

IN THE MATTER OF

A complaint filed under ss 73 & 74 of the Private Security Personnel and Private Investigators Act 2010

IN RELATION TO

D, E & C LIMITED

DECISION

[1] In July 2019 Ms A filed a complaint against C Limited (C). Ms A's complaint related to the way Ms E carried out a workplace investigation for Ms A's previous employer. Ms A also said that Ms D and Ms E, were providing private investigation services through their company C without the necessary certificate or licence.

[2] I referred the complaint to the Complaints, Investigation and Prosecution Unit (CIPU) to investigate whether C, Ms E or Ms D were carrying out work that required them to have a licence or certificate in the class of private investigator.

[3] CIPU completed their report in March 2020. The writer of the report concluded that C and its directors were carrying out work that fitted within the definition of private investigator and they should therefore hold the appropriate licence and certificates. It also concluded that C and its directors were not exempt from holding a licence or certificate under s 22(d) of the PSPPI Act on the basis that both directors hold practicing certificates as lawyers.

[4] C disagrees with the investigator's findings and have asked me to review his conclusions. They submit a purposive interpretation should be applied and that it was never the intention of the Act for employment consultants and investigators to fit within the definition of a private investigator. In addition, even if they were required to hold a licence at the time they carried out the investigation, they should now be exempted by s 22(d) as they hold practicing certificates as lawyers.

[5] The key issues I need to decide are:

- a) Were C private investigators and therefore required to have a security licence?
- b) If so, are C exempt from holding a licence as both Ms E and Ms D are lawyers undertaking work pursuant to a practicing certificate?

[6] I note that regardless of my decision on either of those issues I have no jurisdiction to deal with Ms A's complaint about the way Ms E carried out her work and the outcome of her investigation. Sections 73 and 74 of the Act specifically provides that I only have the jurisdiction to deal with complaints against licence or certificate holders. C does not hold, and never has held, a licence and Ms E and Ms D do not have, and never have held, certificates. The most I could do, if I find C is operating in breach of the Act, is to refer that issue back to CIPU to consider further action.

Are C private investigators who are required to hold a security licence?

[7] Section 5 of the Act defines private investigator as:

- (1) In this Act **private investigator** means a person who, for valuable consideration, either by himself or herself or in partnership with any other person, carries on a business seeking or obtaining for any person or supplying to any person any information described in subsection (2).
- (2) For the purposes of this section **information-**
- (a) means any information relating to-
 - (i) the personal character, actions, or behaviour of any person; or
 - (ii) the financial position of any person; or
 - (iii) the occupation or business of any person; or
 - (iv) the identity of any person; but
 - (b) does not include information that is contained in a public record.

[8] C specialise in independent investigations into workplace complaints. They are contracted to carry out investigations on behalf of an employer where there are allegations of misconduct, either by one employee against another or by an employee against a manager. Most allegations relate to bullying, sexual harassment or other inappropriate behaviour in the workplace but can also relate to allegations of fraud or theft.

[9] When such allegations are made an employer is legally required to establish the facts of the complaint. To ensure fairness to all parties and that any investigation is conducted in accordance with the principles of natural justice and procedural fairness, it is now considered best practice for employers in New Zealand to engage a specialist third party to undertake an independent employment investigation.

[10] C advise that the following steps were undertaken in the investigation involving Ms A, and in most other investigations they carry out:

- a) Participants voluntarily participate in an interview and may have a support person or legal representative present. This includes both the people who have made the complaint and the people against whom complaints have been made.
- b) The company may also provide the investigator with relevant evidence and the investigator can request additional information from the employer.
- c) The respondent and the complainant are provided with the opportunity to review and comment on all the evidence collected by the investigator.
- d) Both the complainant and respondent are provided with the opportunity to review and comment on the draft investigation report.
- e) A final investigation report is provided to the employer setting out the investigators opinion on whether the factual allegations occurred and, if so, whether that conduct amounts to a breach of the employer's relevant policies.

[11] C's investigation regarding Ms A involved seeking or obtaining information into the actions and behaviour of the people involved and could, in other investigations, involve seeking information as to the identity of the people involved and possibly the financial position of any person. Therefore, C is carrying on a business of seeking or obtaining for its clients or supplying to its client's information as defined in s 5(2) of the Act.

[12] C accepts that their investigations fit within a narrow, black letter interpretation of s 5 of the Act. However, they submit, that a purposive rather than narrow interpretation is required, particularly where there is some ambiguity about whether previously un contemplated circumstances fall within the scope of the Act.

[13] They submit that when the Act was passed Parliament's main concern was to ensure private security personnel and investigators did not get out of hand and to deter cowboy operators. They further submit that the Act was directed at private investigators in the sense in which that role is commonly understood, namely covert investigations and surveillance of targets. They do not consider it was ever intended to include the type of work carried out by employment investigators. They also say that there are some significant differences between the investigations they and other employment investigators undertake and those undertaken by the typical private investigator.

[14] I accept that parliament may not specifically have had employment investigators in mind when considering the work of private investigators when the Act was passed. This may have been because this type of work is a relatively recent feature in the New Zealand market. However, parliament clearly intended the definition of private investigator to cover all people in the business of carrying out investigations into a person's character, actions or behaviour. This is an integral part of an employment investigators work.

[15] I accept employment investigations are more transparent than most of the investigation work undertaken by other private investigators. However, since employees often pre-emptively give consent as part of their employment agreement I do not consider they are any more voluntary than the work of some other private investigators.

[16] C also says their work is more akin to that of an adjudicator rather than an investigator and that they receive information rather than seek it out. I do not accept the submission that the investigation work is passive rather than active. They determine who they will speak to, the questions they will ask and the information and documentation they will seek. They then assess the information they obtain and complete a report on the factual allegations they have investigated. Other than providing all people involved in the investigation with a draft report for comment, this is not substantively different to what is done by many other private investigators.

[17] C says a further difference is that if individuals decline to participate in an employment investigation covert surveillance or invasion of privacy does not follow. However covert surveillance and invasion of privacy is not part of the definition of the work of a private investigator as set out in s 5 of the Act. In addition, the work carried out by those more commonly considered to be a private investigator covers a wide range and frequently does not include surveillance or invasion of privacy.

[18] The word private when referring to private investigators does not mean covert or secret. It is used to distinguish private investigators from public or state appointed investigators such as the Police or others employed as investigators by government agencies.

[19] C's website states that they undertake "independent workplace investigations and reviews" and that they specialise in "independent investigations into workplace complaints". Other entities holding themselves out to be workplace investigators state that they are investigation companies, impartial fact finders and that that no investigation is too complex.

[20] Based on the evidence of the work C do I conclude that even if a purposive interpretation is applied, by carrying on the business of employment investigators C come within the definition of a private investigator as set out in s 5 of the Act.

[21] At the time C carried out the investigation involving Ms A they did not fit within any of the exemptions set out in ss 5(4) or 22 of the Act. Therefore, C should have held a licence in the class of private investigator. Failure to do so was a breach of the Act.

[22] I accept that the breach was unintentional and that there is a widespread misconception in the industry that people in the business of employment investigations are not private investigators. While my decision may have significant implications for those who carry on business as employment investigators, I do not consider the result will be perverse as submitted by C.

[23] C submit that most employment investigators would not meet the criteria for a security licence as they have no training or experience in surveillance and security. However, surveillance experience is not an essential part of the training or experience for all private investigators. To meet the training and experience qualifications for a security licence in the class of private investigator all an investigator needs to show is that they are a trained and experienced investigator. Therefore, any competent and experienced employment investigator meets the training and experience requirements for a licence.

[24] There is also no substance in the submission that the requirement for employment investigators to be licenced would be perverse as it would undermine the reviews by people such as Dame Margaret Bazely or Maria Dew QC into allegations of harassment and bullying. While both have undertaken investigations, neither are holding themselves out to be in the business of investigation. Therefore, they are not required to hold a licence. The definition of private security employee in s 13 of the Act makes it clear that individuals who are employed or contracted to carry out an investigation are only required to have a certificate of approval if they are engaged to do so by a private investigator.

[25] I accept the consequences arising from such investigations are employment ones and that consequential actions by the employee can be challenged through the Employment Relations Authority and Employment Court. However, I do not consider any requirement for employment investigators to be licenced with the PSPLA means the PSPLA would become an employment regulator.

[26] A person concerned about the legality or conduct of an employment investigator cannot file a complaint, or request an investigation, against the investigator in the Employment Relations Authority or Employment Court. Neither body has a regulatory role over employment investigators and any concerns regarding their work can only be considered in the context of a claim against the employer who engaged the investigator.

[27] In addition, the Licensing Authority routinely refuses leave for complaints to be filed against investigators or employers where the complaint relates to employment matters which are more appropriately dealt with in the context of an employment dispute. I am only likely to grant leave for a complaint against an employment investigator if the complaint was about breaches of the Act or if there were grounds for disqualification under the Act. I have already declined leave for Ms A to file a complaint against her employer for this reason even though her employer holds a security licence.

Are C exempt from holding a licence under s 22 as its officers are lawyers undertaking work pursuant to a practicing certificate?

[28] Since C undertook the investigation involving Ms A it has become a law firm and both Ms E and Ms D now hold practicing certificates as lawyers. C therefore say that even if

they were required to hold a security licence in the past they are now exempt from doing so under s 22(d) of the Act.

[29] This subsection provides that the Act does not require any person to hold a licence or certificate:

in respect to the carrying on by that person of an occupation or business in accordance with a practicing certificate... issued under any other enactment.

[30] C argues that many lawyers carry on investigations and that lawyers who do work as employment investigators are carrying on business in accordance with a practicing certificate issued under the Lawyers and Conveyancers Act 2006. They are therefore now exempt from also needing to have a licence or certificate with the PSPLA.

[31] I agree. Section 22(d) provides an exemption for people who are licenced or permitted to carry out security work under some other regime. This is particularly the case if the other regime under which they are licensed ensures they are qualified to carry out the work and has a robust complaint process if they act contrary to the public interest

[32] The purpose of the Act is to ensure those offering private security services are suitably qualified to carry out the work and do not behave in ways that are contrary to the public interest. The training and ethical requirements for lawyers are more extensive than those under the Act for private investigators. In addition, the complaints process for and against lawyers is more comprehensive than that for private investigators. Therefore, the purpose of the Act is achieved by C being a law firm and its officers holding practicing certificates as lawyers.

[33] Employment investigations, such as those undertaken by C, have often been carried out by either in house counsel or employment lawyers. Therefore, I accept C are now carrying out the business of employment investigators in accordance with their practicing certificate as lawyers.

[34] I do not accept Ms A's submission that lawyers being exempted under s 22 from holding a licence means that there is nobody to ensure their actions are ethical and fair. The ethics and fairness requirements imposed on lawyers in conducting investigations is greater than those imposed by the PSPLA. Complaints can be made to the Law Society for such breaches and the system for complaints against lawyers holds them accountable for unethical practices.

[35] There are also clear ethical guidelines for lawyers regarding conflicts of interest which address Ms A's concern regarding any conflict between advocating for a client and undertaking an independent review.

Conclusion and Summary

[36] C are, for valuable consideration, carrying on a business of seeking or obtaining for their clients, or supplying to their clients, information as defined in s 5(1)(a) of the Act. C is therefore a private investigator. At the time they carried out the investigation involving Ms A, C was required to hold a licence as a private investigator. C was in breach of the Act because they did not hold a licence.

[37] C is however now an incorporated law firm and its officers both hold practicing certificates as lawyers. They are therefore exempt from needing to hold a licence under s 22(d) of the Act and are no longer in breach of the Act.

[38] I do not consider any further action against C, or its officers, is necessary for its breach of the Act. I accept that any breach was inadvertent and a result of the widespread belief within the employment investigation industry that they were not private investigators. Therefore, even if C had not become an incorporated law firm, I would not have recommended prosecution action against them but would have allowed them time to rectify the situation.

[39] Ms A's complaint is upheld to the extent of concluding that C breached the Act by working as private investigators without the necessary licences or certificates. For the reasons outlined in paragraph [6] above I have no jurisdiction to deal with any other parts of Ms A's complaint.

[40] The balance of the complaint is therefore dismissed, and the complaint is closed.

DATED at Wellington this 4th day of June 2020

The image shows a handwritten signature in blue ink, which appears to read 'P A McConnell'. To the right of the signature is a circular official seal. The seal features a central coat of arms with a crown on top, flanked by two figures. The text 'THE PRIVATE SECURITY PERSONNEL LICENSING AUTHORITY' is written around the perimeter of the seal.

P A McConnell
Private Security Personnel Licensing Authority