

IN THE MATTER OF

Complaint by **DM** against **ST** made under s 73 Of the Private Security Personnel and Private Investigators Act 2010 (the Act)

HEARD by telephone on 21 July 2022

DECISION

[1] ST holds an individual licence in the class of private investigator and works as an employment investigator. DM has filed a complaint against ST following an employment investigation undertaken by ST where DM was one of the complainants.

[2] DM's main complaint relates to the adequacy of the information of training and competency upon which the Authority relied when granting ST's licence. I have already directed that this is not an appropriate basis for a complaint against ST.

[3] I reject DM's submission that to qualify for a licence in the class of private investigator ST needs to establish that he is competent in all categories of investigation including investigations on criminal charges which require formal briefs of evidence with sufficient evidential rigour to prosecute or defend criminal charges. This is neither a requirement of the Act nor the training regulations issued under the Act. It is also a restricted view of the full extent of the work that falls within the class of private investigation.

[4] I am also satisfied that ST provided enough information to establish his competency and experience as an employment investigator to qualify for a licence in the class of private investigator. Leave is accordingly refused for DM to file a complaint based on alleged deficiencies in the process for granting individual licences

[5] DM also alleges that ST was guilty of unsatisfactory conduct or misconduct when carrying out the investigation. He says ST demonstrated lack of knowledge with regards to gathering evidence and conducting interviews. This included:

- Not dealing appropriately with conflicts of interest
- Breaching confidentiality and privacy
- Tampering with witnesses
- Failing to objectively apply the evidence in determining whether breaches of law and policy had been established.

[6] In relation to the final bullet point I previously directed that I did not consider it appropriate to deal with the aspects of DM's complaint which relate specifically to ST's findings and would require me to assess the evidence and reach conclusions on the subject matter of the employment investigation.

[7] In addition, several other allegations outlined in DM's complaint could at most only amount to failure to follow best practice and therefore do not constitute a valid ground on which a complaint can proceed. Despite my directions and further advice given at the hearing DM continued to assert that failure to follow best practice amounts to unsatisfactory conduct and misconduct. He has also attempted to file further submissions and documents since the hearing trying to relitigate these points.

[8] One example of this is DM's complaint regarding ST hearing from a witness by telephone without getting her to sign a confidentiality agreement or a brief of her evidence and not including a full report of the telephone conversation in his report. I accept that good practice guidelines and the terms of engagement for the investigation provide that confidentiality agreements be signed by people spoken to and for summaries of information provided by witnesses to be set out in the report.

[9] ST explained that the person he spoke to over the phone was a reluctant witness who would only speak to him under conditions of strict confidentiality. As the information provided by this person primarily corroborated the account of events by others, ST was prepared to speak to her on these conditions.

[10] In the context of the type of employment investigation ST undertook it is occasionally appropriate to relax best practice procedures and processes in order to try and obtain all the relevant information. Such a decision is one an employment investigator is entitled to make, provided the people relying on the report are made aware of the limitations of the information obtained. The fact this type of information is not admissible in any court proceedings does not mean it is wrong to refer to it in an employment investigation.

[11] I therefore do not intend to address any further this and the other allegations outlined in the complaint which I have already concluded would, at most, only amount to failure to follow best practice or process. In addition, there is no evidence to support DM's allegation that ST tampered with witnesses. This allegation largely refers to ST asked some witnesses leading questions. This does not amount to witness tampering

[12] Therefore, as noted in my pre-hearing directions, the remaining issues for me to decide are:

- Did ST fail to appropriately deal with a perceived conflict of interest? If so; does this amount to misconduct or unsatisfactory conduct?
- Did ST breach confidentiality and privacy? If so, does this amount to misconduct or unsatisfactory conduct?

[13] Unsatisfactory conduct is defined in the s 4 of the Act as:

- (a) Conduct that falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee ...; or
- (b) Conduct that is incompetent or negligent, or
- (c) Conduct that would reasonably be regarded by ...private investigators of good standing as being unacceptable.

[14] Section 4 of the Act defines misconduct as being conduct by a licence holder "that a reasonable person would consider to be disgraceful, wilful or reckless or conduct that contravenes the Act"

Did ST fail to appropriately deal with a conflict of interest?

[15] DM alleges that ST was guilty of misconduct or unsatisfactory conduct by failing to disclose a potential or perceived conflict of interests to all complainants. DM alleges the conflict arose from ST's wife and son working for the same employer that engaged ST to carry out the employment investigation.

[16] ST however says that those who engaged him to carry out the employment investigation knew his wife and son worked for the same employer, which was a large employer in the provincial city where he lived and worked.

[17] Neither ST nor those who engaged him considered there to be an actual or perceived conflict of interest as both family members worked in different areas to the complainants and those against whom the allegations had been made. In addition, there were no accountability lines between ST's relatives and those being investigated and there was no common interest between them, and the parties involved in the investigation.

[18] There is no evidence that the fact ST's wife and son worked in other departments for the same large employer could or did result in any bias or predetermination on the part of ST. They were not colleagues in the accepted sense and were barely, if at all, known to those interviewed by ST as part of the investigation. In addition, ST was open about his relationships when asked about them.

[19] I conclude that there was no actual or perceived conflict of interest between ST's role in the investigation and the fact that his wife and son worked for the same large employer. I further conclude that he was not remiss in not proactively disclosing his relatives' employment with the same employer to all the complainants or others he interviewed.

Did ST breach confidentiality and privacy?

[20] DM says ST breached privacy and confidentiality by sending a copy of the interim investigation findings to a respondent's husband's email address. The respondent's husband is also employed by the same employer. ST says he was asked by the respondent to send the interim investigation report to her private email as she was still on leave. He has provided a copy of the authorising email.

[21] I accept that the private email address provided by the respondent was one shared with her husband who was also employee of the same employer. Other than this there is no evidence that the person's husband saw or read the report or that there was any breach of privacy or confidentiality.

[22] Even if there was, the responsibility for this would be on the person who provided the email address and asked for the report to be sent to it. She had signed a confidentiality agreement and ST was reasonably entitled to assume that she would keep any report sent to her confidential and ensure it was not opened or read by her husband.

[23] The second key area where DM says ST breached confidentiality and privacy was by not getting all people from whom he obtained information to sign confidentiality agreements. This allegation relates to both the reluctant witness referred to paragraphs [8] to [10] above and by the support person of another witness.

[24] I accept that failure to get a witness to sign a confidentiality agreement was not in accordance with best practice or the agreed processes for how the investigation was to be conducted. However, for the reasons set out above, departure from the agreed processes

in the circumstances was a decision ST was entitled to make. It does not constitute a breach of privacy or confidentiality on ST's part. Even if that person disclosed that she had spoken to ST to some co-workers, as alleged by DM, any breach of privacy was her responsibility and not ST's.

[25] The only other person who ST did not ask to sign a confidentiality agreement was the support person of another party. ST says it is not standard practice for support people to sign confidentiality agreements when undertaking employment investigations. DM however submits that the support person also answered questions during the interview and provided additional information. He considered this was inappropriate and should not be allowed without the person first signing a confidentiality agreement.

[26] ST accepts that obtaining testimony from a support person should not be encouraged. However, the support person only made three comments in a two-hour interview and two of those related to actions the support person had undertaken. Neither of these were relevant to the substance of the matters being investigated. The third matter was a statement of fact by the support person.

[27] I do not consider there was any breach of privacy or confidentiality by letting the support person speak without signing a confidentiality agreement. I agree that obtaining testimony from support people should not be encouraged. However, in the context of employment investigations it is occasionally appropriate to allow a support person to speak if they have relevant first-hand knowledge of the issues being discussed.

[28] With the benefit of hindsight, it may have been preferable for ST to have got the support person to sign a confidentiality agreement as she provided information directly. At the hearing ST agreed to review his practices and may in future get support people in these circumstances to sign confidentiality agreements. He advised that the support person in this case was a witness to the confidentiality agreement signed by the person she was supporting and knew any information should be kept confidential. In addition, there is no evidence that any confidentiality was breached by the support person.

[29] The final allegation in relation to alleged failure to adequately deal with privacy issues is that ST did not reach the appropriate conclusion where a person being investigated had admitted to disclosing peoples sick leave, medical or training information to other staff members. ST does not deny such a disclosure was made but he did not consider that disclosure relevant to his investigation as it did not include information relating to DM or the other complainants.

[30] ST considered the comments referred to fell outside the terms of reference. He also advises that during the investigation DM raised several alleged breaches of the Privacy Act, Official Information Act or Employment Relations Act. ST considered these to be matters of a personal grievance and more appropriately addressed by DM to his employer rather than forming part of the investigation.

[31] ST and DM have different views on the extent of the issues included in the scope of the employment investigation. To decide whose opinion is correct would most likely require me to review the complaint, terms of reference and the full investigation report. As already noted, this is not appropriate in the context of this disciplinary hearing.

[32] In any event, even if DM's factual allegations in this regard are correct, any failure on ST's part is not a breach of privacy or confidentiality. At most it would be a mistake in interpreting the extent of the investigation as set out in the terms of reference. This is very unlikely to be enough to amount to unsatisfactory conduct or misconduct as defined in the Act.

Conclusion

[33] I accept ST departed from best practice and standard and agreed process on occasions in conducting the employment investigation. However, he neither failed to deal appropriately with a potential conflict of interest nor breached privacy and confidentiality.

[34] Any departure from best practice was acceptable in the circumstances and was not serious enough to amount to either misconduct or unsatisfactory conduct. DM's complaint is accordingly dismissed.

DATED at Wellington this 2nd day of August 2022



P A McConnell

Private Security Personnel Licensing Authority