

**Attention is drawn to the
order prohibiting
publications of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 73
5438416

BETWEEN

B
Applicant

A N D

PROFESSOR HARLENE
HAYNE, Vice Chancellor of
UNIVERSITY OF OTAGO
Respondent

Member of Authority: M B Loftus

Representatives: Peter Cranney, Counsel for Applicant
Barry Dorking, Counsel for Respondent

Investigation Meeting: 16 April 2014 at Dunedin

Submissions Received: At the investigation

Date of Determination: 5 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, B, claims he was unjustifiably disadvantaged by two actions of his employer, The University of Otago. He says he was unjustifiably suspended and then issued a final written warning which was unjustified by virtue of its reliance on information obtained contrary to an order of the District Court.

[2] The University disputes the claim and says it acted lawfully and fairly.

Conduct of the investigation

[3] Just prior to a telephone conference scheduled to discuss administrative issues pertaining to the investigation Counsel jointly asked that the investigation be limited to the question of whether or not the *employer's actions were unjustified actions within the meaning of s103A*.

[4] They advised it was common ground B's employment had been affected to his disadvantage so if the answer is yes, he must have been unjustifiably disadvantaged. The parties would then attempt to resolve the question of remedies but leave was sought to return to the Authority should they be unable to do so.

[5] In the event I agreed to this proposal evidence would be offered by way of an agreed statement of facts accompanied by a bundle of documents. I agreed and in doing so congratulate Counsel for the constructive and co-operative way in which they have approached this matter.

Background

[6] At all material times B was an employee of the University. His manager, Mr Andrew Ferguson, learned B was to appear in the District Court at Dunedin on 14 June 2013. He was present in the public gallery when B appeared and took detailed notes which he subsequently used for the preparation of a more detailed report.

[7] B was discharged without conviction and the District Court Judge issued an order for *suppression of name and all details in relation to the defendant and this offending*.

[8] Mr Ferguson considered B's court appearance raised questions about whether his employment should continue but was uncertain as to the effect of the suppression order. He sought legal advice. He also reported the matter to three managerial colleagues and his report(s) were subsequently seen by three or four other employees of the University.

[9] Given the legal advice the University then commenced a disciplinary investigation and advised B he would be suspended in the meantime.

[10] That led to an ongoing exchange which continued for approximately four months. Essentially the University was trying to progress its investigation in the face of B's position that (a) it was inappropriate to do so given the order of the District Court and (b) he would not provide answers as to do so might breach that order.

[11] B's failure to answer the substantive accusations led to various unilateral

decisions from the university. It also saw an initial recommendation B be dismissed though the ultimate decision was he be issued a final written warning.

Determination

[12] The District Court ordered the *suppression of name and all details in relation to the defendant and this offending*.

[13] To suppress is to [1] *end the activity or existence of*; [2] *prevent from being seen heard or known* (The New Zealand Oxford Dictionary, Edited by Tony Deveson and Graeme Kennedy at the New Zealand Dictionary Centre, Oxford University Press, 2005).

[14] If something no longer exists it cannot be used. Nor should it be used if that use is prohibited. Whichever way I look at this definition I conclude the University's use of the information obtained by Mr Ferguson was contrary to the order as worded by the Judge.

[15] However that is not necessarily the end of the matter. It is submitted *suppress* must be interpreted in the manner envisaged by the various sections under which the District Court may make such an order (see Sections 200 and 205 of the Criminal Procedure Act 2011). Those sections limit the concept to a ban on the publication of a report or account.

[16] Account means [1] *a narrative or description....* Report means [1] *a. bring back or give account of. ... c. relate as spoken by another.* (Both also The New Zealand Oxford Dictionary).

[17] The documents prepared by Mr Ferguson provide a narrative or description of what occurred in the District Court. I conclude they constitute an account which was then brought back and given to others.

[18] That raises the question of whether or not the account was published. Publish means [2] *make generally known.* [3] *announce formally ...* [4] *communicate to a third party.* (Both also The New Zealand Oxford Dictionary).

[19] Mr Ferguson's report, which contained a narrative of what occurred in Court, was communicated to others in a formal manner. While not generally promulgated, I conclude, given the definition, it was published.

[20] That conclusion means the Judge's order was breached whichever way it is viewed - either as expressly worded or interpreted in the context of the Criminal Procedure Act 2011.

[21] The conclusion the information upon which the University relied was obtained and used contrary to the Court's order means I must consider whether a fair and reasonable employer would have done so in the circumstances (*Ravnjak v. Wellington International Airport Ltd* [2011] ERNZ 32). *Ravnjak* does not preclude an investigation by the University nor the information's use. The question is whether the outcome was reasonable.

[22] I conclude the answer is no.

[23] The jurisdiction to deal with a proceeding relating to an offence is, with some restrictions, conferred upon the District Court (s.9(1) of the Criminal Proceedings Act 2011). B was charged with an offence and the Court properly dealt with it. In doing so it issued the suppression order. It gave three reasons for doing so.

[24] They were the threat to B's employment, the general consequences of a conviction and attached stigma and B's subsequent actions and his response after the event was commendable.

[25] Of these it was the threat to B's employment which the Judge said he saw as the most significant. There is then the fact there was a discharge without conviction. That suggests the offending was at the lower end of the scale.

[26] The Judge's comments, along with the outcome send a clear message. The body charged with deciding the outcome of these allegations had concluded it warrants no penalty and B's employment should be protected. Despite knowing the outcomes and the rationale behind them there is little evidence the University considered these factors.

[27] Instead it chose to ignore the Judge's comments and proceed with a second round of action. Its managers went so far as to both consider and recommend dismissal. Ultimately they applied a lesser sanction but one which still disadvantages B. I conclude those are not, in the circumstances and given the Judge's comments, the actions of a fair and reasonable employer.

[28] There is then the fact it took four months to finalise the issue. That, I conclude, was inordinately long in the circumstances and also unreasonable.

[29] Finally there is the decision to suspend. B was given an opportunity to comment on his proposed suspension. He chose not to do so but concentrated instead on the wider issue of whether or not disciplinary action was appropriate. I cannot, therefore, criticise the University for that decision.

Conclusion and Costs

[30] For the above reasons, and having considered the detailed submission of Counsel, I conclude the University is unable to justify its actions. Given the parties consensus B has been disadvantaged it follows he has a personal grievance in that he has been unjustifiably disadvantaged in his employment.

[31] I leave it to the parties to address remedies but reserve leave for them to return to the Authority should they be unable to do so.

[32] Costs are reserved.

Suppression

[33] The District Court prohibited publication of all details relating to B's identity and the offending. Suppression is granted where the circumstances of a case outweigh the principle of open justice. Such circumstances exist where there is a real risk the administration of justice would be frustrated or rendered impractical (*R v Patterson* [1992] 1 NZLR 45 (HC) at p50).

[34] To nullify the effect of the District Court's order by now naming B would be contrary to the Court's order and that would frustrate the administration of justice.

[35] I therefore order B's identity be suppressed.

M B Loftus
Member of the Employment Relations Authority