BUDDLE FINDLAY

Name suppression: where privacy rights meet good faith

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On first principles, human resources professionals are very good at dealing with privacy issues. The technical legal requirements, however, are not as widely understood, and we think there is a need to have a good working knowledge of the Privacy Act, and in the public sector of the Official Information Act. It is important also to understand how good faith works in practice, and what it means for employees' privacy rights.

Last month the Supreme Court confirmed that employers have the right, to a point, to know about the criminal acts of their employees, even when a name suppression order is in place.[1] There are some important lessons in the case about good faith and privacy.

ASG v Hayne, Vice-Chancellor of the University of Otago

This precedent-setting case involved a security guard (ASG) and his employer, the University of Otago (The University). The employee pleaded guilty to wilful damage and assaulting his former spouse. He was discharged without conviction in the District Court, and the Judge made an order prohibiting publication of ASG's name and details of the offending.[2]

A senior University manager was in Court while ASG was sentenced. After seeking legal advice, he disclosed the information to a limited number of colleagues, including the Vice-Chancellor. The University undertook an investigation, suspended ASG and gave him a final written warning. ASG then returned to work.

ASG raised a personal grievance claiming that both the suspension and the final written warning had unjustifiably disadvantaged him. The Employment Relations Authority ruled that the University had breached the suppression order and was therefore unable to justify its actions. The Employment Court, Court of Appeal and Supreme Court disagreed.

Scope of suppression orders

The Supreme Court confirmed that suppression orders generally prohibit publication to the public at large, including via the media and by 'word of mouth', and to individuals where the purpose of the suppression order would be undermined. Importantly, however, suppression orders do not prohibit the dissemination of information to those with a "genuine interest in knowing, where the genuineness of the need or interest is objectively established".

An employer will have a genuine interest where a "potential nexus between the circumstances relating to the charges faced by the employee and the obligations of the employee to his/her employer" exists. The necessary nexus can exist even where the conduct in issue takes place outside the employment relationship. Here, given the nature of ASG's charges and his role at the University (protecting students on campus and positively influencing personal safety and behaviour, on and off campus), the Court said that the University (and several of its managers and HR staff) had a genuine interest in knowing ASG had pleaded guilty to an offence of violence against his spouse.

As such, disclosure of the information was not a breach of the suppression order, and the University was justified in using and relying on the information.

Good faith and criminal charges

Interestingly, the Court of Appeal concluded that ASG had breached his statutory duty of good faith by not informing the University that he was facing (and subsequently pleaded guilty to) charges of assault and wilful damage. The Supreme Court did not disturb that finding.

Comment

Good faith requires employees to inform their employer about a criminal charge (pending or otherwise) if the offending is relevant to their job or the employer's business.

Additionally, while employees may sometimes refuse to answer questions that might incriminate them and jeopardise their defence

to a criminal charge, employers are not necessarily precluded from asking employees about the charge or from pursuing a disciplinary process. Neither will name suppression preclude this, provided the nexus exists between the charge and employment. The 'privilege against self-incrimination' is not an absolute 'right to silence'.

If an employer wishes to investigate conduct which is the subject of a criminal charge, we recommend that the employer considers asking for copies of any statements the employee provided to Police, copies of information the employee received from the Police (eg the charging document, any summary of facts, witness statements, and any other information supporting the charge) and confirmation of when and how an employee intends to plead. There may also be conduct outside the criminal charge that the employer can enquire about, not covered by the employee's privilege against self-incrimination.

Given the added legal complexity, and the added pressure and sensitivity that comes with criminal charges, employers should take extra care in any inquiry or disciplinary process. There are significant consequences for both the employer and employee if the employer acts hastily or harshly. And, as the University of Otago case shows, even if the employer is acting lawfully, it may have to go all the way to the Supreme Court to prove that.

[1] *ASG v Hayne, Vice-Chancellor of the University of Otago* [2017] NZSC 59.

[2] Under section 200 of the Criminal Procedure Act 2011.

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