**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2013] NZEmpC 202**
**ARC 20/13**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | GUY HALLWRIGHT<br>Plaintiff |
| AND | FORSYTH BARR LIMITED<br>Defendant |

Hearing: 26-28 August 2013

Appearances: Mr A H Waalkens QC and Mr M J McGoldrick, counsel for plaintiff
Mr P B Churchman QC, counsel for defendant

Judgment: 13 November 2013

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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## Introduction

[1] The plaintiff has brought a de novo challenge to a determination of the Employment Relations Authority (the Authority) which found that the plaintiff had been justifiably dismissed from his employment.[1]

## The facts

[2] Mr Hallwright was a senior investment analyst at the defendant company, Forsyth Barr Limited (Forsyth Barr), and had been since 2005. It is apparent that he enjoyed a good reputation, both within and outside the organisation. Events began to unravel on 8 September 2010 when Mr Hallwright was involved in an incident while driving his car. He and another motorist got into an altercation and Mr Hallwright ran over the motorist as he was departing the scene, causing significant long term

[1] [2013] NZERA Auckland 79.

physical and likely psychological injuries.[2] These events did not occur during the course of Mr Hallwright's employment. Rather, they occurred during his own time and while he was transporting his daughter to an appointment. On 20 September 2010 Mr Hallwright was charged under s 188(2) of the Crimes Act 1961 with causing grievous bodily harm with reckless disregard, an offence that carries a maximum term of imprisonment of seven years.

[3] Mr Hallwright made his first appearance in Court on 28 September 2010 and was bailed subject to conditions. He applied for, and was granted, interim name suppression. The Crown, with the support of media organisations, appealed against this order. The High Court lifted name suppression, with delayed effect from 1 December 2010. Mr Hallwright's alleged offending, his occupation and the identity of his employer became the subject of immediate (and ongoing) media coverage.

[4] While the incident occurred in early September, and Mr Hallwright was charged on 20 September 2010, he did not immediately advise Forsyth Barr of either fact. It is apparent that Mr Hallwright took the view that there was no need to advise his employer about the incident, the charge that flowed from it, or his Court appearance, because he considered the issue to be related to his driving not his employment.

[5] Mr Hallwright says that he advised Mr Paviour-Smith, the managing director of Forsyth Barr, that he was facing a criminal prosecution in late November 2010, shortly before name suppression was lifted. Mr Paviour-Smith was adamant that Mr Hallwright did not proactively raise the issue with him and rather he became aware of the charge following reports of an internet blog which included a link to the directory of senior personnel at Forsyth Barr and posed the question as to "which road rage guy" had been charged with a serious criminal offence. I preferred Mr Paviour-Smith's evidence on this point. It was consistent with an email he sent to Mr Hallwright on 26 November 2010, attaching the link to the blog, and later correspondence to Mr Hallwright dated 7 August 2012 reiterating this version of events. In comparison, Mr Hallwright's evidence became somewhat equivocal under

[2] These events are more fully set out in the District Court Judge's sentencing notes: *R v Hallwright* DC Auckland CRI-2010-004-017554, 30 August 2012.

cross-examination, during which he suggested (contrary to his earlier recollection of events) that perhaps he had rung Mr Paviour-Smith but not got through. During the conversation with Mr Paviour-Smith, Mr Hallwright made it very clear that he would be vigorously defending the charge, that the truth would come out and that he would be acquitted.

[6] It is common ground that Mr Paviour-Smith met with Mr Hallwright shortly after the telephone call. Mr Hallwright's recollection is that Mr Paviour-Smith advised him that he considered that the incident was not relevant to his employment. Mr Paviour-Smith strongly denies having said this. He accepts that he did not speak to Mr Hallwright about possible employment consequences he might face in the event that he was convicted but says that he was reserving judgment and proceeding in the interim on the basis that Mr Hallwright was entitled to the presumption of innocence pending the outcome of the criminal process. Mr Waalkens QC submitted that as Mr Hallwright had not been cross-examined on his recollection of what was said at the meeting it was not open to the defendant to submit that Mr Paviour-Smith's evidence ought to be preferred. I do not accept this.

[7] In *R v Soutar*[3] the Court of Appeal observed, with respect to the duty of counsel under s 92 of the Evidence Act 2006 to cross-examine witnesses on all significant matters in issue, that:[4]

> The general purpose of the duty reflected in s 92 [of the Evidence Act 2006] was commented on by this Court in *R v Dewar* [2008] NZCA 344 as being one of fairness. It relates to the challenge and confrontation of opposing witnesses under the adversarial system. It is not, however, absolute. Nor does it need to be slavishly followed where the witness is perfectly aware if his or her evidence is not accepted on a particular point.

[8] In the present case briefs of evidence were filed in advance of the hearing, with leave for the plaintiff to give any evidence orally in reply at the hearing. Mr Paviour-Smith specifically disputed Mr Hallwright's version of events in his brief of evidence and the plaintiff gave no contrary evidence in reply.

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[3] [2009] NZCA 227.
[4] At [27].

[9] Mr Paviour-Smith's evidence as to what was said is consistent with the fact that he was sufficiently concerned about the reported contents of the blog that he made immediate contact with Mr Hallwright, the steps he took during the intervening period to reiterate the need for Mr Hallwright to keep him in the loop in relation to what was going on and his ongoing concern as to the potential for negative media fall-out and damage to the company's reputation. It is also consistent with Mr Paviour-Smith's subsequent response to third party correspondence (expressing concern in relation to Mr Hallwright's ongoing employment) in which he made it clear that he was suspending judgment until the outcome of the criminal process was known.

[10] Mr Hallwright's trial process generated a considerable amount of media coverage, much of which drew attention to the fact that Mr Hallwright was a senior employee at Forsyth Barr and much of which characterised the alleged offending as a case of "road rage" and a "hit and run". Immediately following the lifting of name suppression on 1 December 2010, *The New Zealand Herald* (the *Herald*) ran an article which stated that:[5]

> A leading financial adviser accused of a road rage hit-and-run incident can be named for the first time.
>
> Guy Hallwright works for the investment banking firm Forsyth Barr and is charged with reckless disregard to the safety of another.

[11] Mr Paviour-Smith was plainly concerned about the media coverage and sent an email to all staff (including Mr Hallwright) on 2 December 2010 at 8.47 am:

> **Subject:** News Article
>
> **Importance:** High
>
> …
>
> Many of you will be aware of the news regarding Guy Hallwright.
>
> Please ensure you do not discuss this matter with anyone from the media. Please also refrain from participating in discussions or speculation with anybody externally from Forsyth Barr.

[5] Edward Gay "Road rage-accused name released" *The New Zealand Herald* (online ed, Auckland, 1 December 2010).

[12] Mr Hallwright spoke to a journalist from *The National Business Review* (the *NBR*) about the incident. A media report followed on 2 December 2010. The article appeared under the headline: "Forbarr's Hallwright tells his side of road rage story."[6] It went on to quote Mr Hallwright as saying that:[7]

> …
>
> "I did not instigate the incident, the other guy did," Mr Hallwright, a respected senior Forsyth Barr analyst known for his media commentaries, told National Business Review today. ...
>
> "It's fair to say my view is that the other party was the instigator and the accident happened as I was trying to escape," Mr Hallwright said. ...
>
> "I maintain I was not guilty, I have pleaded not guilty – which immediately indicates I don't agree with things as they are portrayed – and the case will be defended." ...
>
> After working overseas he returned to New Zealand as head of research at First NZ Capital, then Director of telecommunications research at Credit Suisse First Boston Australia before joining Forsyth Barr in 2005.

[13] Mr Hallwright emailed a copy of the article to Mr Reece, his immediate manager, on 2 December 2010 at 12.50 pm, under the subject line "from NBR website FYI".

[14] A further charge was laid against Mr Hallwright on 1 February 2011 (namely, wounding with intent to cause grievous bodily harm). Mr Hallwright did not advise Mr Paviour-Smith that this additional charge had been laid. While Mr Hallwright had been asked to keep Mr Paviour-Smith up to date with the Court process, an article appeared in the *Herald* on 16 March 2011. The article generated further strident correspondence from a member of the public, who sent an email of concern to the Chairman of the Board and which was copied to a number of others. Mr Paviour-Smith forwarded the email on to Mr Hallwright noting his displeasure at finding out about Mr Hallwright's most recent Court appearance via this route and reiterating the need to keep him informed of developments.

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[6] Jock Anderson "Forbarr's Hallwright tells his side of road rage story" *The National Business Review* (online ed, New Zealand, 2 December 2010).

[7] Mr Hallwright accepted in cross examination that he had no reason to believe that the statements attributed to him in the article were inaccurate.

[15] From this early stage Mr Hallwright was well aware of the public interest in the case and could not have been labouring under any misapprehension about the concerns Mr Paviour-Smith had in relation to the media coverage that was being generated as a result of the criminal process Mr Hallwright was facing – that was why Mr Paviour-Smith directed Mr Hallwright to let him know about court dates and it is clear that it was on this basis that Mr Hallwright was keeping him informed. Mr Paviour-Smith's concerns about media coverage and its potential to prompt client queries is reflected in his contemporaneous correspondence to staff (including Mr Hallwright) and copied to Board members.[8]

[16] It is notable too that Mr Hallwright was the recipient of several emails (at his Forsyth Barr email address) from people expressing their concerns about the incident in what can conservatively be described as shrill terms.[9]

[17] It is equally evident that Mr Paviour-Smith had made it clear that he was reserving judgment on Mr Hallwright's alleged offending and what might flow from it until after the criminal process had come to a conclusion. This is reflected in contemporaneous correspondence Mr Paviour-Smith wrote to the author of the email complaint sent to the Chairman of the Board, saying that:

> This is not indicative of the organisational culture of Forsyth Barr or our industry.
>
> ...
>
> We believe in the right to a fair trial and people being given an opportunity to defend themselves. *We are not going to cast any judgement on this until the court has dealt with it.*

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[8] See, for example, "Everyone in Auckland":

> FYI, on Monday Guy's trial commences in Auckland...
> There may well be some publicity about this and I wanted you to be aware as such in advance….
> …
> Some clients may also raise this in discussions with you. Again you are requested not to comment. The matter is before the courts, Guy is entitled to a fair trial, is innocent until proven guilty beyond reasonable doubt and it is not appropriate to comment in the circumstances.

[9] During this period Mr Hallwright also received email correspondence raising concerns about the criminal prosecution, some of which was supportive of the difficult position that both he and the company were in.

> *You even suggest that we do not adopt a kneejerk reaction to this, and we agree.*
>
> Your comment that we "knew about this and did nothing about it" is unacceptable and misses the point in light of the comments made above.
>
> [Emphasis added]

[18] As Mr Hallwright acknowledged in cross-examination, Mr Paviour-Smith's email, which Mr Hallwright was copied into the same day, made it clear that Mr Paviour-Smith was reserving judgment until after the Court had dealt with the criminal charges. He accepted that it was entirely appropriate for Mr Paviour-Smith to give him the benefit of the doubt and allow the criminal justice process to run its course before reaching any concluded views. This stands at odds with the argument advanced on his behalf that he was somehow lulled into a false sense of security by not being expressly advised that his employment might be in peril if he was convicted.

[19] On 29 June 2012 Mr Hallwright was convicted of causing grievous bodily harm with reckless disregard. The second charge was dismissed. That evening Mr Paviour-Smith sent an email to all staff advising of the outcome of the trial, suggesting that they "ignore the sensationalist media articles" and asking that they continue to refrain from making any external comment.

[20] Mr Paviour-Smith discussed matters with Mr Hallwright on 4 July 2012. Mr Hallwright indicated that he was considering appealing against the conviction. Mr Paviour-Smith advised Mr Hallwright that once he had confirmation of whether an appeal would be pursued he would address the future of Mr Hallwright's employment. Mr Hallwright says that this came as a shock to him, but I do not accept that that was so. It was consistent with Mr Paviour-Smith's earlier approach, which the plaintiff was well aware of, namely of suspending judgment until after the criminal process had concluded.

[21] In the event, there were further delays in confirming whether an appeal would be mounted because of uncertainty as to the availability of Mr Hallwright's counsel. A series of meetings followed, the details of which were not before the

Court. Ultimately, Mr Hallwright did not appeal against his conviction. It remained unclear when the decision not to appeal was communicated to Mr Paviour-Smith.

[22] Mr Paviour-Smith initiated a formal disciplinary process by way of letter dated 7 August 2012. He drew attention to the fact that Mr Hallwright's employment agreement contained two terms, namely a (non-exclusive) definition of serious misconduct which included "[c]onduct bringing the Employer into disrepute",[10] and an obligation not to "engage in any activity that is likely to compromise [your] ability to carry out [your] duties".[11] He went on to set out his preliminary view that Mr Hallwright's conduct fell within both of these provisions and that his continuing employment was in jeopardy. The letter made it clear that while Mr Paviour-Smith had been prepared to defer any action based on Mr Hallwright's early reassurances to him that he was innocent and that the charges had arisen out of an unfortunate accident rather than criminal offending, the position changed once he had been convicted.

[23] Mr Paviour-Smith accordingly invited Mr Hallwright to a meeting to discuss matters further, put him on notice about the seriousness of his concerns and encouraged him to seek legal advice. He made it clear that the company was concerned about the publicity his conduct had generated, pointing out that:

> …It is also clear that there has been extensive publicity about your conduct and the ensuing court proceedings. Almost all of that publicity has been negative and much of it has identified you as an employee of Forsyth Barr. Given the significant media profile that you hold as a result of your position with Forsyth Barr, the degree of media interest and linking in the media reports of the incident and your employment at Forsyth Barr was inevitable. There has been significant client awareness and comment about your actions and subsequent conviction.

[24] Mr Hallwright responded, advising that there was a concern that the company had misunderstood the situation regarding the circumstances and outcome of the case, and the gravity of the conviction. Mr Paviour-Smith replied, advising that he did not believe that the company had misunderstood the situation relating to the circumstances and the outcome of the case, as "the conviction seemed fairly clear".

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[10] Clause 17.3.b.
[11] Clause 4.6.

He reiterated that the forthcoming meeting was an opportunity for Mr Hallwright to comment and for him to listen to his comments.

[25] A meeting was held on 15 August 2012. Submissions were made on Mr Hallwright's behalf, focussing on the issue of culpability, the circumstances surrounding the offending, the victim's attitude and the perceived threat that he posed, and Mr Hallwright's wish to extricate himself from the situation before it escalated further. It was submitted that Forsyth Barr should not proceed until after sentencing had occurred. Mr Davison QC, Mr Hallwright's criminal lawyer, indicated on the plaintiff's behalf that a discharge without conviction was a possible sentencing outcome. He said that it was important to focus on the conduct and the degree of recklessness involved, pointing out that recklessness covered a wide spectrum of activity "from the deliberate end to the more spontaneous end of things".

[26] It was submitted that the conviction had not affected Mr Hallwright's ability to undertake his duties – that he had received no negative feedback from his institutional clients, that media interaction was not a significant part of his role and that he would be happy to step back from it, together with client seminars. Further detail was sought as to the damage said to have been suffered to the company's reputation. Mr Paviour-Smith responded by advising that:

> In measuring the degree of damage to reputation, the damage has been shown through client feedback, staff feedback and probable loss of business. The negative feedback has come from a whole range of parties.

[27] While Mr Hallwright's lawyer expressed the view that the public had been poorly informed by the media, Mr Paviour-Smith made the point that:

> People are entitled to have a view ... The facts are that he was found guilty of a serious charge. He is a prominent high profile individual hence the media interest.

[28] Mr Paviour-Smith did not immediately take up the suggestion that he wait until after sentencing. Rather, he sent Mr Hallwright a draft letter dated 22 August 2012. He referred to the media coverage that had occurred, including descriptions of Mr Hallwright as an 'investment banker' and senior employee of Forsyth Barr,

negative feedback he had received and the perceived damage to the company's reputation, the fact that his position included dealing with media inquiries and how this might be compromised going forward, and the need for the utmost integrity and probity in senior employees. Mr Paviour-Smith expressed the provisional view that:

> There is no doubt that you are a person of high media interest and are intimately associated with Forsyth Barr. It was an integral component of your position as Director Research that you be available to make public statements and provide commentary to the media. The only reason that the media are interested in having you comment on investment matters is as a result of your position with Forsyth Barr. Other than as an employee of Forsyth Barr, you had no media profile. By that I mean you were not newsworthy or notable in any other area of your life.
>
> The integrity and probity of senior employees in the investment industry is of enormous importance. *Public confidence in us and the public perception of our senior employees is critical to our continued success in the marketplace.* I do not accept the claim by your lawyers that your actions have not brought Forsyth Barr into disrepute. *Again, if you simply do a Google search, you will see the extent to which our brand and reputation has been tainted by association with someone who has been charged with and now convicted of recklessly causing grievous bodily harm.*
>
> ...
>
> *As I also explained on 15 August, the feedback we have had from staff and clients indicates that many of those who have become aware of your actions have been disturbed by them. I accept that I cannot, and may never be able to, accurately quantify the extent to which Forsyth Barr has lost business or suffered damage to our brand and reputation as a result of the publicity around your actions and conviction, but there is no doubt in my mind that our reputation has been damaged and that the extent of that damage is reflective of the fact that, through your high media profile, and through the nature of the publicity about this matter, your name and that of Forsyth Barr have been inextricably linked.*
>
> ...
>
> As well as expecting our senior employees to be persons of integrity and moral rectitude, *our many retail clients expect that our senior staff will have the attitude and ability to exercise sound judgment.* Irrespective of the exact penalty that is imposed on you at sentencing, *it seems undeniable that you did not exercise sound judgment on this occasion...*
>
> [Emphasis added]

[29] The letter concluded with the provisional view that the two allegations of misconduct were established and that the relationship between the parties had irretrievably broken down. Mr Hallwright was invited to comment on the proposed penalty, which was summary termination of his employment.

[30] Mr Hallwright responded on 27 August 2012 seeking to correct one aspect of Mr Paviour-Smith's summary of the circumstances surrounding the incident. As Mr Paviour-Smith noted, the summary contained in his letter had reflected what Mr Davison had had to say (without correction from Mr Hallwright at the time) during the course of the earlier meeting.

[31] Mr Hallwright responded through his lawyers on 28 August 2012, expressing a concern that there had been a failure to wait until after sentencing which, it was said, would provide "crucial information on the Court's view of [Mr Hallwright's] culpability in relation to the events of that day". It was asserted that this was indicative of predetermination. Injunctive proceedings were threatened if the company proceeded before sentencing had taken place. Mr Paviour-Smith agreed to postpone any decision until after sentencing,[12] in spite of his view that there was no need to wait. He stated that:

> We have an obligation to form our own view as to whether there has been a breach either of the obligation not to bring the employer into disrepute or to engage in activities that compromise an employee's ability to carry out his duties. That is not a question that will be answered by the court. I do not accept your assertion that knowledge of the sentence is critical to the decision making process. What was critical was the finding of the jury that [Mr Hallwright] was guilty of the offence of injuring with reckless disregard.

[32] Mr Paviour-Smith made it clear that an agreement to defer a final decision was on the basis that between the time of sentencing and the issue of the decision in relation to the disciplinary investigation, Mr Hallwright was not to make any public statement on behalf of the company, have any media interaction on behalf of the company or interact with any private clients.

[33] Mr Paviour-Smith also responded to other concerns that had been raised on Mr Hallwright's behalf. In relation to the particularisation of the communications from clients, he confirmed that:

> I have not relied on any particular email but on the fact that we have received a number of emails (and comments) that indicate an adverse reaction from the public/our clients to [Mr Hallwright's] behaviour and particularly his conviction.

[12] In a response dated 29 August 2012.

[34] Mr Hallwright agreed not to talk to the media in the intervening period.

[35] Mr Hallwright was sentenced in the District Court on 30 August 2013. The sentencing generated more publicity, which also featured reference to Forsyth Barr. For example, *3 News Online* reported (under the headline "Forsyth Barr analyst sentenced for road rage incident"):[13]

> Prominent Forsyth Barr analyst Guy Hallwright has been sentenced to 250 hours community service and ordered to pay $20,000 in reparations after a road rage incident in 2010.

[36] The story was accompanied by two subject tags – "Guy Hallwright" and "Forsyth Barr". An article also appeared in the *NBR* around this time, speculating on whether Mr Hallwright would keep his job with Forsyth Barr, with the director of a Christchurch-based stock broking firm reported as saying that:[14]

> If it was one of our employees, *obviously there is a bit of reputational damage there with what he did*, but I would be looking to give the guy a second chance.
>
> [Emphasis added]

[37] Mr Hallwright's solicitor wrote to Mr Paviour-Smith following sentencing advising that, while there had been an "extreme reaction" in the media to the comments the Judge had made during the course of sentencing, his comments were "highly relevant to the company's decision making". In particular it was noted that the Judge had focussed on Mr Hallwright's good character and contribution to the community, that he had observed that it would be "extremely unfortunate and indeed unfair" if Mr Hallwright were to lose his employment and that he would regard termination as a "quite unnecessary response to this circumstance". Reference was also made to the Judge's criticisms of the media coverage and uninformed comment that this was said to have generated.

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[13] "Forsyth Barr analyst sentenced for road rage incident" (30 August 2012) 3 News Online http://www.3news.co.nz/Forsyth-Barr-analyst-sentenced-for-road-rage incident/tabid/423/article ID/267388/Default.aspx.

[14] Caleb Allison "Hallwright should keep his job – finance man" *The National Business Review* (online ed, New Zealand, 31 August 2012).

[38] Mr Paviour-Smith made a request for a copy of the Judge's sentencing notes and also the submissions made on Mr Hallwright's behalf at sentencing. The notes were not immediately available. Mr Paviour-Smith was urged to delay making any decisions until they were provided and it was reiterated that Mr Hallwright should not be held responsible for the views of uninformed members of the public "based on the continuing unbalanced media reporting over which he has no control". In the event the sentencing notes were provided to Mr Paviour-Smith on 17 September 2012. They traversed the circumstances surrounding the offending, including (as Mr Paviour-Smith noted in his subsequent letter) that:

- The victim had expressed his dissatisfaction with Mr Hallwright's driving and "I am afraid, and I imagine you now regret this in the extreme, you responded with a well recognised gesture of dissatisfaction. You completed that with a verbal accompaniment".[15]

- Mr Hallwright had got out of his car, approached the victim's car and said, "[w]hat is your problem?"[16]

- "Perhaps recognising that things had the potential to get out of hand you then retreated to your own vehicle, having slammed the door closed on Mr Kim's car which, perhaps, was not calculated to turn the temperature down."[17]

- The jury had found Mr Hallwright guilty of causing grievous bodily harm with reckless disregard. While the charge did not contain an element of intentional harm it did involve "... you having seen that there was a risk to someone else, which you carried on in an unacceptable fashion and ran".[18]

- Although the Judge expressed the view that there was an alternative charge that could have been laid, he acknowledged that he was obliged to

[15] *R v Hallwright*, above n 2, at [3].
[16] At [4].
[17] At [4].
[18] At [21].

accept the jury's verdict as to the offence that Mr Hallwright was guilty of and to have regard to the fact that "... there was a circumstance where you knew there was a risk of injury and you carried on regardless".[19]

- The Judge noted that both parties bore some responsibility for creating the situation which led to the incident and that Mr Hallwright was operating under a state of anxiety. However, he did not think it was accurate to describe the situation as one of "[a]cute urgency", and noted that the victim had suffered significant physical and possibly significant psychological damage as a result of Mr Hallwright's offending.[20]

- The Judge noted what he described as Mr Hallwright's "momentary lapse of judgment" and his good character.[21]

- The Judge imposed a combined sentence of "no small amount" of community work (250 hours), $20,000 reparation and 18 months disqualification from holding or obtaining a driver's licence.[22]

[39] Mr Paviour-Smith wrote to Mr Hallwright on 19 September 2012. He referred to the Judge's sentencing notes in some detail. He accepted various points that Mr Hallwright had made in relation to the sequence of events, including (for example) that he did not yell "fuck off" to the victim. He refuted Mr Hallwright's suggestion that his factual assessment had been influenced by press coverage. Rather he said that it had been informed by what Mr Hallwright's lawyer had said on his behalf at the earlier meeting. Nor did Mr Paviour-Smith accept the suggestion that Mr Hallwright was being held accountable for the "ill informed views of the public" or "unbalanced media reporting". He made it clear that:

> What you are being held responsible for is your actions and the two specific allegations are whether your conduct could be described as "conduct bringing your employer into disrepute" or was a breach of your obligation that you "... shall not engage in any activity that is likely to compromise your ability to carry out your duties".

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[19] At [14].
[20] At [17].
[21] At [33].
[22] At [37]-[38].

[40] Mr Paviour-Smith dealt with each allegation as follows:

> **Has your conduct brought your employer into disrepute?**
>
> There is no doubt that your actions and subsequent trial and conviction have resulted in publicity for not only yourself but for Forsyth Barr. As your own lawyer has acknowledged, aspects of that publicity have been extreme. The reference to your employment, which has accompanied almost all of the media reports, may have been unnecessary as opined by Judge Neave. But it is the reality of what has happened. As a result of your actions Forsyth Barr has been subjected to significant adverse publicity as the employer of someone who has been convicted of an offence of causing grievous bodily harm with reckless disregard for the safety of others.
>
> Also as Judge Neave noted, some degree of public humiliation of you as a result of your conviction for this offence is "inevitably justified and part of the penalty process". It is also undoubted that there has been a range of responses to the extensive publicity with its emphasis on your employment. I accept that at one end of the continuum there are people who can rightly be described as "nutters" and whose views can be disregarded. However, at the other end of the continuum are people who are genuinely concerned that an employee of ours has been convicted, after a jury trial, of an offence of this nature. Their response cannot be dismissed as being "extreme", or even as being unforeseen. Our business requires a significant degree of public trust. Forsyth Barr has been brought into disrepute through the extensive media coverage of your trial, conviction and sentence, as the employer of an employee who has been convicted of a serious criminal offence, namely causing grievous bodily harm with reckless disregard, albeit one whose actions could be dealt with short of imprisonment.
>
> Accordingly, I confirm the conclusions that I reached in my draft decision of 22 August which was that your actions, and subsequent conviction and sentence, have brought Forsyth Barr into disrepute. Even accepting that they were at the lower end of the range of behaviour caught by s 188(2) of the Crimes Act, your actions were of the type that the public and those we interact with could not reasonably expect that one of our senior employees would engage in.
>
> **Has your ability to carry out your duties been compromised?**
>
> Your lawyer, in her letter of 3 September, noted that you had continued working for us since the incident. She asserts that "there is no risk nor disadvantage to the company if [you continue] in employment". I am not able to accept that assertion. As I set out in my draft decision, the fact that you had a high media profile and that you were someone whose actions the media would take a great interest in, arose directly from the fact that an integral part of your employment at Forsyth Barr involved you making public statements and providing commentary to the media.
>
> ...
>
> I note that in the New Zealand Herald of Saturday 15 September in the front page story on you (which once again expressly referred to your employment by Forsyth Barr) you were quoted as declining to comment and saying, "I

> have no faith in the media". I can understand why you might have said that, but, whether you accept it or not, interacting with the media is, and always has been, an integral component of your role. Our ability to continue to allow you to do that has been compromised by your actions and the subsequent publicity. I accept that you cannot control that publicity and that there are grounds for criticising aspects of the reporting as Judge Neave did. However, even setting aside the more extreme media response, it is inevitable that your conviction on a serious offence of this nature was always going to attract media attention and compromise your ability to interact with the media in the way that you had done previously. It also affects your credibility and integrity, both of which are important to your role.
>
> I therefore confirm my view that your conduct has compromised your ability to carry out your duties.

[41] Mr Paviour-Smith concluded that Mr Hallwright's conduct had "irreparably damaged the relationship of trust and confidence that is fundamental to the employment relationship", that he had brought the company into disrepute, that he had breached his employment agreement by engaging in activity that was likely to compromise his ability to carry out his duties and that his conduct amounted to serious misconduct warranting dismissal.

[42] The letter of dismissal was hand delivered, though not by Mr Paviour-Smith. He was in Wellington at the time and had arranged for the most senior person in the Auckland office to give the letter to Mr Hallwright. While Mr Hallwright was advised to read the letter when it was handed to him he did not immediately do so. As it transpired Mr Hallwright first heard about his dismissal from his lawyer, who rang to find out how he was following receipt of an emailed copy of the letter.

## Test of justification

[43] While the incident occurred on 8 September 2010, Mr Hallwright's dismissal did not take place until some two years later. That means that the relevant test for justification is contained in s 103A of the Employment Relations Act 2000 (the Act), as amended with effect from 1 April 2011. The question of whether a dismissal is justifiable must be determined, on an objective basis, by assessing whether the employer's actions, and how the employer acted, were what a fair and reasonable

employer could have done in all the circumstances at the time the dismissal occurred.[23] The range is now wider than it was under the previous s 103A test.

[44] The plaintiff submits that his dismissal was substantively and procedurally unjustified, and that the decision to dismiss was unreasonable and an excessive overreaction to media reports.

## Serious misconduct?

[45] Mr Hallwright contends that Forsyth Barr did not have reasonable grounds for concluding that his conduct amounted to serious misconduct. In particular it is submitted that the conduct relied upon was unrelated to his employment in that it was a private 'driving' matter; that engagement with the media was an ancillary, as opposed to an integral, part of his role and his ability to undertake his duties was not compromised by either the fact of conviction or the media reporting; that the defendant was not materially brought into disrepute by either the conviction or the media reporting; and that, given the defendant continued to employ the plaintiff between September 2010 and September 2012 in "full knowledge" of the conduct, it was not open for the defendant to assert a breakdown in the relationship of trust and confidence as it did in August 2012.

*Was there a sufficient connection with Mr Hallwright's work?*

[46] There is no dispute that the conduct that gave rise to Mr Hallwright's conviction and the associated media coverage did not occur while he was at work. Mr Waalkens submitted that the conduct complained of was therefore unrelated to his employment and there was accordingly no basis for the assertion that it had impacted upon the defendant's business or that it was incompatible with the plaintiff's duties. He submitted that cl 4.6 of the employment agreement, which Forsyth Barr relied upon in dismissing the plaintiff and which provides that the employee shall not engage in any activity that is likely to compromise their ability to carry out their duties, was not intended to apply in situations such as the present but rather where, for example, an employee is convicted of a serious dishonesty offence.

[23] See the discussion in *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160.

[47] A conviction for a serious dishonesty offence may indeed give rise to a breach of the employment agreement. However, I do not consider that different forms of conduct are automatically excluded from the reach of cl 4.6, particularly when regard is had to other provisions of the agreement.[24] Much will depend on the particular context. In the present case the context includes the high media profile enjoyed by the plaintiff because of his role within Forsyth Barr, the nature and circumstances of his criminal offending and the broader public impact that it had. I return to these issues below.

[48] It is well established that conduct that occurs outside the workplace can give rise to disciplinary action. In *Smith v Christchurch Press Company Ltd*[25] the Court of Appeal stated that:[26]

> Dismissal for serious misconduct cannot be confined to conduct in the course of employment in any but the widest sense. It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal.

[49] It is not necessary that the conduct itself be directly linked to the employment but rather that it have the potential to impact negatively on it. That is why an employee can be held to account for what might otherwise be regarded as a private activity, carried out away from the workplace and with no ostensible connection to the employment or other employees.

[50] Counsel for the plaintiff submitted that *Smith* was authority for the proposition that out-of-work conduct must reach a higher standard of seriousness before it will impact on the employee's suitability for ongoing employment. I do not consider that the Court of Appeal was introducing a graduated scale of seriousness, depending on the type of conduct or where the conduct has occurred. Rather, the focus of the inquiry is on the impact of the conduct on the employer's business.

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[24] See, for example, cl 4.2 (which provides that the employee will use "best endeavours to perform their duties in a manner which will best promote the interests of the Employer") and sch 2 (which sets out 'Key Tasks' of the employee, including an obligation to "represent the company as required" and to "undertake other duties as may be required by the Employer from time to time").
[25] [2001] 1 NZLR 407 (CA).
[26] At [21].

Impact may, but need not, correlate with seriousness. In *Smith* the Court of Appeal emphasised that:[27]

> ... there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

[51] Mr Churchman QC referred to a number of cases involving out-of-work conduct.[28] Each is fact intensive and little can be drawn from them in terms of general principle, other than confirmation that seemingly 'private' conduct culminating in a criminal conviction, in which a sufficient connection with the employer's business can be established, can justify dismissal.

[52] The defendant had genuine concerns that Mr Hallwright's conduct (which led to his conviction and which gave rise to significant negative publicity, much of which was linked to Forsyth Barr) impacted adversely on the company's reputation. I do not consider that to be an unreasonable position to adopt, even having regard to the fact that the offending arose out of an incident that took place on a road while he was driving during his personal time. The reality is that it was not a minor driving offence – it was more serious, in that it involved an unseemly altercation with another motorist, reckless behaviour and serious injury to the victim.

[53] The required nexus is between the impugned conduct and the employer's business. In the present case the offending generated a considerable amount of negative publicity that repeatedly linked Mr Hallwright to Forsyth Barr, including the headline appeared on the *3 News* website following sentencing: "Forsyth Barr analyst sentenced for road rage incident". Given the nature of the company's business, and concerns about maintaining its reputation both in the marketplace and

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[27] At [25].

[28] See *Airline Stewards and Hostesses of NZ IUOW v Air New Zealand Ltd* [1986] ACJ 462 (AC), *Craigie v Air New Zealand Ltd* [2006] ERNZ 147, *Hyland v Royal Alexandra Hospital* [2000] ABQB 458 and *Leach v Office of Communications* [2012] EWCA Civ 959.

within its client base, there was a sufficient connection between the conduct and the employment.

*What gave rise to the company's concerns?*

[54] Mr Waalkens submitted that it was the media publicity, over which the plaintiff had no control, which became the erroneous focus of the defendant's concerns. I do not think that this characterisation accurately reflects the situation. As was made clear in Mr Paviour-Smith's letter of 7 August 2012, the concern was that the plaintiff's criminal conviction negatively impacted the company's reputation and the plaintiff's ability to do his job.

[55] It was also submitted that the only reasonable interpretation that could be placed on Mr Paviour-Smith's letter of 7 August was that Mr Hallwright's conduct, in terms of what was said to give rise to the proposed disciplinary action, was the conduct underlying the incident[29] rather than the conviction itself.

[56] It is plain that the conviction was the catalyst for the disciplinary action. That is clearly spelt out in the introductory sentence of Mr Paviour-Smith's correspondence of 7 August ("I refer to the fact that on Friday 29 June you were convicted…") and the fact that no disciplinary action was initiated until after the conviction had occurred. As Mr Paviour-Smith said in evidence, if Mr Hallwright had been acquitted he would not have been dismissed, although he may have faced some form of disciplinary action in relation to (for example) his failure to immediately advise his employer of the charges that he faced. This is consistent with the fact that the disciplinary process was deferred until after the trial had been concluded, the penultimate paragraph of Mr Paviour-Smith's 7 August letter, Mr Paviour-Smith's email of 14 August, the notes of meeting and the draft letter dated 22 August.

[57] It is clear from the letter of 7 August 2012, that while Mr Paviour-Smith had been prepared to defer any action based on Mr Hallwright's early reassurances to him that he was innocent and that the charges had arisen out of an unfortunate

[29] As summarised in para [2] of the letter.

accident rather than criminal offending, the position changed once he had been convicted.

*Actual proof of damage required?*

[58] It was submitted that as Mr Hallwright's employment agreement specifically defined serious misconduct as including "conduct bringing the employer into disrepute" and as the defendant had purported to proceed on the basis that this provision had been breached, it was incumbent upon the company to demonstrate actual loss or damage to its reputation.

[59] I am not drawn to Mr Waalkens' narrow interpretation of the employment agreement. If he is right, no pre-emptive action could be taken by Forsyth Barr until actual damage had occurred, after the horse had effectively bolted. That cannot have been the intention of the parties, particularly in relation to reputational damage which is notoriously difficult to prove. Nor does it appear to have been the approach adopted by the Court of Appeal in *Smith*. There, Gault J observed that:[30]

> We do not accept that it is necessary for there to be demonstrated actual adverse effect on the employment situation before the employer is entitled to conclude that the conduct warrants dismissal. Mr Couch contended that without any evidence of actual negative impact there was no justification for dismissal. This cannot be correct. The employer does not have to wait for a negative impact on the working environment before dismissing an employee when such impact is inevitable. In many situations the potential for such an effect is clear enough.

[60] The point is echoed in *Mussen v New Zealand Clerical Workers Union.*[31] There a union employee had been dismissed for serious misconduct for bringing her employer (the union) into disrepute. The conduct in question had occurred outside of work (being present while others spray painted a political message on a retailer's wall). There was no direct evidence of damage to the union employer's reputation and suppression orders were in place thereby reducing the public's awareness of the union's connection to the incident. However, the Court concluded that the employer had been brought into disrepute "because people will and do talk".

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[30] *Smith v Christchurch Press Company Ltd*, above n 25, at [28]. Although note that this case involved a common law action for wrongful dismissal.
[31] [1991] 3 ERNZ 368.

[61] It is obvious that extensive media publicity focussing on the plaintiff and his senior and trusted position with the defendant company, juxtaposed with the serious criminal charge he was ultimately convicted of, would impact negatively and materially on the defendant's reputation.

*Was there damage/reasonable belief that damage had occurred?*

[62] Even if I am wrong on this point, I am satisfied that the company did sustain reputational damage. I pause to note that Mr Waalkens accepted that some damage would have been caused to Forsyth Barr's reputation but submitted that it was not material.

[63] Much was made of the absence of direct evidence at the hearing from, for example, clients who could attest to the fact that they had left or considered removing their business from Forsyth Barr because of damage sustained to the company's reputation. However, the inquiry is not whether it can now be established that Forsyth Barr's reputation was materially damaged or likely to have been damaged. Rather it is whether Mr Paviour-Smith had a reasonable basis for forming the view that Mr Hallwright had committed serious misconduct at the relevant time.

[64] As Mr Paviour-Smith readily acknowledged in his letter of 22 August, the company was unable to quantify the damage it had sustained and may never be able to do so. As he said, clients are not obliged to advise the reasons why they are leaving and 'you do not know what you do not know'. Reputational damage is difficult to prove, which is why in defamation cases the Court considers what the hypothetical bystander would take from the statements that have been made.[32]

[65] Mr Paviour-Smith advised Mr Hallwright during the course of the disciplinary process that he had received negative feedback from clients, staff and members of the public, and that he believed that the company's reputation had been damaged. As he later noted in his letter to Mr Hallwright of 19 September, while some of the feedback from members of the public was extreme and could be put to

[32] See, for example, *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin: "a statement that might tend to lower the plaintiff in the estimation of right-thinking members of society generally".

one side, other feedback pointed squarely to reputational damage. I did not understand Mr Waalkens to be suggesting that Mr Paviour-Smith had fabricated the feedback he had received, rather that he had been overly sensitive to it. This was a proposition that Mr Paviour-Smith firmly rejected, and his evidence in relation to the sort of feedback, including from clients, was consistent with the evidence of other witnesses for the defendant (Messrs Lambert and Edmond[33]) who confirmed that they had received negative feedback which caused them serious concern about the impact on the company's reputation and which they advised Mr Paviour-Smith of at the time. Mr Paviour-Smith was also aware that front line staff were fielding concerns.

[66] It is clear that much of the feedback provided was during the course of conversations which arose in passing, were not recorded and that the names of those who had raised concerns could not otherwise be recalled. I accept the evidence that such feedback was received and that it reflected serious concerns, including from clients, about the situation. I do not accept that Mr Paviour-Smith's reaction to the feedback he received reflected undue sensitivity on his behalf.

[67] It was Mr Paviour-Smith's genuinely held view that the company's reputation had been damaged and that was a view reasonably open to him having regard to the circumstances at the time. The reality was that Mr Hallwright was in a high profile, trusted senior position within the company and extensive media coverage had linked his offending with the company brand. I accept Mr Paviour-Smith's evidence that the company is in large measure dependant on its reputation for integrity and sound judgment, and the more traditional nature of some of its clientele. While, as Mr Hallwright pointed out, financial institutions have suffered some bad press in recent years, it does not follow that Mr Paviour-Smith's concerns were ill-founded. Mr Paviour-Smith strongly refuted the suggestion that the company would simply bounce back from any collateral damage arising from Mr Hallwright's conviction, given the nature of the business and his role within it.

[68] The evidence relating to damage to reputation was reinforced by other evidence called by the defendant, namely Mr Ralston's. In the final analysis I did

[33] Both senior managers within the company.

not gain much assistance from that evidence. I am satisfied that Mr Paviour-Smith reasonably concluded that the company had been brought into disrepute as a result of the plaintiff's actions.

*Failure by company to take steps to dilute damage sustained to its reputation?*

[69] A subsidiary argument was advanced that the company had failed to take any steps to mitigate the damage to its reputation, such as by applying for name suppression for itself. This failure was said to support a credibility finding in relation to whether or not Mr Paviour-Smith had informed the plaintiff that he did not see the issue as having any employment consequences, and that the company's failure to proactively take steps to manage the collateral damage to its own reputation was consistent with it perceiving no connection between the criminal charges that Mr Hallwright was facing and his employment. I have already found that Mr Paviour-Smith made no such statement, and nor could the plaintiff have reasonably believed this to be the company's position.

[70] It was further submitted that the company was essentially responsible for the damage to its reputation it now complains about. However this overlooks the sequence of events, including that the story had already broken in the media before the defendant became aware that Mr Hallwright had been charged. Effectively the company was, as Mr Churchman submitted, blind-sided. The situation was exacerbated by Mr Hallwright's failure to advise his employer of the position. While there is, as Mr Waalkens submitted, authority for the proposition that name suppression may be granted even when the 'cat is out of the bag',[34] I do not accept that the fact the company did not take retrospective steps to apply for name suppression or seek out public relations advice materially advances the plaintiff's case. The company adopted a consistent approach throughout, to avoid public comment and to make it clear that judgment was being reserved until after the conclusion of the criminal process.

[34] See *Ellis v Auckland District Law Society* [1998] 1 NZLR 750 (HC), *S v Wellington District Law Society* [2001] NZAR 465 (HC), *R v Police* HC Wellington AP 256/02, 19 November 2002 and *B v B* HC Auckland HC4/92, 6 April 1993.

*"Unbalanced" media coverage should not be visited on Mr Hallwright?*

[71] Mr Waalkens sought to draw a distinction between damage to reputation incurred as a result of what he termed "balanced", as opposed to "unbalanced", media reporting. It was submitted that Forsyth Barr could not reasonably have had regard to the impact of the latter class of reportage in reaching any decisions as to the seriousness of any misconduct and the impact of it on its business. I do not consider that such a bright line can or should be drawn. It would be unrealistic to require an employer in a case such as this to sift through the media coverage and make an assessment, from both a qualitative and quantitative perspective, as to the reasonableness or otherwise of what the media were saying and the impact of it.

*Ability to undertake role compromised*

[72] Mr Hallwright was a senior investment analyst. I am satisfied that an integral part of his role involved extensive media engagement through providing comment on topical issues, which invariably led to him being identified as a Forsyth Barr employee. Implicit in his role was the need to show sound judgment. While it is true, as the plaintiff submits, that the letter offering him employment did not make express reference to the media aspect of his role, it made the point that he would be contributing to the ongoing development of the company's business and one of the key tasks identified in the position description for the role was representing the company as required.

[73] Mr Hallwright tended to significantly minimise the importance of the media aspect of his role, namely the public interface that he had. It is clear that he had a significant public profile and that this was an important component of his position. His research papers were posted on Forsyth Barr's website and he gave a substantial amount of media commentary.

[74] I accept that Mr Paviour-Smith held genuine and reasonable concerns about the difficulties that would likely arise in Mr Hallwright continuing to undertake his role within the company against the backdrop of the criminal conviction and the media coverage that had occurred. His evidence was that he considered it likely that

Mr Hallwright's conduct would generate ongoing media coverage and damage to the company's reputation (including with its more traditional client base). These concerns resonate with the way in which the media had tracked the story through the District Court. It was suggested that Mr Hallwright would have been capable of stepping aside from his media role and that other steps could be taken to address the concerns that had been identified in relation to his ability to perform his duties. However, it is clear that Mr Paviour-Smith turned his mind to whether there could be some modification to Mr Hallwright's role or duties, and he concluded that it would be very difficult to do so having regard to the nature of his role and the business. I accept his evidence that this was so.

[75] Mr Paviour-Smith was also concerned that Mr Hallwright's comments following his conviction to the *Herald* on 15 September 2012 (advising that he had "no faith in the media") and on 20 September 2012 (that it was unlikely that he would ever speak to the *Herald* again), compromised his ability to undertake his role. Mr Paviour-Smith reasonably considered that such expressions of distrust and disdain would negatively impact on Mr Hallwright's ability to constructively engage with the media going forward. Given that engagement with the media was a key aspect of the role and one that could not readily be divested, it was open to Mr Paviour-Smith to conclude that. Mr Hallwright's comments (regarded, reasonably, as unwise) provided further support for the view that his ability to carry out his duties was materially compromised.

*Concerns about ability to do job not vitiated by ongoing role in interim*

[76] It is clear that Mr Hallwright had had media contact during the two year period that he was facing trial. He had not, however, been convicted at that point. There is one example (possibly two) of him engaging on work related issues with the media following his conviction which may, on one analysis, be taken to suggest that the company was unconcerned about the potential impact of a conviction on Mr Hallwright's ability to his job or damage to the company's reputation. I do not consider that allowing Mr Hallwright to engage in media commentary (described by Mr Paviour-Smith as a key part of his role) during the period up to his dismissal reflects a lack of concern or undermines the company's ability to argue that Mr

Hallwright's ability to do his job going forward was compromised. I have already observed that it was clear that the company was reserving judgment in terms of employment implications until the criminal justice process had been concluded.

[77] Nor do I consider that the fact that Mr Hallwright continued to work in the intervening period vitiated the company's ability to take disciplinary action against him following his conviction. While the fact that he continued to work and engage with the media during this period may be taken to suggest that the company's stated concerns about damage to reputation are over-exaggerated, I do not accept that that is so. The reality is that the company was in a difficult situation. Any steps to take disciplinary action against Mr Hallwright pending the outcome of the criminal process may well have led to a grievance, particularly in the context of his assurances that he was innocent and that the truth would come out at trial.[35] The other alternative was to place Mr Hallwright on suspension during that time. Rather, the company took the step of standing behind him while he vigorously defended the criminal charges, wearing the collateral damage to its reputation in the interim, giving him the presumption of innocence, making it clear that it was reserving judgment and allowing the criminal process to run its course before reaching a concluded view or taking any disciplinary action. The position changed when Mr Hallwright was convicted, as Mr Paviour-Smith made clear. The delay between the incident and the conclusion of the trial process cannot be laid at the defendant's door. I struggle to see how Forsyth Barr can be criticised for adopting the course that it did.

*Culpability*

[78] The plaintiff submitted that Mr Paviour-Smith had erred in reaching a conclusion described as incompatible with that reached by the District Court Judge in sentencing. In this regard it was submitted that because the Judge characterised Mr Hallwright's conduct as being at the lower end in terms of culpability, and

[35] See *Russell v Wanganui City College* [1998] 3 ERNZ 1076 where the Court, while noting that an employee is not entitled to have a disciplinary process stayed as of right while a criminal process is ongoing, cautioned against conducting disciplinary investigations while the outcome of criminal proceedings were pending.

reflected a momentary lapse of judgment in the heat of the moment, it was not sufficiently serious to warrant a finding of serious misconduct.

[79] I perceive two difficulties with this submission. First, it oversimplifies what the District Court Judge had to say and glosses over material aspects of his sentencing remarks which were less favourable to Mr Hallwright. Secondly, it suggests that Forsyth Barr was obliged to directly translate the District Court Judge's view as to culpability in the criminal justice context into an assessment of the extent to which Mr Hallwright's criminal offending might impact on his employment obligations.

[80] While much is made of the District Court Judge's views as to the degree of culpability involved in the offending, it is evident that Mr Paviour-Smith did in fact consider these observations in relation to the circumstances surrounding the incident, including those which reflected poorly on Mr Hallwright and the way in which he conducted himself.[36] I do not accept the submission that Mr Paviour-Smith approached the decision-making task with a closed mind or that his description in evidence of Mr Hallwright's offending as representing a "monumental error of judgment" reflected such an approach. The reality was that Mr Hallwright had been convicted, following trial, of a serious offence which, while not containing an element of intentional harm, nevertheless involved appreciating a risk to another person and running it regardless, thereby causing significant physical and possible psychological damage to the victim. While he did not receive a custodial sentence (the maximum available term being seven years for the offending) he was sentenced to "no small amount" of community work, a substantial reparation payment and a lengthy period of disqualification from driving.

[81] The District Court Judge expressed the view that it would be "unfair" for Mr Hallwright to lose his job. However, and as he acknowledged, that was a matter for Mr Paviour-Smith to weigh – at least at first instance – having regard to the terms of Mr Hallwright's employment agreement and other relevant matters that were within his province as employer. And as Mr Churchman pointed out, it is apparent that the

[36] Mr Paviour-Smith referred to the sentencing notes extensively in his letter of response (referred to above at [40]).

Judge was not privy to the details relating to the feedback that Forsyth Barr had received and the implications of this for its brand and business.

*No ability for employer to penalise further?*

[82] It was pleaded that it was not for Forsyth Barr to 'further penalise' Mr Hallwright by terminating his employment. This point was not developed but I took it to reduce to a submission that Mr Hallwright had been punished enough by the District Court in relation to his offending and that any further 'punishment' would be a disproportionate response to what had occurred.

[83] Although not referred to by counsel, concerns about the overall proportionality of sentences imposed by the criminal justice system and sanctions imposed by employers arising out of the same underlying conduct has received some academic attention,[37] but does not appear to have gained much in the way of judicial traction. That likely reflects the fact that sentencing in the criminal jurisdiction is aimed at achieving different goals, which are distinct from the concerns impacting on the employment relationship itself. While the criminal proceedings were directed at establishing whether the plaintiff had a reckless disregard for the safety of others, the employment proceedings are predominantly concerned with whether the employer was entitled to dismiss the plaintiff on the basis of conduct bringing it into disrepute and which impaired his ability to carry out his duties as an employee.

[84] I cannot accept that the fact that Mr Hallwright's criminal offending was addressed in sentencing by the District Court somehow compromised Forsyth Barr's ability to deal with it as an employment issue with employment consequences. Ultimately it is not for this Court, or for the District Court, to say whether it would have imposed the same disciplinary outcome had it been the employer. Rather, this Court's role is to assess on an objective basis whether the decision and conduct of Forsyth Barr fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.[38]

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[37] See, for example, Mirko Bagaric "The Disunity of Employment Law and Sentencing," (2004) 68 JCL 329.

[38] See the discussion in *Angus v Ports of Auckland* [2011] NZEmpC 160.

[85] If, as I have found, Forsyth Barr was entitled to form the view that Mr Hallwright's conduct amounted to serious misconduct, it was also entitled to proceed to consider dismissal as an appropriate disciplinary outcome. The fact that he had already been 'punished' in criminal proceedings by the District Court cannot, and does not, mean that Forsyth Barr was hamstrung in terms of the disciplinary action it could take.

## Process

[86] It was submitted that Forsyth Barr made a number of procedural errors in the way it dealt with the disciplinary process, including that the defendant failed to put all of its concerns to Mr Hallwright for his response; failed to genuinely consider the information he put forward, with particular reference to the 'inaccurate' and 'unbalanced' media reporting and the effect of that reporting; failed to adequately consider the District Court Judge's observations in sentencing; failed to advise the plaintiff that in the event of adverse media reporting and/or a conviction his employment was at risk; and carried out the dismissal in an inappropriate manner. I have already addressed the substance of a number of these concerns above.

*Insufficient detail of concerns regarding reputation to enable the plaintiff to respond?*

[87] It is well established that an employer is required to identify its concerns with adequate particularity to provide an employee with a reasonable opportunity to respond to them.[39] The plaintiff contends that the defendant failed to adequately particularise its concerns in relation to reputational damage to enable him to respond to them during the course of the disciplinary process.

[88] While the specific details of who had provided much of the feedback could not be provided, given the way in which it had been communicated, I am satisfied that the gist of the feedback was made known to Mr Hallwright and that he was sufficiently advised of the nature of the company's concerns in this regard. Mr Hallwright did not suggest that Mr Paviour-Smith's concerns were ill-placed and it

[39] *Gwilt v Briggs & Stratton New Zealand Ltd* [2011] NZEmpC 140 at [72].

would have been naive of him to have taken any such position. As Mr Paviour-Smith observed in his correspondence to Mr Hallwright of 22 August 2012:

> As I also explained on 15 August, the feedback we have had from staff and clients indicates that many of those who have become aware of your actions have been disturbed by them... there is no doubt in my mind that our reputation has been damaged and that the extent of that damage is reflective of the fact that, through your high media profile, and through the nature of the publicity about this matter, your name and that of Forsyth Barr have been inextricably linked.

[89] This was a reasonable summary of the situation and put Mr Hallwright squarely on notice of the defendant's concerns, and the basis for them.

*Affirmation of employment?*

[90] Mr Hallwright continued to work during the two year period he was facing criminal charges, including interacting with the media on work related matters. During this period Forsyth Barr made it clear that Mr Hallwright was entitled to the presumption of innocence. It is apparent that there were ongoing concerns with potential damage to reputation during this time but that the company was prepared to weather that aspect of the storm until the criminal process had been concluded. For the reasons I have already given, I do not consider the fact that Mr Hallwright was permitted to continue working during this time, and to engage with the media providing commentary on market issues, prevented Forsyth Barr from taking disciplinary action following conviction.

[91] The fact that Mr Hallwright gave one media interview, possibly two, after his conviction in relation to work related issues was said to reflect the fact that the company was unconcerned about the potential for damage to reputation flowing from a conviction. However, this must be seen in the light of Mr Paviour-Smith's correspondence of 29 August 2012 confirming that while he would (reluctantly) wait until the sentencing notes became available, in the interim Mr Hallwright was not to engage in providing any media commentary.

*Failure to genuinely consider Mr Hallwright's response?*

[92] It was submitted that Mr Paviour-Smith failed to genuinely consider the information put forward on Mr Hallwright's behalf, most particularly in relation to the observations made by the District Court Judge in sentencing. I do not accept this submission. It is evident that the plaintiff was given a full opportunity to put material before Mr Paviour-Smith for consideration and that issues relating to the circumstances of the offending, and the Judge's observations in this regard, were thoroughly traversed. It is also evident that Mr Paviour-Smith considered those submissions. His evidence was consistent with the references to these matters in his subsequent correspondence. The fact that he was not persuaded by the matters raised on Mr Hallwright's behalf does not mean that they were not genuinely considered or appropriately weighed.

*Manner of dismissal*

[93] Mr Paviour-Smith is based in Wellington. He arranged for the most senior member of staff in Auckland to hand-deliver the dismissal letter to Mr Hallwright in a brown envelope marked confidential. He also arranged for a copy of the letter to be emailed to Mr Hallwright's lawyer. The envelope was handed to Mr Hallwright at around 5 pm and he was told to read it. As it happens, Mr Hallwright was in the process of responding to an urgent request and did not immediately open the envelope. He then received a telephone call from his lawyer asking how he was and it was via this means that he heard news of his dismissal. An email to staff was circulated advising that Mr Hallwright would be leaving the firm but not otherwise detailing the circumstances of his departure or the basis of it.

[94] While it would have been open to Mr Paviour-Smith to travel to Auckland and deliver the letter in person, such a step was not required. The reality is that the letter followed an earlier draft letter and submissions on the proposed penalty of dismissal. The letter was given to him in a courteous way, in private, by a senior member of staff, and he was told to read it. It was unfortunate that the news ultimately came from his lawyer but I do not consider that the manner in which the defendant dealt with this issue can be criticised in any material way. The email to

staff advising of Mr Hallwright's departure came shortly afterwards but was an internal-only one and was crafted in moderate terms.

*Compromising Mr Hallwright's ability to stem the damage incurred from media coverage?*

[95] Mr Paviour-Smith was criticised for stymieing Mr Hallwright's attempts to mitigate the fall-out of the conviction in the media and more generally. Mr Hallwright gave evidence in chief that Mr Paviour-Smith had been obstructive when he suggested making a public statement. I do not consider that these criticisms are justified when events are viewed in context. On 29 June 2012, Mr Hallwright emailed Mr Paviour-Smith saying that he would like to make a few comments on the matter in a meeting that Monday following the conviction unless Mr Paviour-Smith thought he should not. Mr Paviour-Smith replied advising that:

> I think its best you leave it for now. I'm conscious the outcome has only just occurred and things just need to settle a bit.
>
> I'm in [Auckland] on Tuesday and it would be good to catch up – perhaps then we could discuss how best to communicate with staff about it.
>
> The other option is a note from you to staff which is pre-agreed.

[96] Mr Hallwright replied to Mr Paviour-Smith saying that a note to staff would be fine and Mr Paviour-Smith responded saying that Mr Hallwright should take the weekend to think about what he would like to say. In the event, Mr Hallwright did not revert to Mr Paviour-Smith about the issue and in cross examination he accepted that Mr Paviour-Smith had acted reasonably. The reality is that Mr Paviour-Smith had made it clear to Mr Hallwright that he was able to devise his own suggestions for discussion. The fact that he did not take up this offer cannot be blamed on Mr Paviour-Smith.

*Alternatives to dismissal*

[97] The plaintiff submitted that inadequate consideration was given to possible alternatives to dismissal. It is clear that Mr Paviour-Smith did turn his mind to the options that had been identified on behalf of the plaintiff in terms of modifying Mr

Hallwright's role and his level of interaction with the media and clients. Ultimately he decided against such a course, having concluded that it would be very difficult to accommodate the changes necessary to adequately address his concerns. I accept his evidence in this regard.

[98] As the full Court emphasised in *Angus*, s 103A(5) precludes conclusions based on minor or inconsequential defects in process. The emphasis is on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor. I conclude that the process followed by Forsyth Barr was fair overall.

## Conclusion

[99] I am satisfied that it was open to Mr Paviour-Smith to conclude that Mr Hallwright had committed serious misconduct and that the decision to dismiss, and how the defendant acted, was what a fair and reasonable employer could have done in all of the circumstances. It follows that Mr Hallwright's dismissal was justified. It also follows that he is not entitled to the remedies he seeks, including reinstatement.

*No reinstatement even if dismissal unjustified*

[100] However, I record that even if I had found Mr Hallwright's dismissal unjustified I would not have ordered reinstatement in the circumstances of this case. It is clear that there was an irretrievable breakdown in the relationship between Mr Paviour-Smith and Mr Hallwright, generated largely by actions taken by Mr Hallwright during the course of the disciplinary process, including secretly recording a conversation between the two of them and describing Mr Paviour-Smith in an email to another employee in pejorative terms ("Hi Mate. Not necessarily the end of the story. And you are not getting the real one from [Mr Paviour-Smith]. He is slippery").

[101] It would be necessary for a relationship of trust and confidence to exist between Mr Paviour-Smith (as managing director) and Mr Hallwright, given the

nature of their respective positions. While it was effectively put to Mr Paviour-Smith that he was over-reacting to the impact of Mr Hallwright's actions and comments, including in terms of any working relationship into the future, I do not accept that this was so. I was left with no doubt that Mr Hallwright's actions and comments reflected a fundamental lack of trust in his employer[40] and, conversely, left his employer with a fundamental and irreparable lack of trust in him. In such circumstances I would not consider reinstatement an appropriate remedy. The position is reinforced by Mr Hallwright's comments about distrusting the media, and the likely impact of these comments (which I have already referred to) on the practicality of continued employment.

[102] For completeness, reference was made to other correspondence, variously describing Mr Paviour-Smith in highly unflattering terms. However this correspondence was penned by the plaintiff's wife, not the plaintiff, and in the context of supporting her husband through what she described as an extremely stressful time. I would not have been minded to visit Mrs Hallwright's strongly expressed views of Mr Paviour-Smith's character on her husband, as I was invited to do by Mr Churchman, in the context of the claim for reinstatement.

*Inadequate steps to mitigate loss*

[103] Nor would I have granted the extent of damages sought by Mr Hallwright – I was not satisfied, based on the evidence before the Court, that he took sufficient steps to mitigate his loss. While I accept that he found the period following his dismissal difficult, he gave evidence that he has been undertaking voluntary work and his wife gave evidence that he has spent a considerable amount of time acting as executor on his father's estate. Mr Hallwright did little to look for alternative employment and the steps he did take (placing his name with one recruitment agency and personally "keeping abreast of industry vacancies") fell short of what is required.

[40] Indeed Mr Hallwright accepted in cross examination that his act of tape recording the meeting with Mr Paviour-Smith reflected a lack of trust in his employer.

## Bonus

[104] The employment agreement provided that Mr Hallwright's total remuneration comprised the salary specified in the first schedule and, "where applicable", performance bonuses as may be specified in the third schedule.[41]

[105] Mr Hallwright claimed that he is entitled to a bonus for the final six months of his employment. While accepting that there are difficulties with the assessment process, it was submitted that taking an average of the previous periods would lead to a bonus of around $63,000.

[106] Mr Paviour-Smith gave evidence that issues such as individual performance during the period under review and the company's overall performance were relevant in determining what, if any, bonus would be paid. This is consistent with the way in which previous bonuses had been dealt with, as reflected in the documentation before the Court.

[107] There is no question that Mr Hallwright was competent and that he diligently undertook his tasks during the final six months of this employment. However, his conviction fell within the timeframe, albeit by one day. Mr Paviour-Smith gave evidence that it was for this reason that no bonus was considered justified. He also made the point that bonuses vary and are not always given. He said that he had not received a bonus for that period and that only 40 per cent of people within Mr Hallwright's area had. Of those, most had been more junior staff. Mr Hallwright was, of course, a senior employee. It is clear that the bonus pool for the first half year for 2012 was significantly constrained. That is reflected in an email communication dated 13 September 2012.

[108] In the final analysis the defendant's bonus payments are discretionary. The exercise that I was invited to embark on is, in these circumstances, speculative. In any event, on the evidence before the Court I am not satisfied that Mr Hallwright would likely have received a bonus in light of the approach adopted in relation to other staff, his conviction and the circumstances prevailing at the time. I do not

[41] Clause 7.2.

consider that a basis for the claim for the bonus payment has been adequately made out and I accordingly decline to make the orders sought by the plaintiff.

## Conclusion

[109] For the foregoing reasons, the plaintiff's challenge is dismissed.

[110] Costs are reserved at the request of the parties. If they cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the defendant filing any submissions and material in support within 40 days of the date of this judgment and the plaintiff filing any response within a further 20 days.

Christina Inglis
Judge

Judgment signed at 8.30am on 13 November 2013