court of Appeal when assessing whether an employee's misconduct outside the workplace impacted on his employment obligations: *Smith v Christchurch Press Co Ltd* [2001] 1 NZLR 407 (CA) at [25]-[26].

certain circumstances notwithstanding the making of a non-publication order, publication may occur. Examples include where a person has escaped from lawful custody or failed to attend court when required to do so; nor is publication prohibited to any persons assisting with the administration of a sentence imposed, or with the rehabilitation of the person, or where specified persons require the information for the purposes of their official duties; or in respect of a person who is proposing to conduct a public prosecution against the person for an offence and the information is needed for that purpose. The previous provision was s 141 of the Criminal Justice Act 1985. It was specifically considered by the Law Commission who recommended it for inclusion in a new statute notwithstanding the recommendation it also made that the term publication should not be defined. We accept the submission of Mr Harrison QC that the provision was included out of an abundance of caution. It does not limit the definition of permissible publication.

[53] We consider that the above interpretation of "publication" is consistent with the provisions of the New Zealand Bill of Rights Act 1990 (NZBORA). On the one hand there are rights to freedom of opinion and belief (s 13), and as to freedom of expression which includes the freedom to receive information of any kind (s 14). On the other hand an accused person has a right to a fair trial (s 25) which can include prohibition of publication of an accused's name and identifying details.[30] We consider that the interpretation advanced by the Vice-Chancellor and accepted by us in this judgment balances those rights, and is demonstrably justified in a free and democratic society in terms of s 5 of the NZBORA.

[54] For completeness, we observe that if information is conveyed contrary to a non-publication order, there may be circumstances where it could subsequently be concluded under s 103A that a fair and reasonable employer could rely on that information in all the circumstances. However, relying on improperly obtained information involves a difficult judgment, and any employer faced with such a prospect would be well advised to proceed with considerable caution and after

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[30] *R v B* [2008] NZCA 130, [2009] 1 NZLR 293 at [23]-[24], [49]-[50]. White J considered a similar, but not identical, issue in *Slater v Police*, above n 20, at [51]. Inter alia, the Court was required to consider whether information or material posted on a blog constituted publication of a "report or account" under ss 139 and 140 of the Criminal Justice Act 1985; balancing NZBORA rights the Court concluded a blog posting would amount to a "report or account" and thus there was publication under the statute.

obtaining legal advice. The Court does not need to say anything more about this issue in the circumstances of the present case.

Application of the foregoing principles

[55] Mr Cranney in the course of the hearing accepted that information could be passed on in cases of necessity but submitted that the present circumstances did not fall within the principle. We have already decided that a test of "necessity" is too narrow and restrictive.

[56] Counsel also submitted that in this instance the University was the very organisation to which the non-publication order was directed. It is not evident from the sentencing notes that the non-publication order was made so as to preclude communication of the offence and of ASG's name in identifying particulars to the University. The rationale for the District Court Judge's orders were that a conviction would amount to a disproportionate consequence having regard to the offending; and that as a matter of principle a person so discharged should have the benefit of a non-publication order. The sentencing Judge did not refer to any submission made for ASG to the effect that undue hardship would be caused to ASG were the University to learn of the circumstances and no undue hardship finding was made in relation to the non-publication issues.

[57] ASG's employment agreement contained health and safety provisions which required the University to encourage safe work practices. Appendix B to the agreement identified certain personnel provisions arising from s 77A of the State Sector Act 1988. These included recognition of good employer responsibilities, including the provision of good and safe working conditions, and the requirement that all employees would maintain proper standards of integrity, conduct and concern with regard to the wellbeing of students attending the institution. ASG's job description emphasised these responsibilities in its statements of objectives and key tasks. As a matter of law, the University also had statutory obligations to take all practicable steps to ensure safety of employees and others under the Health and Safety in Employment Act 1992.

[58] The Court accepts the submission made by Mr Harrison that the University had a duty and an entitlement as an employer to investigate and, if need be, take action to address potential health and safety and related concerns arising in respect of one of its employees. ASG came to the attention of the police because he was violent to his partner and damaged property. We are satisfied that the University had a genuine interest in the subject matter of the offences having regard to ASG's work responsibilities.

[59] In the present case the Deputy Proctor disclosed the information he had heard while in Court to a small number of persons within the University all of whom had a genuine interest in receiving it, given its potential relevance to its employment relationship with ASG. In the circumstances the disclosure did not amount to a prohibited publication. The Court concludes the steps taken by the Vice-Chancellor and her representatives were steps which a fair and reasonable employer could have undertaken.

[60] An issue was raised for ASG that the period of suspension was unduly prolonged. We have considered the sequence of correspondence which passed between the parties. Given the legal issue which lay at the heart of the parties' respective positions, and the fact that – as Mr Cranney accepted – neither party caused undue delay at any particular stage of the investigation, the Court finds that overall the period taken to determine it was justifiable in the particular circumstances.

[61] Further, the nature of the conduct which was the subject of the offences, and the totality of the information which was provided on behalf of ASG, leads to a conclusion that the imposition of the warning was a step which a fair and reasonable employer could take, although such a warning should not be open-ended and should lapse through the passage of time.

[62] In summary the conducting of the investigation, the suspension, and the imposition of a final written warning were all justified under s 103A of the Act.

[63] Accordingly, the University's challenge to the Authority's determination succeeds, and ASG's cross-challenge fails. The decision of the Authority is set aside pursuant to s 183(2) of the Act and this judgment stands in its place.

[64] The provisional view of the Court is that given the importance of the matters raised, costs in both the Authority and this Court should lie where they fall. If the University as the successful party wishes the Court to consider an application for costs, however, that should be filed within 21 days; and ASG's response should be filed within 21 days thereafter.

B A Corkill
Judge
For the full Court

Judgment signed at 4.00 pm on 11 November 2014