

IN THE MATTER OF

A complaint against **C H** under s 74 of the Private Security Personnel and Private Investigators Act 2010

DECISION

[1] A C has laid a complaint asking for C H's certificate of approval to be cancelled. He says that Mr H is guilty of misconduct as he made secret recordings of conversations at his workplace. Mr H was subsequently charged with unlawfully intercepting telecommunications but was discharged without conviction.

[2] Mr H accepts he placed a recording device in his employer's office area. He however says this does not amount to misconduct as his actions did not meet the high level required to find his conduct was disgraceful. Even if his actions are found to amount to misconduct his certificate should not be cancelled given the judges conclusions that the outcome of his criminal charge should not impact on Mr H's future employment prospects.

[3] Section 4 of Act defines misconduct as conduct by a "certificate holder that a reasonable person would consider to be disgraceful, wilful or reckless or conduct that contravenes this Act or any regulations made under this Act". Section 83(e) provides that it is a discretionary ground for the cancellation of a certificate if the certificate holder has been guilty of misconduct or gross negligence in the course of carrying out work to which the certificate relates.

[4] The issues I therefore need to decide are:

- Is Mr H guilty of misconduct because he made covert recordings at his workplace?
- If so should his certificate be cancelled, or any other disciplinary action taken?

The recordings

[5] Mr H advises that after he transferred locations with his previous employer he found himself in an unhealthy work environment. He believed that his immediate manager and his manager's superior were actively targeting him for constructive dismissal. Mr H sought advice as to what to do and was advised to keep written records of what was happening.

[6] He then decided to try and record evidence of what he considered to be a conspiracy against him by leaving a tablet device recording on his desk which was in an open plan office. He did this over two days. Mr H believed this was the only option open to him as he needed evidence to take matters further. He had been told by his manager that any approach to head office with a complaint or concerns would be treated as serious misconduct.

[7] I accept Mr C's submission that there were other avenues open to Mr H under his employment contract. However, given the fact that other aspects of the employment contract were not being adhered to, and the difficult situation Mr H was in, Mr H believed his only option was to try and get evidence of what he believed was happening.

[8] It was Mr H who disclosed the fact he made the recordings to management in the context of an employment meeting. There is no evidence or even any suggestion that Mr H provided the recordings to anyone else or even advised anyone else they existed.

[9] Therefore, while the recording breached the privacy of his manager and other employees it did not breach the privacy of any other members of the public. Mr C states in his submissions that clients' communications may have been recorded. However, there is no evidence of this.

[10] Mr H was dismissed from his employment for making the recordings and his employer laid a complaint with the Police. Mr H was then charged with making a covert recording. He was offered diversion but there were aspects of the summary of facts which he could not accept and therefore diversion was not an appropriate option. He subsequently pleaded guilty to the charge but was discharged without conviction and his name permanently suppressed.

[11] When discharging Mr H without conviction the Judge concluded that his offending was in the minor area of offending. He also considered the impact of any conviction on Mr H's future employment and decided that the consequences of a conviction on his employment prospects within the security industry would be out of all proportion to the gravity of the offending.

[12] Following the discharge without conviction this complaint was filed.

Do Mr H's actions amount to misconduct?

[13] Mr C says Mr H's actions in leaving a device recording private conversations breached the standards of the security industry and the rights to privacy of his fellow employees and broke the trust of his employer. He says that any such breaches which results in a person being dismissed from their employment should be deemed to be misconduct as defined by the Act.

[14] Mr H however says that his conduct was an employment matter and did not, and was not intended to, impinge on the privacy and security of members of the public. He says that matters of privacy, trust and confidence expected of an employee are separate matters to the issue of misconduct under the Act.

[15] For his conduct to amount to misconduct, Mr H says, it must be conduct that is shockingly unacceptable as that is the Oxford English Dictionary definition of the word "disgraceful". While his conduct may be considered regrettable, ill-judged, inconsiderate or foolish it does not amount to misconduct.

[16] Mr H's employer considered his actions amounted to serious misconduct under his employment contract and therefore, Mr H was dismissed. Mr C says that as Mr H's conduct was deemed to be serious misconduct under this employment contract it also amounts to misconduct under the Act.

[17] The definition of misconduct under the Act is however different than the definition of serious misconduct under Mr H's employment contract. For Mr H's actions to amount to misconduct they must be such that a reasonable person would consider them to be disgraceful, wilful or reckless or be a breach of the Act or regulations made under the Act.

Given the circumstances I do not consider Mr H's actions were wilful or reckless. Therefore, the key consideration is whether a reasonable person would consider them to be disgraceful or whether they breached the Act or the regulations.

[18] The use of the word "disgraceful" in the definition of misconduct was deliberate and used to indicate that misconduct must be at a reasonably high level. Shockingly unacceptable is not however the only dictionary definition of disgraceful as its other definitions include "shameful or dishonourable."¹

[19] While the definition of misconduct under an employment contract is different to the one in the Act, in general reasonable people would consider conduct that resulted in a person being dismissed because of serious misconduct would be considered disgraceful. Particularly in this case, as if Mr H had held a certificate in the class of private investigator, his actions would have been in breach of the Code of Conduct as set out in regulation 6 of the Private Security Personnel and Private Investigators (Code of Conduct – Surveillance of Individuals) Regulations 2011 (the regulations).

[20] While Mr H's certificate does not include the class of private investigator he should have been aware of the limitations imposed on surveillance as set out in the regulations.

[21] Therefore, by a narrow margin, I conclude that Mr H's actions amounted to misconduct. While the circumstances and motivation for Mr H's actions mitigate their seriousness, those issues are more appropriately considered in the context of what disciplinary action should be taken, if any.

Should Mr H's certificate be cancelled, or any other disciplinary action taken against him?

[22] Misconduct is a discretionary ground for cancellation of a certificate. Section 81(1)(c) of the Act says that instead of cancellation I can suspend a certificate, order the certificate holder to undertake further training, impose conditions on the certificate holder, reprimand the certificate holder or impose a fine.

[23] In determining the appropriate penalty, I need to consider both the gravity of the misconduct, the impact of any penalty and any other relevant factors in relation to Mr H's competency, experience and character.

[24] Mr H is an experienced and skilled security worker in the classes to which his certificate relates. There have been no previous issues or complaints about Mr H technical ability, work or competency. In addition, the covert recording arose out of a very difficult situation which put a lot of stress on Mr H. I accept Mr H's actions were a one-off event and such conduct is unlikely to occur again.

[25] While I accept Mr C's submission that Mr H's actions breached the standards required of a certificate holder and the trust of his employer there is no evidence that his actions damaged the reputation of his employer. I also do not accept that Mr H's actions were sufficiently serious that he should be prevented from shifting to another employer.

[26] Such a submission is effectively asking me to review and overturn the District Court Judge's conclusions when discharging Mr H without conviction. This is not the appropriate role of the Licensing Authority. The District Court Judge concluded that Mr H's actions were

¹ The Concise Oxford Dictionary

towards the minor end of offending and that any outcome that would prejudice Mr H's ability to seek alternative employment within the security industry was out of proportion to the gravity of the offending. I agree.

[27] Mr H has already paid a considerable price for his actions. He has lost his job and was charged with a criminal offence. Since then he has found it very difficult to find another position in his area of expertise. I do not consider any further penalty is necessary. Mr H may keep his certificate of approval.

Conclusion

[28] Mr H's actions of making a covert recording at his workplace amounts to misconduct. However, for the reasons set out above, I do not consider any penalty or further disciplinary action is warranted. Therefore, apart from the finding of misconduct, the complaint is dismissed.

[29] I make a final order suppressing Mr H's name and any other information that may identify him.

DATED at Wellington this 17th day of May 2021

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