NOTE: THE SUPPRESSION ORDERS MADE IN THE EMPLOYMENT COURT ON 4 JUNE 2014 REMAIN IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND SC 61/2016

BETWEEN **ASG**
Appellant

AND **HARLENE HAYNE**
Respondent

Hearing: 8 February 2017

Coram: William Young J
Glazebrook J
Arnold J
O'Regan J
Ellen France J

Appearances: C R Carruthers QC and P Cranney for the Appellant
R E Harrison QC for the Respondent

CIVIL APPEAL

MR CARRUTHERS QC:

May it please Your Honours, I appear with Mr Cranney for the appellant.

WILLIAM YOUNG J:

Thank you Mr Carruthers.

MR HARRISON QC:

May it please Your Honours, I appear for the respondent.

WILLIAM YOUNG J:

Thank you Dr Harrison. I just note that there is the suppression order in relation to the appellant's name still in place. Mr Carruthers.

MR CARRUTHERS QC:

May it please Your Honours. I have handed up an outline of the oral argument I propose to make. I have noted out the outset that the issue of public access and restrictions on reporting is dealt with in a discrete section of the Criminal Procedure Act 2011, Part 5, Subpart 3 in sections 194 to 211.

WILLIAM YOUNG J:

Just pause there. Does that address access to Court records? How do the search rules apply when there's a suppression order, do you know?

MR CARRUTHERS QC:

I think they apply on the basis that one would have to –

WILLIAM YOUNG J:

Go to the Judge.

MR CARRUTHERS QC:

– apply for access.

WILLIAM YOUNG J:

The Judge would probably say no or yes.

MR CARRUTHERS QC:

Yes. Your Honour that really goes to very much the heart of part of my argument, and I come to it in just a moment, but I'll deal with it now.

The sections that we deal with concerning suppression of identity, that's 200 to 211, really provides something in the nature of a code, because they prohibit publication with statutory exceptions and a mechanism by variation or revocation to deal with cases where publication becomes warranted. So like the access to Court records where one would apply for permission to have access, if there is an issue concerning a suppression order of the kind that arose here with the employer wanting to deal with it, the proper cause, as indeed the Court of Appeal found, was to apply to vary the order. So the fact that that mechanism exists points, in my submission, to the comprehensive nature of the prohibition –

GLAZEBROOK J:
How could the employer find out about it, in order to apply for a variation? They did find out about it in this case, possibly in breach of the interim suppression order in fact, but we don't know how they found out about it. In any particular detail.

MR CARRUTHERS QC:
Yes, yes. One can, as these things have a habit of emerging, it can emerge by word of mouth, but the moment –

GLAZEBROOK J:
Although it will be by word of mouth contrary to the orders.

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
I mean we don't know whether the original one was in breach of the interim suppression order because it could have come through other means, one can assume. Somebody had personal knowledge of something happening without –

MR CARRUTHERS QC:

I think this is the point, really, that the Law Commission focused on when it came to looking at the question of whether publication should be defined, and what its scope should be, and it recognised that there would have to be an element of discretion in, for example, in the police in enforcing situations because one can imagine somebody sitting, a husband or wife sitting in the Court, hearing a case, going home that night and explaining what had happened and technically, as Your Honour observed, that's a breach of the order, but it's in a context that, at least the background to the legislation recognised – should not attract criminal sanctions, and it probably goes to the wider point made by the Law Commission that the whole question of publication is an issue that's best left in the hands of the Court to determine on a case by case basis. So if we bring that to the present case my submission is that plainly as soon as the respondent had information, the proper course, as the Court of Appeal recognised, was for the respondent to apply to vary the order, and one wouldn't expect it to be revoked, but to be varied to allow information to be dealt with in the employment context.

ARNOLD J:

Do you accept, I think what Mr Cranney at least accepted in the Court of Appeal, that there was a concept, a necessity which might justify conveying information that has been suppressed to somebody else, and that wouldn't entail the need to go to the Court.

MR CARRUTHERS QC:

No, I don't accept that, and that concept, Your Honour, has really arisen from the *Director-General of Social Welfare v Christchurch Press Co Ltd* HC Christchurch CP31/98, 29 May 1998 case, and part of our argument here is that the context of the *Christchurch Press* case is entirely different. I'll take you to a passage in Justice Panckhurst's judgment, in fact I'll do it now because it's probably convenient. It's probably best if I use the respondent's bundles of authorities. We have narrowed ours down to three but it's probably best if I deal with the respondent's bundle. So I'm in respondent's bundle, volume 2, and I'm under tab 12, and I'm going to page 10 of the reasons that

Justice Panckhurst gave. The background to this case was a publication by Christchurch Press that criticised the actions of the Department of Social Welfare, and the Director-General obtained an interlocutory injunction preventing publication, this was an application to discharge that injunction, and what it involved was that it was a consideration of a provision in the Children, Young Persons and Their Families Act 1989, section 438, and the relevant part is set on page 10 of the reasons where the provision is, "Subject to subsection (2) of this section, no person shall publish any report of proceedings under this Act except with leave of the Court that heard that proceeding." Or those proceedings. There's obviously an error in the report.

Then the Judge went on, "Subsection (2) then provides that the prohibition does not extend to the publication of any report in a bona fide professional context, to statistical information relating to proceedings, or to the results of bona fide research. In my view, when so read, the sense of subsection (1) becomes apparent. The focus is upon the publication of reports. I do not consider these words are apt to capture the bare communication of information to genuinely interested people, like social workers, foster parents and teachers, who of necessity must be given some information on account of their involvement with a child involved in the proceeding."

So what one can see is that in a social welfare context, where necessarily information has to be provided in order to deal with the child involved, that is not, in the Judge's analysis, a report of proceedings. Now that concept is brought into the Court of Appeal's judgment, and I'll come to that in an orderly way if I may, because I want to analyse the reasons that the Court of Appeal gave. So the reason I resisted in response to Your Honour Justice Arnold, is that that may well be an apposite interpretation of section 438 for the purposes of administration of social welfare, but it is not a universal proposition in relation to suppression orders because the suppression order in this case was for quite a different purpose, and the very purpose of the suppression order in this case is subverted by the analysis the Court of Appeal makes to say, well of necessity the University had to know.

WILLIAM YOUNG J:

Could the appellant's wife have told her solicitor what had happened. I mean could she say, my husband assaulted me, he pleaded guilty, he was later discharged without conviction. Please put this in an affidavit in proceedings in the Family Court?

MR CARRUTHERS QC:

Well I think that situation is again one that the Law Commission recognised as being, the communication itself would be subject to privilege –

WILLIAM YOUNG J:

But that wouldn't prevent it being an offence. It might not be subject to privilege if it is in the nature of an offence.

MR CARRUTHERS QC:

Yes. Your Honour, I think one gets into the same analysis as the example that I discussed with Justice Glazebrook, that it falls into a category where the legislation did not intend the criminal law to intervene, which is essentially the way in which it was put in the Law Commission materials.

GLAZEBROOK J:

Is it quite the same? I can understand that concept, that it didn't intend the criminal law to intervene. But does that necessarily indicate whether you can or can't publish under – because there's a difference between having a criminal sanction for publishing, because there is always a discretion as to whether you – a discretion both on the police and then to a degree in terms of, obviously intended here for the courts also to exercise that discretion if the police are getting above, outside of the normal realm that you would expect to have a criminal conviction – sorry I'm, this is rather a long way of saying this, but does it necessarily characterise what publication means in these contexts, and the second thing is whether a breach of that actually means you can't use that information if it does come to you, which is the second part of the submission.

MR CARRUTHERS QC:

Of the question, yes.

GLAZEBROOK J:

Which you will be coming to.

MR CARRUTHERS QC:

Yes. All I can say in response is that that's certainly the analysis that the Law Commission made, that it went to whether it was publication for the purposes of the legislation. But I accept the distinction that Your Honour makes between what is publication and what is simply a discretion in a situation where technically there has been publication.

GLAZEBROOK J:

It's just it is relatively difficult to have that case by case analysis as to a definition of publication, as against looking at an individual case as to whether there has been a breach sufficient to engage the criminal law. But that's probably a criticism of the Law Commission as against – it might just be, as you say, that that's what was intended.

MR CARRUTHERS QC:

Yes, yes, I have to accept that. I accept that analysis Your Honour. So the context, for the purposes of this case, is that in our submission there is a clear prohibition. There are statutory exceptions which are important as I'll come to in a moment. But crucially there is a mechanism by variation to deal with the situation that arose here. Just going on in the outline, the reason for the submission that there was a breach of section 200, and that the first question should be answered yes, is that the primary consideration of the consequences leading to the order was protection of the appellant's employment, and I just want to quickly take you through the District Court Judge's decision on that issue, and I've identified the paragraphs that I'm going to refer to. I'm in case on appeal volume 3 and I'm under tab 1 at the beginning of that volume, and I'm on page 50 at paragraph 6 where the Judge found, "As to the gravity of the offending, whilst it did involve an assault by you

against your partner at that time, it was more towards the lower end of the scale in terms of seriousness. I accept that." And then he concludes that paragraph by saying, "The level of culpability here is towards the lower end of the scale in terms of seriousness." Then at paragraph 7 and 8 he deals first with the consequences and the first one he lists is loss of job, and then he looks at overseas travel and the general consequence of stigma within the community. Then paragraph 8, "Considering those consequences, the most relevant for me is the potential that you would lose your job and I take the view that, given the type of employment you are in, there is an extremely strong likelihood that you would lose your job." Then the Judge describes the role that the appellant has in the balance of paragraph 8.

Then he comes back to the issue in paragraph 11, right at the bottom of the page, "But the most significant issue for me in relation to consequences relates to your employment. You have two children. You will need to continue to provide financial support for the children despite the fact that your relationship is no longer." Then paragraph 12, again the last part of that paragraph, "And as I say, provide support so if you were to lose your job, that would have a significant impact on them and of course on their mother and I need to take that into account."

Then just in context in passing –

O'REGAN J:
All of that is in the context of whether to discharge without conviction.

MR CARRUTHERS QC:
Yes.

O'REGAN J:
Not whether to suppress name though, isn't it?

MR CARRUTHERS QC:
Well it must necessarily come to both because –

O'REGAN J:
Well no, the statutory test for suppression of name is extreme hardship. This is the statutory test for discharge, which is are the consequences out of proportion to the level of offending.

MR CARRUTHERS QC:
Yes, I understand that, and then he goes on to simply deal with name suppression without identifying the extent of the extreme hardship. But my submission from the context of the reasons is that it was plainly seen as extreme hardship. That he would likely lose his job because that's the primary reason that the analysis for discharge is made.

Because I'm dealing with it in passing just in paragraph 13 there's an important point about going back to the gravity of the offending. Just the last two or three lines of paragraph 13. "This offending occurred within the context of that relationship but more significantly the breakdown of that relationship and that is often a very difficult time for people." Then at paragraph 15, right in the centre of the page, the appellant's partner made it clear that she didn't want him to lose his job and then finally he concludes that the statutory test is satisfied in paragraph 17 and goes on to make a final order for name suppression. My submission is really, as I have said in response to Your Honour Justice O'Regan's question to me, is that the extreme hardship was plainly related to the issue of loss of job.

So coming back to the legislation, and putting the issue of employment into context, my submission is that the fact that the legislation provides for statutory exceptions allowing publication in certain circumstances points to the comprehensive nature of a prohibition, and then I've drawn attention to the mechanism for variation in section 208 and the exemption for the police in certain circumstances.

If I can just pause there. It has to be an issue of some interest that there is that exception for the police, because it was simply a matter of being necessity and having a genuine interest in the disclosure, one could say there

would be no need for any exception, any statutory exception for the police. Not a major point but an indication as to the comprehensive nature of these provisions, and the fact that it is in the nature of a code.

ELLEN FRANCE J:

Just in relation to that Mr Carruthers, there is now an additional, or a recent additional exception, isn't there, for the job protection registry and associated – which I suppose adds some support for your code submission?

MR CARRUTHERS QC:

Yes it does Your Honour because that example, or that exception brings it very much into a context similar to the *Christchurch Press* case.

ARNOLD J:

So just to understand this. The Law Commission said that rather than defining publication they thought it better to leave it to the Courts to work out the sort of ambit of publication. But this argument that this is a code seems to run against that view of the Law Commission with what you seem to be saying is that any communication basically will be a publication and you'll only protected if you come within one of those exceptions.

MR CARRUTHERS QC:

Yes, I am saying that, and I'm saying it against the background that the Law Commission recognised that word of mouth was publication and it needed to be protected so I do accept the inconsistency between what the Law Commission is saying and what, in fact, finished up as the legislation.

GLAZEBROOK J:

You say that there's also, that the Law Commission at least was also assuming that there'd sort of be a trivial exception ie going home and saying I was in Court today and there was an interesting thing that happened.

MR CARRUTHERS QC:

Yes, yes.

GLAZEBROOK J:

But of course with social media one knows that there may not be anything such as an innocent exception at least – but if it goes no further than that is probably a trivial, but you say they were really looking at a trivial exception ie something which should not engage the criminal law.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

As being the exception that would be used in terms of publication, rather than saying that going home, telling one person is not publication.

MR CARRUTHERS QC:

Yes, yes.

GLAZEBROOK J:

So it's the circumstances in which you say something which aren't serious enough to engage the criminal law is what the Law Commission were thinking of as the exception.

MR CARRUTHERS QC:

Yes, I think they were thinking of paddling in the Napier duck pond.

ARNOLD J:

Well if that's what they did have in mind though because they do refer to *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC), which does accept Justice Panckhurst's exception of the genuine interest. They refer to *Smith* for another point.

MR CARRUTHERS QC:

Yes, they do, yes.

ARNOLD J:

That they were clearly aware of that decision.

MR CARRUTHERS QC:

I've then, in paragraph 6, submitted that the cases relied on are in a different context. There are a few of them. I've given the reference to the paragraphs in the written submissions, and I don't need to add to that, I think in answer to Your Honour Justice Arnold I identified the point on which I maintain the distinction exists. I then note at the Court of Appeal's decision in paragraph 36 that the proper course was for an application to be made to vary the suppression order, to permit publication to and between staff at the University for the purposes of the investigation and necessarily any steps that the University then wanted to take.

Then at paragraph 8 I've gone on to summarise the other findings of the Court and made a submission that that really can't be sustained, and I think I'd rather go through the decision of the Court of Appeal and just deal with the three reasons for the finding that the Court made. I'm in the judgment which is in volume 1 under tab 12, and I'm at paragraph 39, which is at page 86 of the case. The first of the reasons relied on by the Court of Appeal was the legislative background and my submission is that that doesn't support the conclusion that the Court made. If one looks at paragraph 8.32 of the Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) issues paper, which is set out in paragraph 39, it actually gives the very example that we've got here, and the last sentence of paragraph 8.32, "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." That was in the context that the Law Commission was recognising that as a matter of policy the provisions ought to include word of mouth communications.

In my submission the context of the issues paper supports the conclusion that the prohibition in section 200 can really only be avoided by one of the exceptions, or by variation. Now the Court of Appeal then goes on in paragraph 40 to consider the report of the Law Commission and the extract from the report is in the appellant's bundle of authorities under tab 3, and there's just a short section under 7.17 and 7.18, that I just want to draw

attention to. Part of 7.18 is quoted by the Court of Appeal in paragraph 40 but what the Commission finished up with by way of report on publication is this. "In the issues paper we ask whether publication should be defined in legislation. The Courts have said that publication involves publicly disclosing or putting material in the public arena. Is it not restricted to publication in the news media. We set out our view that as a matter of policy publication in the context of the Criminal Justice Act 1985 should include word of mouth communications. We asked whether the legislation should define more clearly what publication means. A statutory definition would have the advantage of legal clarity and certainty, but it may extend the ambit of the offence too far. Submitters were divided as to whether a statutory definition should be included and equally divided as to whether such a division should include passing information by word of mouth." Then the Commission concludes, "We do not recommend including a statutory definition of 'publication'." And then the balance of that paragraph appears in paragraph 40 of the Court of Appeal's decision.

The next background material that the Court referred to was the explanatory note in the Criminal Procedure (Reform and Modernisation) Bill 2010 (243–1), and in my submission the one part of the explanatory notes on clause 199 appears in the centre, "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." Well, in the present case you'd fall squarely in an account of the criminal proceedings.

And the second reason for the Court's conclusion is in paragraph 43 where the Court concludes that, "What emerges from these few relevant cases is that 'publication' refers to dissemination to the public at large rather than to persons with a genuine interest in conveying or receiving the information," and then there's the submission that was made of necessity, and the Court concluded, "We do not accept the exception is so limited and extends to permitting the passing on of information to persons who either need to know or have a genuine interest in knowing." Well, with respect, those few cases

on which the Court relies draw in a different context and really are not apposite to the provisions in the Criminal Procedure Act 2011.

And the third reason is at paragraph 44, and I think I've dealt – I'll come back to the question to the duty of good faith in just a moment. So I've then submitted at paragraph 10 that that conclusion of being consistent with the background material is wrong in my submission, and I've identified the written argument at 82 to 85. And my argument is that the reason that there was, for the conclusion that there was no publication on the basis that there was a need to know or there was a genuine interest in knowing really contradicts the earlier conclusion of the Court of Appeal that the respondent should have applied to vary the order and drew attention to paragraph 36.

Now can I come to deal with the terms of the Employment Relations Act 2000 in section 4? This was not pleaded or argued, this was an issue that was raised by the Court, and it's dealt with in paragraph 30 of the Court of Appeal judgment going through to 33, but there is a very small part of section 4 that is relied on by the Court of Appeal, and Your Honours don't have section 4 in front of you, but in terms of section 4(1), which is not set out in the Court of Appeal judgment but is referred in section 4(1)(a) that is, provides that, "The parties to an employment relationship, specified in subsection (2), must deal with each other in good faith and without limiting paragraph (a) must not, whether directly or indirectly, do anything to mislead or deceive each other or that is likely to mislead or deceive each other," and then goes on to subsection 1(a) which continues in subparagraph (c).

Now what is important in looking at the employment relationship that's being referred to in section 4 is that it is much wider than just an employer and employee, it extends to a union and an employer, a union and a member of a union, a union and another union, a union and other unions where they are in a collective bargaining agreement, and it includes one employer with another employer bargaining on a collective agreement. So it is extensive. And then in section – I was referring there to section 4(1D)(2), and subsection (4) sets out the matters that may be the subject of that duty of good faith, it really

relating to collective bargaining or dealings between employee. So in my submission it is really difficult to argue that this is a situation of good faith. Let me give you some illustrations.

If an employee thought that he or she had been wrongly charged and had information that pointed to the fact that he or she had been wrongly charged and was, in due course, acquitted on the basis that that informant was right and the prosecution information was wrong. My submission is that there is no reason in principle why any of those facts should be reported to an employer. And in the context of the present case –

ARNOLD J:
Just, the contract of employment provided that the employee was to have no convictions didn't it? I think the authority or the Employment Court refers to how if it were right that he'd been convicted surely there'd been an obligation to disclose that?

MR CARRUTHERS QC:
To disclose the conviction?

ARNOLD J:
Yes.

MR CARRUTHERS QC:
Yes.

ARNOLD J:
Right.

MR CARRUTHERS QC:
Yes.

ARNOLD J:

So that wouldn't depend on – I mean, you'd just have an obligation to do it if you had a successful appeal later on and that might resolve it as far as the employer was concerned.

MR CARRUTHERS QC:

Yes. Part of the difficulty for this argument about the scope of the duty of good faith is that there was really no evidence, well, there's no evidence –

ARNOLD J:

Yes, I understand that point, but it only comes up at the Court of Appeal stage.

MR CARRUTHERS QC:

Yes.

ARNOLD J:

Yes.

WILLIAM YOUNG J:

What would happen if Ms Hayne had gone down herself to the District Court? Could she have used the information?

MR CARRUTHERS QC:

No, no. No, she would be subject to the order and would have to apply for variation of the order.

WILLIAM YOUNG J:

But it wouldn't be – if she just wrote to the appellant and said, "I was in Court, I hear what happened, the order precludes me from discussing this with any other staff member of the University so I'm going to deal with it, unusually, myself, there's nothing in the order to stop me talking to you about it and acting on it, what do you have to say?" Because she's not – unless a

publication to the appellant is itself a breach of the order, which it's hard to see that it could be.

MR CARRUTHERS QC:
Yes, I know, that's – well at some point there is going to be a publication, even if it's after –

WILLIAM YOUNG J:
It's not necessarily going to be a report of the proceeding though is it?

MR CARRUTHERS QC:
No, but –

WILLIAM YOUNG J:
A report or account of a proceeding.

MR CARRUTHERS QC:
Well it would fall within the definition of an account of a proceeding because it actually discloses information that formed part of that proceeding.

GLAZEBROOK J:
Why would it though. She just says, well in that case I decided to terminate your employment. She doesn't have to write down why at that stage.

MR CARRUTHERS QC:
Your Honour, I think if one gets into personal grievance –

GLAZEBROOK J:
Well then if he runs a personal grievance then presumably at that stage it's relatively hard to see why he would be able to say I know there's a reason I was fired. I was given the possibility of explaining myself. I did explain myself.

WILLIAM YOUNG J:

Or it could simply be, I'm of the view that you've assaulted your wife and you broke a cellphone. That comment wouldn't be a report of the proceeding, as I understood from the way Justice Panckhurst dealt with the matter.

O'REGAN J:

It only has to be a publication of his name though.

WILLIAM YOUNG J:

Yes, but it has to be in a report or account of the proceeding. I looked at the judgment we gave a few years ago, *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 where we discussed the legislative history, part of which is *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) where Mr Taylor had been sitting in at a trial of Dr Sutch and had recorded the name of an SAS witness which he later published otherwise than as a witness in the proceedings. Now when he was prosecuted the prosecution didn't think they could rely on the precursor to section 200 because it wasn't closely related to what had happened in Court. Now it doesn't decide anything one way or the other but the Court seems to have acted on the basis that that was probably right because it dealt with it as a common law contempt.

MR CARRUTHERS QC:

The difficulty with that analysis is really the procedure under the Employment Relations Act by which discipline can be exercised, because if one looks at section 103A there's an obligation on the employer to act objectively in the way the process is administered, and in subsection (2) the obligation is very much squarely on the employer to behave in a proper way. So it's difficult to see that it would be an appropriate process for the respondent to use information that she had and knew was in fact protected by a court order.

WILLIAM YOUNG J:

But there is a power to clear the Court, which plainly wasn't engaged here, and couldn't be engaged because the basis, the statutory bases weren't available.

MR CARRUTHERS QC:

Yes. Really while I understand the –

WILLIAM YOUNG J:

Theoretical analysis.

MR CARRUTHERS QC:

– analysis, that is not what happened here and –

GLAZEBROOK J:

Well unless, Mr Morton was an agent of the employer or of the Vice-Chancellor, which is an argument that has been made. So the argument being if the Vice-Chancellor could have sat in Court and used that, there's no reason why she can't use it if it comes to her via one of her agents.

MR CARRUTHERS QC:

Well except this. That that actually is, will be either a written report, or a word of mouth report, by the –

GLAZEBROOK J:

Oh, no, certainly there were written reports and words of mouth here, so I understand your point.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

It was different from what had been postulated in terms of nothing being written down.

MR CARRUTHERS QC:

Yes.

ARNOLD J:

It does make a somewhat unusual contrast though, between an employer who's an individual person and they'd say, "I employ 20 security guards and they work for various people around town and I happened to hear of this and go to court and learn of this," then you get to the issue that Justice Young put here is the employer, for my case me, I'm in court, I hear the information, surely I'm entitled to use it in terms of considering whether it requires any disciplinary response from me as an employer. Now if that's right, in principle does it matter that the employer is a corporate entity where the steps are being taken by duly authorised people?

MR CARRUTHERS QC:

So you're postulating that – but the difficulty of that analysis is that there will still be a report of some kind, orally or in writing, by the agent to the principle, and that really becomes a publication that is in contravention of the order.

GLAZEBROOK J:

Can you publish to yourself if you're an agent? I mean, normally a communication – I mean, you'd say yes I presume, in that case, because anything written down is a publication.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

But you can been seen as publishing to yourself.

MR CARRUTHERS QC:

Well, there's a distinction between an employee and the employer, I mean they are distinct legal personalities even if there is an agency relationship created. So there would still be a publication of sorts between agent and

principal. So it's not agent publishing to agent, it's agent publishing to a separate legal entity.

WILLIAM YOUNG J:
So if I'm appearing for one of a number of defendants who is appearing in Court and the first one is sentenced, name suppressed, if I go down and listen to what happens I can probably make use of that internally in terms of what I later do, but if I send someone else down who then reports back to me they're probably committing an offence.

MR CARRUTHERS QC:
Yes.

WILLIAM YOUNG J:
It's a pretty broad approach.

MR CARRUTHERS QC:
Well, but I mean the ultimate protection is what, is in the legislation.

WILLIAM YOUNG J:
So no one would prosecute, it's that no one would prosecute, or that if it was it would be treated as too trivial to warrant the criminal law by the Judge.

MR CARRUTHERS QC:
Yes. Now I think that brings me to the second question. So my submission is that the first question gets answered yes and the second question, my submission is that it's not open to the respondent to use the information for the reasons that I've argued, and that question should be answered no.

WILLIAM YOUNG J:
Is that issue – I have some reservations as to how clearly that issue is before us. I suppose you've got the Employment Relations Authority decision which I think it wasn't actually rejected by the Employment Court, although it wasn't that convinced by it, is that right?

MR CARRUTHERS QC:

No, I think that's right, yes.

WILLIAM YOUNG J:

So we would be really making what's effectively an evaluative finding that's not entirely one of law if we fully engage with that question. The most likely answer is that it all depends.

MR CARRUTHERS QC:

Well, yes.

GLAZEBROOK J:

To me actually this is probably one of the more important questions in the sense that it's a bit like inadmissible evidence in a civil proceeding, whether there is an ability to get rid of that inadmissible evidence in a civil proceeding. This is basically a civil proceeding. If you come across information why, even if it's in breach of a Court order, shouldn't you use it? I mean, that might depend on how, the sort of things that are being argued by the respondent in terms of how relevant it was to the employment situation, how bad it was that you came across that information when actually somebody had been in court themselves and heard it legitimately in court to hear it rather than coming across it some other means, the fact probably that it was a very odd order for the Judge to have made, especially without explaining why. He seems to have equated the discharge with conviction, which is a different test with an automatic name suppression, which is an odd juxtaposition, it has to be said. Because in fact if the person wasn't allowed criminal convictions under the employment contract, this wasn't a criminal conviction because of the discharge without conviction and, as actually happened, he didn't lose his job. And one can understand why that might have been the case, with a serious but at the lower end of the scale criminal charge of this nature.

MR CARRUTHERS QC:

Yes. I think in terms of the way in which the evidence was obtained, I mean, it is improperly obtained, it is in contravention of a court order, and my submission would be that you are not entitled to use that evidence in that way.

GLAZEBROOK J:

That wouldn't necessarily be the case in a court case, because certainly there is an argument that in a civil court case inadmissible, even unlawfully obtained, evidence can't be excluded. Obviously in breach of privilege can be excluded –

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

– but not mere unlawfulness. Now whether that is as broad brush as that and whether there would be a residual discretion is something that I think we skirted over in a case and didn't decide, or didn't need to decide in fact.

MR CARRUTHERS QC:

Right, no.

GLAZEBROOK J:

But this is not even a court case though, this is an employment relationship where all sorts of things that wouldn't be admissible in court can be taken into account.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Obviously as long as they're relevant and as long as the person is given a proper chance to explain.

MR CARRUTHERS QC:

Well, and –

GLAZEBROOK J:

And as long as the consequences are then proportional to whatever…

MR CARRUTHERS QC:

Yes, and it's important to recognise the scope of the employer's obligations in relation to discipline, which is part of the point I made about section 103A.

GLAZEBROOK J:

But here's there's no complaint about the process in terms of then given full ability to explain, and no complaint about the consequences either in the sense of them not being proportional to the issue.

MR CARRUTHERS QC:

No, well –

GLAZEBROOK J:

There's a complaint about the consequences in terms of them being in breach of the suppression order.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

But not assuming there was no breach – although I mean of course there has been a breach and so –

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

Well, it turns on what would a fair and reasonable employer do. Well, it would be hard to say, I think, that as a legal proposition that a fair and reasonable

employer “must” disregard all information which has been the subject of a suppression order. I mean, that would be quite a hard, to my way of thinking, a hard proposition to support. It would be hard I also think to support the proposition that a fair and reasonable employer would always disregard a suppression order.

MR CARRUTHERS QC:
Yes, yes.

WILLIAM YOUNG J:
So that's why I think the answer, it may be it may not be a legal answer, it may be just it’s a just depends on what would, what the tribunal of fact thinks a fair and reasonable employer would do.

MR CARRUTHERS QC:
Yes.

WILLIAM YOUNG J:
Which I suspect might have been the proposition that Dr Harrison was advancing in his submissions.

MR HARRISON QC:
Except it’s “could” these days rather than “would”, Your Honour.

MR CARRUTHERS QC:
Well Your Honours, those are my submissions in support.

WILLIAM YOUNG J:
Commendably succinct. It’s a short point.

MR CARRUTHERS QC:
Well it is really a short point when one analyses it. Dr Harrison.

MR HARRISON QC:

Yes, I too hopefully can be reasonably brief, given that things are spelled out in detail in the written submissions. There are two questions. The first question is a question of statutory interpretation of course, as I'll come to in just a moment. I see there, being here, three competing interpretations, but as in the written submissions I consider it's helpful to have both the employment relationship context, first principles, spelled out and understood, and I do that in the written submissions at page 2 on. I note in particular at page 2 the Employment Relations Act, section 4, duties. Page 3 the employment agreement, and the obligation imposed on the Vice-Chancellor to act as a good employer, which is an obligation also owed under the legislation. The State Sector Act 1988, that's paragraph 9, section 77A, and I note that in that context paragraph 10, the job description that applied to ASG, those duties are summarised in evidence, footnoted in paragraph 10 of the job description which is omitted from the case on appeal as the last two pages of my written submissions.

So that was the situation and I summarise in paragraph 11 the contractual and statutory context, the Vice-Chancellor's duty and entitlement as employer, not the District Court and its criminal jurisdiction to address these issues in relation to ASG. And in paragraph 12 I argue that ASG duty was to act in good faith and therefore at least once he had admitted his offending, to disclose. My learned friend said earlier that the section 4 issue was not pleaded, nor raised in argument. In fact this entire section, from paragraph 7 on, in my submissions in this Court, also appeared very much word for word in my submissions to the Court of Appeal, so it was argued by me in the Court of Appeal along those lines.

So I will leave that but also just mention the District Court sentencing process on a first principles point of view. I reject, with respect, as I think the Court of Appeal did, the notion that name suppression, the power to suppress names under section 200, can be used to shield an employee from an employer. That, with respect, seems to me to be a misuse of the power, if the power is directed to that issue.

WILLIAM YOUNG J:

Well the point is, in a way, the point is that the employer's not being heard. The other point against you is that I think for as long as I've been involved in the criminal law, it has been a pretty standard submission to District Court Judges, or their predecessors that, you know, if this gets out his employment is wrecked. Now sometimes that might not be because of the employer's reaction but because of public reaction. But it's not, I mean I feel a bit sorry for the District Court Judge because he's sort of been assailed on all sides and yet it was quite a standard sort of approach in the District Court, I imagine.

MR HARRISON QC:

My response to that, Sir, would be it's a standard submission in support of a discharge without conviction that employment will be affected by a conviction, if a conviction is entered, and that's well and good. That's within the power of the District Court to address. But to go further and say simply because if the employer finds out about what, ex hypothesi is a discharge without conviction, that could affect employment. That is going too far given the criteria for a non-publication order in section 200 itself, subsection (2)(a), cause extreme hardship to the person charged and there are other criteria. We're a long way from that when a Judge says, as here, it follows inexorably because I've discharged without conviction that I should suppress.

GLAZEBROOK J:

Although you could infer, as I think Mr Carruthers was suggesting, that it was, the extreme hardship was the loss of the job and it was extreme hardship not only for him but also for his daughters and ex-partner.

MR HARRISON QC:

Well –

GLAZEBROOK J:

Although I agree that's now how he articulated. He articulated it as, if you get a discharge without conviction you automatically get name suppression which can't be right.

MR HARRISON QC:

Well this is really why I've taken the trouble to set out what, in my view, are the first principles in both jurisdictions. In the employment jurisdiction it is the employer, and in turn the employment institutions, to decide whether the correct response to the conduct which underlies offending and a discharge without conviction jeopardising employment in any way. It's not for a District Court Judge in the criminal jurisdiction, without hearing from the employer, to effectively preclude that, particularly when –

O'REGAN J:

That's really a submission that could be made under a section 208 application, isn't it. I mean the order is made, it's still in force, it's binding. The only question is, what does it mean.

MR HARRISON QC:

It could be made in support of a 208 application except for the chicken or egg situation that if the Deputy Proctor had not been there the employer would never have found out about it, and would be unable to apply. In any event –

O'REGAN J:

Well presumably he would also have needed to instruct someone to make the application, which would have involved disclosure as well.

MR HARRISON QC:

Yes, and quite possibly –

GLAZEBROOK J:

He probably knew about it contrary to the interim suppression order in the first place.

MR HARRISON QC:

And no doubt in applying relying on information disclosed in breach of the non-publication order, facing an argument that that evidence is inadmissible.

ARNOLD J:

Can I just ask a question. That job description you've annexed to your submissions refers to not having a criminal conviction and being willing to undergo a police clearance check. Would a police clearance check throw up something like this if there'd been a discharge without conviction at an earlier point?

MR HARRISON QC:

I don't know whether it would throw it up or not. Presumably it would not. I read this as a job description for the applicant so that if, when you're hired you should have no criminal convictions, and if you later get a criminal conviction obviously that may jeopardise your employment but it doesn't mean you're unemployed automatically. So this was the original, this was the job description for which he applied and was appointed and at that point he had not had any convictions and undergo the clearance check. So it's not an automatic disqualification if you later get a conviction, let alone a discharge without conviction.

So turning then to the critical issue of interpretation of the expression "forbidding publication" at page 6, para 21.1 I have set out what I see as the three possible interpretations of that expression. The first, I do just want to talk about these a bit. The first is that forbid publication effectively means suppress all mention of the specified subject matter beyond the courtroom. What goes on in court stays in court. Secondly, prohibit making the specified subject matter known to the public or a section of the public but no further. Thirdly, forbid publication means prohibit making the specified subject matter known beyond the courtroom except that the bare communication of information to genuinely interested people is permitted or it's to be treated as not making known to the public or a section of the public.

So those are the three, first, second and third interpretations. The appellant argues for the first one, it appears to me, but there is no prior authority to support that. Either the second or the third interpretation is satisfactory to the respondent and means that the first question gets answered in its favour. And there is authority to support, as I will argue, both the second interpretation and the third interpretation.

Now also, and my learned friend has not addressed this at all, if we embark on a New Zealand Bill of Rights Act 1990 interpretation exercise, looking at values such as freedom of expression and related values, then reading the expression forbid publication down to permit limited and proportionate appropriate communication, at least as per the third alternative interpretation, is the appropriate interpretation applying section 6 of the Bill of Rights.

ELLEN FRANCE J:
Can I just check, do you accept that publication means the same when you're dealing with the statutory, so the prohibition for example in section 204, automatic suppression situations?

MR HARRISON QC:
Yes, I do. If we focus for the moment on the third interpretation, which is to say disclosure to the genuinely interested person, the way I would argue that is that if we have, say, a victim or a witness or an undercover officer or something like that, there is unlikely to be a genuinely interested person to whom the identity of the victim should be disclosed under that alternatively interpretation. To put it another way – and this is a point I make in the written submissions – if we're talking about non-publication of identity of the defendant who is charged, there will be people who are genuinely interested in receiving that information, and I give the example of a preschool teacher who faces charges of sexual molestation of children. Even prior to conviction there will be genuinely interested people in relation to the defendant who faces the charges. There will not, under this definition of interpretation, almost ever be genuinely interested people who want to know the name of his victim or of key witnesses. There may be, and there is inherent flexibility, there

ought to be inherent flexibility in the term "publish", but it's quite a different – under other sections of that part of the Act it's quite a different calculus to identify a genuinely interested person and they will be much fewer in number and generally won't exist.

ELLEN FRANCE J:

So the victim who's a battered woman, for example, passing on the name to someone who might assist her. I'm not saying that's necessarily would meet your test, but I'm just not sure that there wouldn't, it's not possible to think of situations where, if genuine interest is the test, you might not satisfy it in relation to a victim or a witness.

MR HARRISON QC:

Well, that's an argument for permitting, for narrowing the concept of publication to permit such disclosures, not for widening the concept of publication to prohibit them. A sufficiently flexible and nuanced genuinely interested person's test ought to be able to deal with the practical disclosures. I mean, I asked ASG in cross-examination whether his family was present in court when he was discharged and he said, "My daughter wasn't." I asked, "Did you tell her the outcome?" and he said, "Yes." Well, of course, and why would the law have a concept of publication that potentially turned that into a criminal offence. You can have genuinely interested persons, but the range of generally interested may well differ depending on whether the publication relates to a defendant, a person charged, or some other person.

And that takes me on, I think, to the point that is made around section 209. If we go to volume 1 of our authorities, tab 1, these sections are set out. Just stepping back one step, my learned friend argued that this part of the Act is a code, in the nature of a code. It's not critical to my argument that it is or it isn't, but ordinarily saying, making that statement means that there's no inherent power or jurisdiction to suppress or prohibit publication of anything beyond what's in the Act, and I'd be wary of calling this a code in that sense. We all know how inherent jurisdiction in power can assert themselves to deal with the casus omissus and this Court has grappled with that in cases such as

the *Siemer* case. So I wouldn't concede that it's a code in that sense. But in any event the code argument doesn't answer the question as to the meaning of publication. That is the expression we're looking at, not publish or publication. So to say that it's a code doesn't assist, but if we go to – the argument is that you've got publish plus section 209, and if we can turn to section 209. The argument there is that section 209 expressly is an express exception and it's the only exception that permits disclosure to the public. Well, in fact if we look at 209(1) if anything it supports the proposition that publication means "make known to the public" because it deals with the scenario where police make public the details of a person who's escaped lawful custody or failed to attend court. So that –

GLAZEBROOK J:

Can we really talk about public now with social media. So my son with his 1500 friends on Facebook, or however many he has, I suppose that's big enough to be a section of the public, but there's something going around the rounds at the moment with a bag of apples to see how many likes they can have for a bag of apples to show some teacher to show the children how quickly things can go through and actually become worldwide. So really those old notions of public and news media, which is what the Law Commission was saying, I think have really gone out of the window with social media, haven't they, in terms of publication, because publication is now with social media is more than anybody could have dreamt of in the days of print media.

MR HARRISON QC:

Yes, I mean that's a separate set of issues but certainly –

GLAZEBROOK J:

You tell one person, they put it on social media, it's out for –

MR HARRISON QC:

Yes, if you tell one person, going back to my third interpretation, if you tell one person and that person is a genuinely interested person, you haven't published, he or she –

GLAZEBROOK J:

No, I understand your argument –

MR HARRISON QC:

If he or she then puts that information on social media, they have published on social media, and I accept that.

GLAZEBROOK J:

No, I understand that, it's just I think that you were making the argument on 209 for the second interpretation in terms of public as against your third interpretation. I can understand the third interpretation except I do wish that it had been made explicit in the legislation rather than – because it is more than you would have expected to be left to the courts.

MR HARRISON QC:

My only point Ma'am –

GLAZEBROOK J:

I can understand, if you see what I mean.

MR HARRISON QC:

My only – yes of course Ma'am, it has been left to the Court. My only point about section 209 is that it's not, too much has been made of it by my learned friend because subsection (1) appears to be talking about the police making public, and therefore the fact that that's in there doesn't imply that the third alternative interpretation is untenable.

WILLIAM YOUNG J:

Subsection (2) does suggest that one on one communications can be publications, but the broad proposition, I guess, is that legislative history suggests that this scheme doesn't act on the basis that everything not specifically carved out is within publication.

MR HARRISON QC:

Well, Your Honour's jumped to subsection (2), and the point I was going to make is, yes, it does allow for one-on-one communication. But what we have to understand about those subsections is that it covers the details of any person the subject of a non-publication order, including witnesses – for example, a witness who doesn't turn up in court, and it also covers victims, and that explains why you've got a specific, perhaps out of an abundance of caution, provision, particularly in subsection (2), that allows information to be provided about victims and witnesses and so on within those categories, both one-on-one but more broadly. So section 201 can't be treated as a kind of expressio unius, thereby defining the brief of the central concept of publish or publication, that's my point about that.

So if we go – my learned friend has dealt with the legislative background in some detail, he's referred to the Law Commission report – I just need to grab a volume here. My learned friend referred to the Court of Appeal judgment which is of course in volume 1 of the case at tab 12, and he referred at para 39 to the issues paper. Now not too much can be read into this because really the passages from the issues paper are, conveniently set out at para 39 on page 86 of the case, are doing an on the one hand, on the other hand, kind of analysis, and they're saying, "Well, we think it should extend to word of mouth publication because look at the damage one person can do, but on the other hand should we leave this to judicial definition?" and that's eventually the conclusion that the legislature adopted.

The other point about the submissions we heard this morning I just want to deal with that was based on a criticism of the reasoning of the Court of Appeal is the suggestion that – this is in para 36 of the Court of Appeal judgment at page 85 – that the real or binding statement here is that the Vice-Chancellor should have applied under section 208(3) to vary the suppression order. It's suggested that that statement is inconsistent with the interpretation, the adoption of the third alternative meaning by the Court of Appeal, and I deal with that in my written submissions by saying, "Well, it's not inconsistent and in any event if the interpretation, if the third meaning interpretation which both

the Employment Court and the Court of Appeal have adopted is the correct one then this reason, this statement, is inconsistent with it and needs to be disregarded. But if we go back to, if we look at para 36 in context, we go back to 34 and 35, the Court of Appeal says, “What could the Deputy Proctor, the man in the Court, properly do? And it’s not a breach of a section 200 order to publish by mentioning the details to a legal advisor,” that's one. And then 35, this is the point, “Secondly, the Deputy Proctor could disclose to the Vice-Chancellor or her deputy the fact of the plea of guilty, which was essentially a proxy for ASG’s failure to inform the university about that himself. So it’s only if 36, if the Vice-Chancellor decided an investigation was required as the view, which I reject with respect, that she should have applied to the District Court to vary, so even on this analysis the disclosure by the Deputy Proctor to the Vice-Chancellor is not a breach, but if there’s a broader investigation that might involve others, third parties, then she applies to vary. But this investigation was handled in-house and that, in my submission, was lawful.

Now that's a suitable time for the morning adjournment, if Your Honours please.

WILLIAM YOUNG J:
All right, we’ll take the morning adjournment then, Dr Harrison.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.51 AM

MR HARRISON QC:
Yes, Your Honours, before the break I had identified what I suggested was the three competing interpretations of the term “make public” or “publish”, and I had submitted that s 209, which the appellant relies on, doesn’t really assist that much.

I want to turn to the section of the written submissions, page 14 on, that addresses text and purpose, and I make the point at para 55 the “forbid

publication" is not that strong as language goes, it's not as strong as expressions like "keep confidential" or "not to disclose to another", those are arguable stronger prohibitions, and of course if we look at the definition in s 195 and the background to that definition, the point about "forbid publication" not being a particularly strong or powerful expression is underlined, publication is further limited to publication in the context of any report or account relating to the proceeding which, if anything suggests something which goes to the public or a section of the public rather than a one-on-one communication, whether in writing or verbal. And I note at para 57 that although this appears to be an unhelpful definition, the background to it is set out in the materials discussed in the Court of Appeal judgment, and those materials are before Your Honours either in the materials provided by the appellant or in the materials provided by the respondent. So the section 195 definition is not, plainly not intended to operate as a complete definition of "publication" or "publish" and the legislative history is plain that these concepts were left to be developed by the Courts. Now if they needed development by the Courts it suggests that there was no absolute prohibition element in the use of that language.

Now the – and this is the point I am making on page 15 of the submissions – you've got section 195 is a limiting definition limiting the publication to the context of any report or account relating to the proceeding. It's interesting that the report, the Law Commission report, which is at tab 3 of the appellant's bundle of authorities, page 66, para 7.17, second sentence notes that the Courts have said that, "Publication involves publicly disclosing or putting material in the public arena," so that both the Law Commission and in turn necessarily the legislature was aware of the authority cited, which is *Solicitor-General v Smith*, which is in favour in fact of the second meaning, and despite the fact that there was authority in favour of the second meaning there was no definition which attempted to exclude the *Smith* interpretation of the expression "publication". So at the very least, while you're not bound by *Smith*, we can say that in terms of the legislative policy there was no decision to exclude the *Smith* meaning, the second meaning –

GLAZEBROOK J:

Well, what about the next sentence straight away?

MR HARRISON QC:

"It is not restricted to publication –

GLAZEBROOK J:

In close word of mouth communications.

MR HARRISON QC:

Yes, they set out their view that it should. They then go on to say that submitters were divided on the point, they therefore do not, they choose not to define it but to leave the job up to the Court. So it can't be said that there was a policy decision carried through into the legislation to include word-of-mouth communications, let alone all word-of-mouth communications.

GLAZEBROOK J:

Well, they just say, "Take a robust approach," which are clearly not intended to be captured by the Act.

MR HARRISON QC:

Yes, well –

GLAZEBROOK J:

So I don't think that's a policy to say, "Well, we'll leave it at the public," in fact it seems the opposite.

MR HARRISON QC:

But they also say in the third sentence that publication is not restricted to publication in the news media, and I accept that. If you disclose to the public or a section of the public, and it doesn't have to be there, the news media, on the second interpretation which I am espousing that is a publication. But I'm happy with my fall-back position which is of course the third alternative interpretation, which is that disclosure to genuinely interested persons is not

publication within the concept, I don't need to go further than that. All I am saying here is that given the opportunity to clarify what "publication" meant by reversing the apparent effect of *Smith*, which is that you need to disclose to the public, that opportunity was not taken up. So that militates against the interpretation being advanced by the appellant here, that is my only point, the background.

So the position overall, we have alternative arguments which are summarised at para 61, and so you've got the first point, 61.1 is what I've put in reliance on what I've called the second alternative interpretation, 61.2, relying on the third alternative interpretation of "publication", that it's permitted to disclose to those with a legitimate interest. In that event the very limited circulation of the information for the limited and justified purpose of an investigation into ASG's continued suitability was not publication. And, thirdly, it certainly wasn't published in the context of a reporter account within the contemplation of that expression. And, finally, 61.4, all involved were acting on behalf of and under delegation from the Vice-Chancellor, the Vice-Chancellor being in law the employer, and each of them was a manifestation of the employer and the internal communications were not a publication, whether in writing or orally, within the contemplation of these provisions.

Now I then go on to note the, a dictionary meaning, the ordinary meaning of "publication". I note that the expression is used in various contexts and, just for completeness I have footnoted some of those. I do make a point again, just amplifying the point I earlier made, at para 67, that "not publish" is an expression lacking in force and stringency by contrast with other language that could have been used, and I single out here, "shall or must not disclose to any person," which is an expression that the legislature does use when it wants a more stringent prohibition, and I've noted that in that paragraph it's used to prohibit release of confidential information by a particular occupation or groups or professions, for example those involved in the security intelligence service, and it's also significantly used, where considered appropriate, in relation to further disclosure of information in the context of court proceedings, and I've footnoted some provisions in footnote 32, they are

not provided, but you can see for example in the Harassment Act 1997, in relation to the complainant or victim in harassment proceedings, the standard is not to disclose rather than prohibit publication. So I submit that "not disclose" is a much clearer and stronger prohibition on releasing information than "not publish", and thus the legislature can and, I submit, should make itself clear by use more explicit language and does so when it wishes that effect.

So then there's page 18, there's the case law, and I'm not going to take Your Honours to that. I just note that in para 69, tucked away in a footnote, I refer to *Re Baird (a bankrupt)* [1994] 2 NZLR 463 (HC), which is provided in our volume 2 bundle. As I note at [69.3], the interpretation there is basically the second meaning, publication to the world at large. Next, in *Ali v Deportation Review Tribunal* HC Auckland HC98/96, 28 November 1996, para 70, that's in the bundle, Justice Tompkins appears to have approved that passage, that's the second meaning again. *Slater v Police* HC Auckland CRI-2010-404-379, 8 July 2011, an unreported judgment of Justice White, over the page, Justice White dealing with a, I think, a predecessor provision regarded "publication" as meaning making something known to the public, again second meaning. Then at para 73, *Solicitor-General v Smith*, he adopts really the third meaning, and that's based on *Christchurch Press,* which is in the footnote, which is also the third meaning. So the case law doesn't support at any point the interpretation put forward by the appellant, but it does support either of the two alternative interpretations on which I rely.

Now I also just amplify my earlier submission about the sharing of information among senior university personnel with a view to providing the employ, the Vice-Chancellor, with it, not amounting to publication, that's under the heading, "Organisational publication," and although this can be regarded as an agency situation, there are exchanges around it being the Deputy Proctor as agent disclosing to the Vice-Chancellor as principal, my submission is that it's closer to what happens under the doctrine of attribution as described by His Honour Justice Tipping in *S v Attorney-General* [2003] 3 NZLR 450 (CA) in that passage I've set out in paragraph 75, although that's a liability, he was

discussing liability, the principle is broader, and as His Honour noted in the third sentence there, second sentence perhaps starting, “Party B’s conduct is deemed to be party A’s conduct. Attribution conventionally arises with corporations or other organisations of like nature which can act only through human beings,” and there’s a sufficient analogy here with the position of the Vice-Chancellor, who’s an office holder, and so it’s not so much agency, it’s simply that the receipted information in open court by the Deputy Proctor effectively became the knowledge of the Vice-Chancellor, that knowledge is attributed to her, it may have been communicated by means of a report, but in reality, as with any employer that is a body corporate in that scenario, you don’t make a distinction that my learned friend argued for between an employer who happens to be a human being and attend in person and a body corporate. Again, the touchstone is whether the particular individual had a sufficient or legitimate interest in receiving the information.

So then there’s the rights analysis which I have spelled out. I have referred at paragraph 21 to this Court’s recent *Erceg v Erceg* [2016] NZSC 135 decision, and my point is that although cases like *Erceg* and the other authorities that I refer to are addressing the particular exercise of the power of suppression, that is to say the exercise of the discretion, the underlying principles about openness and constraint on suppression of what happens in court are values that also ought to be brought to bear as part of an interpretation exercise, not merely as part of the exercise of discretion. These are underlying, as I say at para 80, they’re underlying fundamental values and human rights that bear on the interpretation of the expression “forbid publication”. So I’ve gone through all that, I’ve referred to the rights analysis that Justice White did in *Slater v Police,* this is page 22.

So there’s also the fact of course that we are talking about a term that triggers criminal liability, and that can indeed extend to imprisonment. But I note also that the section that prescribes the criminal liability – this is back to tab 2 of volume 1, section 211 of the Criminal Procedure Act – contains two offences. One is subsection (1), knowingly or recklessly publishing a name, et cetera, in breach of a suppression order, subsection (2), publishing without doing so

knowingly or recklessly, and subsection (6) says, “In a prosecution for an offence against subsection (2) it is not necessary for the prosecution to prove that the defendant intended to commit an offence.” What that means is, I suppose, open to debate, but it seems to suggest that the subsection (2) offence of publication can be committed innocently, perhaps even in ignorance of the knowledge of the existence of the suppression order. But certainly these are good reasons why you do not give an over-broad interpretation to the expression “publish” or “publication”.

WILLIAM YOUNG J:
If there was an offence here it would presumably be a section 211(1) offence, because they did know about the order.

MR HARRISON QC:
Yes, they knew, they knew of the order, and acting on legal advice would not per se be a defence.

So I address the submissions for the appellant, which I have already really addressed also orally this morning. The debate around the Court of Appeal’s reliance on section 4 of the Employment Relations Act of saying that ASG was himself under a duty to disclose, is a side-issue in my submission, it doesn’t really impact on the central question of what “publish” means. The Court of Appeal was referring to that by way of demonstrating the point that the employer in the circumstances of this case was a person with a sufficient or legitimate interest in having the limited disclosure of the information to her. So that's the point at which section 4 was relied on.

If the Court reaches the point that it is opting for the third interpretation of “publish”, which is to say that there can be disclosure to a sufficiently interested person, I do not hear the appellant to argue that the employer in this case was not sufficiently interested, if that is the correct interpretation and there’s no challenge to the proposition so held by both the Employment Court and the Court of Appeal that this employer was sufficiently interested. But it was in that context that the Court of Appeal relied on section 4. And whether

it was right or wrong – and I say it was right to do so – doesn't alter the validity of that conclusion, which I note is not really independently challenged anyway.

So turning to – and I dealt with the point and I make it at [94] to [96] previously, which is that you can have a properly articulated genuinely interested person's perception, which distinguishes between the different categories of intended beneficiary, the witness, the victim and the defendant, that can and should be done.

So the second question, the use of the information obtained in breach of a non-publication order. And I think at para 100 I do identify the dilemma that was debated earlier as to whether this Court can deal with this issue, and I say that there are two issues. The first is whether in point of principle the question as posed must be answered in the negative, that is to say in principle is the Court going to say the respondent couldn't in principle ever rely on this information? But the second question is, well, if the answer is, "We don't say, we don't go that far," then in this case was it permissible? The Employment Court didn't squarely address the question and the Court of Appeal didn't either. So the options if that point is reached would be to say, "Remit it to the Employment Court," or, "This Court, I would submit, has sufficient information to address and determine the question. That's why I dealt with the first issue of principle and then the facts in greater detail.

ELLEN FRANCE J:
Just in relation to that last point, the Authority though does conclude, doesn't it, that these were not the actions of a fair and reasonable employer?

MR HARRISON QC:
It does so because it held that the suppression –

ELLEN FRANCE J:
Because it was a breach in the first place.

MR HARRISON QC:

– the suppression order was breached, yes. But that then was challenged and the Authority's decision was overturned. The procedural history of the matter is summarised in my earlier submissions. I don't accept for a moment that that decision still stands. It was effectively overturned and – but at the end of the day, as I say, you either remit the issue to the Employment Court, if I may be permitted, heaven forbid, or deal with it yourself if reached.

But there is, as to the first issue of principle, and I'm going to hurry through this, there is the decision in *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31, [2011] ERNZ 32, which is in favour of the ability of an employer to rely on information which is, put loosely, improperly obtained for its investigative purposes, subject to the overall fair and reasonable employer touchstone. And then there's the question of admissibility, the information as evidence in a proceeding.

Now in footnote 44 I note the analogy with civil proceedings which was touched on earlier, but what hasn't been directly been mentioned is this Court's recent decision in *Marwood v Commissioner of Police* [2016] NZSC 139, where of course the issue was admissibility in a civil proceeding under the Criminal Proceeds (Recovery) Act 2009, and in *Marwood* it can be said that, "This Court did not go so far as the Court of Appeal which had held that there is no power to exclude evidence improperly obtained in a civil proceedings." It accepted that there was a power to exclude in a Bill of Rights context as against an actor bound by the Bill of Rights. That still leaves the possibility open that there is no power to exclude, as against a private actor such as an employer. I don't need to go that far. The simple point is this, that the jurisprudence in the employment law area makes it plan that an employer exercising disciplinary functions is not a court of law, is not bound to act as a court of law, can act on evidence that would not be admissible in a court of law, and that jurisprudence is presumably not under challenge by the appellant here, and it's all state and noted in *Ravnjak.* So the argument I have set out in some length invites the Court to conclude that there is no, as I say at the end of 107, "There is no rule or principle of law that absolutely

precludes the Vice-Chancellor from utilising the information she received." So it becomes an issue of justification in employment law terms what a fair and reasonable "could", not "would", have done in terms of section 103A, and that again is what the Employment Court rightly held to be the test in *Ravnjak.*

So I go through in the written –

GLAZEBROOK J:
Might there be a public policy issue in terms of deliberately acting in contempt of Court as well?

MR HARRISON QC:
Well –

GLAZEBROOK J:
Not necessarily in this case but – so is just what a fair and reasonable employer would do or because a Court order's involved is there possibly an overlay of the interests of justice and the public?

MR HARRISON QC:
Provided it is addressed in terms of the touchstone of what a fair and reasonable employer could do. If – and this case is different because, for several reasons: the employer sought legal and obtained legal advice saying it could do what it did; the publication was limited; and there was a high degree of relevance to the statutory duties which lay on this employer as a good employer to provide safety for other employees and students. But if you had a case where an employer quite knowingly and callously breached an order that was directed at it, for example, and the order was, "Do not disclose to the employer in question," and went against that, that would be a much stronger case for saying, "No fair and reasonable employer."

WILLIAM YOUNG J:

But that effectively is this case though isn't it? In a way that is this case, because this was, I mean, probably wrongly, that was the purpose of the order, looking at Judge's reasons.

MR HARRISON QC:

Well, I don't – we debated how those reasons should be interpreted and, I mean, really the actual reason given was not that, it was –

WILLIAM YOUNG J:

Okay, no, I understand what you're saying.

MR HARRISON QC:

– it's wrong not to suppress when I have discharged. Well, that was – I have tried to avoid the temptation to collaterally attack the order, but that is patently wrong and I don't accept the more charitable interpretation of the Judge's reasoning when he said that and failed to apply the criteria which ought to have led him to a different outcome. But in any event, for the reasons I have set out in quite some detail in this section in my submissions, if the Court is minded to get to the merits of this quite plainly this, on the facts of this case you could not say that this reliance on that information was something that a fair a reasonable employer could not have done.

So those are my submissions, unless I can be of any further assistance.

WILLIAM YOUNG J:

Thank you, Dr Harrison. Mr Carruthers.

MR CARRUTHERS QC:

The first submission concerns the section 4 point, and my friend has rather put that to one side. But I should be a little clearer in the issue I raise concerning section 4. I said there was no pleading in relation to it, and in volume 1 of the case at tab 10 – I don't need to take you to it, but they're the particulars of justification that were given and the section 4 issue isn't raised

there – there was no finding in the Employment Court on that issue with the result that the questions before the Court of Appeal don't by their terms refer to section 4 and it's true, as my learned friend has submitted, that he refers to section 4 in a context of providing the information to the employee for the purposes of the process that was undertaken, but it's certainly not argued in the way in which the Court of Appeal adopted section 4, and I get to this submission that really there is an inadequate factual basis before the Court of Appeal, and certainly before this Court, for a conclusion to be reached that there was an obligation on the appellant to tell the employer about the proceedings which were under way or, indeed, the outcome of those proceedings.

The next issue that I want to deal with in reply concerns question two before this Court. I've submitted that the answer to that should be no because of the way in which I have put the argument on the importance of the suppression order. But in relation to some of the examples that Your Honour Justice Young and Justice Glazebrook gave as to – I'm sorry, Justice Arnold as well – of an employer sitting in the Court, it may be that one gets to the notion that Your Honour Justice Young floated that it does all depend and it may not be a question of law on reflection in a case like this because it would, if there was an entitlement at all to use it, it would depend on the employer exercising a fair a reasonable judgement as to whether it should be used without an application to the Court, and of course in this case there was no fair and reasonable assessment that was made, it was simply the employer simply took the, it took the advice that it was able to be used and went ahead and used it instead of applying as I have submitted should have been done.

ARNOLD J:

But didn't, that advice was based on the notion that the employer had a legitimate interest in the information? Why doesn't that count as an assessment of the circumstances? Well, put another way, what is the nature of the assessment that you contemplated that's not an assessment?

MR CARRUTHERS QC:

Well, the nature of the assessment is whether I should use this at all, that is, having regard to the nature of the provision and the existence of a power to apply to vary, that is the nature of the fair and reasonable assessment that ought to be made. And in putting the question to me in the way in which you did, legitimate interest, the whole basis of my submission is that taking that passage from *Christchurch Press* and using it is not a proper basis for looking at a section 200 order. One can readily see it, as Justice Panckhurst did, on a section 438 order or indeed in *Smith* on a section 27A of the Guardianship Act 1968 order, which simply picked up Justice Panckhurst's dictum, and I'll just give you reference to that in a moment. So that's really why I say there was no fair and reasonable assessment.

GLAZEBROOK J:

Isn't it slightly rough to say that if you take legal advice that says you can use it and it's relevant, that you haven't made an assessment? It's difficult to see what the employer could do other than take legal advice. And it isn't a point where you can say the legal advice was clearly wrong on the basis of a case law to date.

MR CARRUTHERS QC:

In the legal advice, as I recollected, there is no consideration of whether an application should have been made to the Court and an appraisal of the legal advice or a request for the legal advice, one might have asked whether there was an alternative which should have been adopted. I understand the proposition that Your Honour puts to me and in part I agree, that the Vice-Chancellor took the right course in obtaining legal advice. But the issue really is whether the right question was asked in terms of how this should be done, and to say –

GLAZEBROOK J:

But that's a criticism of the lawyer, because the question was, "Can I use this?" and if the lawyer's view was no – but the lawyer's view was yes on the

basis of the case law to date, which accorded with what the Court of Appeal said, so it's not obviously a plainly wrong interpretation.

MR CARRUTHERS QC:
No, I accept it's not plainly wrong, I think it –

GLAZEBROOK J:
And if the lawyer thought that there should have been nevertheless an application then the lawyer should have said so. But if the lawyer was definitely of the view that it was all right to use the information, why would you trouble the Court? I mean, you say they should have done, because that's what the legislation says.

MR CARRUTHERS QC:
Yes, yes, I do. But –

GLAZEBROOK J:
But this is in the context of a different view having been taken of the law and one which it's difficult to say was plainly wrong or unreasonable on the basis of the state of the authorities.

MR CARRUTHERS QC:
I'm content to accept that proposition from Your Honour, but what I'm putting is surely a Vice-Chancellor in that position would review and ask whether there was an alternative way of dealing with it other than simply using the information. I mean, one would have almost expected that the Vice-Chancellor say, "Well, shouldn't we be going back to the Court to ask the Judge whether the order can be varied so that we can use the information?" that's the answer that I make to Your Honour's proposition, and it's really on that basis of there being no application, no consideration of that application, that I submit there was no fair assessment made.

Can I just pick up a series of relatively short points in my learned friend's submissions? At paragraph 55 and following he makes the submission that

the sections used forbidding publication and not suppress or keep confidential or not disclose. But what that submission overlooks is that in the interpretation section under section 194 “suppression order” means an order under any of the sections, including section 200, and when one gets to section 200 it in fact has a heading that part of the, the subpart has a heading, “Suppression of names,” and the marginal note or the section heading, “Court may suppress identity of defendant,” so that there is, in my submission, nothing in that point.

Now I want to go through to paragraph 73 and deal with *Smith* and you’ll see that my friend submits that the Full Court adopted earlier authority to the effect that the prohibition on the publication of the reports was not apt to capture the bare communication of information to genuinely interested people. In my submission it’s important to actually put *Smith* in context. At paragraph 62 and 63 the Court deals with the argument under section 27A which ultimately the Court decides that they did, that the Court didn’t need to reach a firm view on whether there was a breach of 27A since there was no prosecution under that section before the Court. But having – and I’m going back to 62 now – having gone through Justice Holland’s decision and then Justice Panckhurst’s decision, the Court concluded, just before line 35, “We respectfully agree with and adopt Justice Panckhurst’s approach. As he pointed out, section 27A focuses upon the publication of reports and its wording is not apt to capture the bare communication of information to genuinely interested people.” Now that picks up part of the dictum that I drew attention to in the *Christchurch Press* case. And then in dealing with the position of Radio New Zealand in *Solicitor-General v Smith* at paragraphs 130 and 131, Radio New Zealand submitted that section 27A should be construed in such a way as to permit the publication of information which is neither private nor confidential where it is published bona fide and for a proper purpose.

And then the Court continued, “We have addressed some of these arguments in paragraph 62 above. Upon the interpretation of section 27A, which we adopt, we hold that Radio New Zealand’s broadcasts did constitute a report of the proceeding in the Family Court. However with the exception of that part of

the broadcast involving Dr Smith we consider that for the reasons already given the broadcasts do not constitute a contempt. We do not need to reach a firm view on whether there was a breach of section 27A since no prosecution under that section is before us." So all I'm doing is looking at the strength of the authority and the way in which the full Court of the High Court dealt with it in *Smith*. And again, in my submission, the context in which those dicta are made is important and are in contrast with the present case.

ARNOLD J:

Well, just on that point, section 27A is set out at paragraph 9 of the full Court's judgment and it is very similar terms to the definition of "publication" in section 195 of the Criminal Procedure Act.

WILLIAM YOUNG J:

There is a difference. The current provision, "The first to account or report," relating to proceedings.

ARNOLD J:

Yes, this one refers to "report". So that is the significant difference.

MR CARRUTHERS QC:

Yes.

ARNOLD J:

So the question is, well, does the addition of that "account or" change or affect what –

WILLIAM YOUNG J:

And "relating to".

ARNOLD J:

– affect what the High Court said about the approach it though at least should be taken?

MR CARRUTHERS QC:

Yes. And when earlier there was a comment about “report” I recall adding immediately, “No, it is an account relating to,” and that's the emphasis that I put for the purposes of this argument because that’s in fact a better analysis of what happened between the observer in the gallery and the Vice-Chancellor.

Paragraph 75 of my friend’s submissions dealing with this issue of attribution. I think what that overlooks is that the Vice-Chancellor is a human being and not a corporation, so the argument I make is that there necessarily was a publication between the observer in the gallery and the Vice-Chancellor, and then again once the information is dealt with.

Just one small point on paragraph 80 where my learned friend gives weight, expresses the giving of weight and the expression of fundamental values and human rights, as one of the fundamental human rights is the rule of law, and that is essentially the approach that I have taken to the suppression order.

So those are my submissions in reply, unless Your Honours have questions of me.

WILLIAM YOUNG J:

Thank you, Mr Carruthers. We’ll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 12.38 PM