Wednesday, **5 July 2017**

In good faith, regardless

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Opinion (/opinion)

After almost four years of litigation, the Supreme Court has delivered a conclusive decision in favour of the vice-chancellor of the University of Otago.

Although the decision provides vindication for the vice-chancellor, it also expands on an employee's good faith obligations to their employer.

In its unanimous decision, the court said the case illustrated that the current approach regarding suppression orders gave rise to some uncertainty.

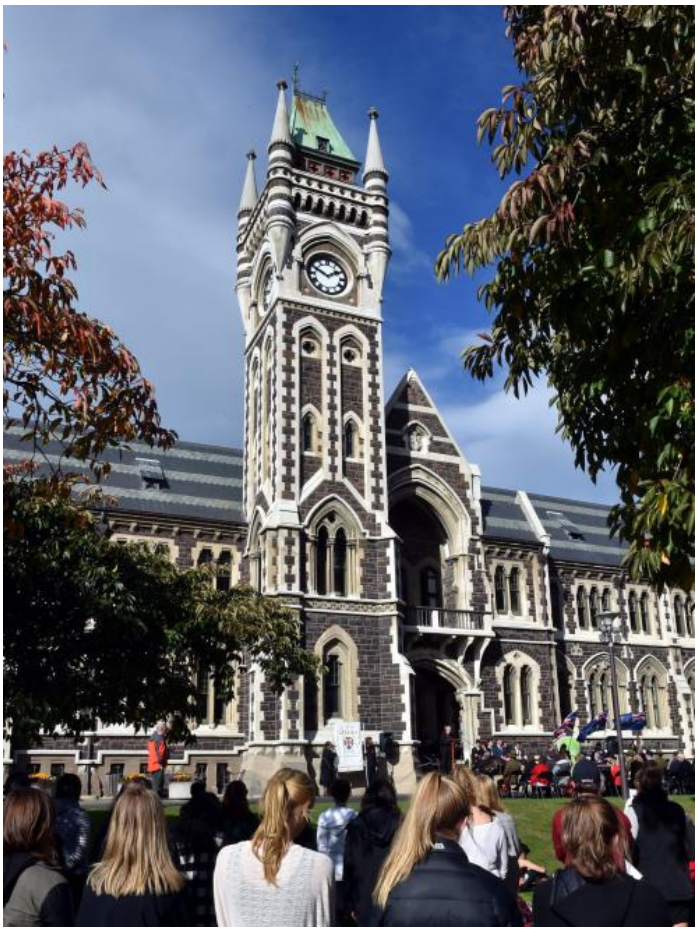
The court further suggested that some legislative clarification might be considered.

ASG v The Vice-Chancellor of the University of Otago involved an employee who occupied a security position at Otago University. He was required to interact with students, staff and (potentially) members of the public in challenging situations.

He pleaded guilty in the Dunedin District Court to charges of assaulting a female and wilful damage. He was discharged without conviction and, in addition, the judge made a non-publication order in respect of his name and the offending. The deputy proctor was present at the district court. 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.

As in the Employment Court and Court of Appeal, the Supreme Court found that the term publication should be interpreted to exclude communication of information to "genuinely interested people". The special nature of an employment relationship requires employers to have trust and confidence in their employees. An employer will have a genuine interest where there is a potential nexus between the circumstances relating to the charge faced by the employee and the obligations of the employee to their employer.

As ASG's employment involved protecting students on campus, particularly at night, his employer had a genuine interest in knowing he had pleaded guilty to an offence of violence against a spouse. The court also said that it was relevant that he worked for a large entity in which a number of people had a legitimate interest in work-related issues raised by his conduct.



University of Otago's clocktower. Photo: Gregor Richardson.

It was accepted that the district court judge who made the order for final name suppression did so because he was concerned about the university learning of the offending and the possible loss of ASG's job. However, the Supreme Court ruled that this was an incorrect basis for a suppression order.

In a nutshell, this decision now means that an employee who faces charges has a good faith obligation to disclose these to their employer. That is regardless of whether the charges are to be defended or, as in the case of ASG, a discharge without conviction is granted. That is even though a discharge without conviction is deemed to be an acquittal.

Employees can no longer sit back silently in the hope that they may be acquitted or that the charges may be withdrawn. The Supreme Court's ruling makes it clear that they must disclose to their employer the fact that they have been charged with any offence.

The case has already been applied by other courts. The Chief High Court Judge recently ruled that the fact of the charge, rather than the way it is ultimately disposed of, is a relevant factor which may impact on the employment relationship. Whether Parliament heeds the Supreme Court's suggestion that the law may benefit from clarification, is yet to be seen. However, even if it does, the employee will not be able to use a suppression order to avoid their good faith obligations to their employer. All of which serves to emphasise the uniqueness of the employment relationship.

- John Farrow is a partner at Webb Farry Lawyers.

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