

IN THE MATTER OF

A complaint made under s 74 of the Private Security Personnel and Private Investigators Act 2010

AGAINST

B M

HEARD by telephone and audio-visual links on 6 October 2021

DECISION

[1] Mr and Mrs D say that B M was guilty of misconduct or gross negligence when he repossessed an excavator from their property on 19 March 2021. They accept that Mr M had the required paperwork to carry out the repossession but say in doing so Mr M breached health and safety requirements, was rude and aggressive, threatened Mrs D, drove over Mr D' foot and smashed a gate and three fences.

[2] Mr M accepts that he took one gate off its hinges and the excavator drove through two fences after it was repossessed. He says the excavator only drove over the fences because Mr D blocked gate ways by parking vehicles across them to prevent the excavator being removed. Mr M denies all the other allegations made against him and says that he acted politely and professionally throughout.

[3] Gross negligence or misconduct is both a ground upon which a complaint can be made against a certificate holder and a discretionary ground for cancellation of a licence or certificate. By its very definition any negligence must be gross and misconduct is defined in s 4 of the Act as conduct that "a reasonable person would consider to be disgraceful, wilful or reckless or conduct that contravenes the Act"

[4] There is no evidence that Mr M has breached the Act. Therefore, the issue I need to decide is whether Mr M is guilty of gross negligence or disgraceful, wilful, or reckless conduct by:

- Driving into a working forestry site without notice and putting himself and others at risk by not stopping at the safety sign and not wearing safety equipment.
- Threatening Mrs D and being rude and aggressive.
- Driving at Mr D causing him to jump out of the way and running over his foot.
- Smashing a gate and 3 fences.

Was Mr M grossly negligent by entering an active logging site and breaching health and safety requirements

[5] Mr and Mrs D say that Mr M drove into a working forestry site without notice, did not stop at the danger sign and did not wear a hard hat and high visibility clothing. They say in doing this he put himself and others at risk by breaching health and safety requirements.

[6] Mr M says that milling was not in action when he visited the property. He deliberately chose to carry out the repossession at 4pm on a Friday afternoon as he knew that any milling finished early on Friday. When he first arrived at the property, he visited the house, but no one answered the door. He then proceeded to the location where he understood the excavator was located. He did not see either the keep out or danger signs referred to by Mrs D. However, even if he did, he says he was lawfully entitled to enter the property in term of the contract the Ds had with Caterpillar Australia.

[7] Neither Mr nor Mrs D were at the property when Mr M arrived. Although they both initially insisted that it was an active milling site Mr D later accepted that by the time Mr M located the excavator, milling had finished for the day and his workers were installing or working on a culvert.

[8] I accept that Mr M took reasonable precautions to ensure that he did not enter an active logging site and did not in fact do so. At most the excavator driver may have been removing logs that had previously been felled but was not felling trees at the time. In any event the excavator driver records in his written statement that he drove over to where his partner and Mr M where to see what was going on. Mr M did not drive up to where he was working and there is no evidence he put himself or anyone else at risk.

[9] There is also no evidence that Mr M drove past the "Danger – Tree Work Operations Area" sign and failed to stop. Mr and Mrs D accepted the sign was not fixed and was relocated from time to time by the excavator driver to near the location where logging was taking place. No-one who attended the hearing was able to say precisely where the sign was located on the day Mr M visited or that Mr M drove past it. I accept Mr M's evidence that he did not see it. In any event the sign said that entry was restricted to "authorised persons" and Mr M was authorised to enter under the terms of the contract Mr and Mrs D had with Caterpillar.

[10] The only other allegations of a breach of health and safety requirements is that Mr M was not wearing a helmet or high visibility clothing. If this was in fact a breach of the health and safety requirements for the site it was a minor breach and inadvertent and accordingly does not amount to gross negligence. I therefore conclude that Mr M was not negligent by driving into a logging site without notice and failing to comply with health and safety requirements.

Was Mr M rude and aggressive and did he threaten Mrs D

[11] Mrs D stated in the complaint that when she tried to tell Mr M that she had paid the overdue amount he was rude and called her a liar and other names. She said that she just tried to diffuse the situation and calm him down and that three times she asked him to come back to the house and he consistently refused. At the hearing she said that she invited Mr M back to the house for a cup of tea or a beer to try and sort the situation out. She also said she felt threatened when Mr M told her he knew where she worked and mentioned the branch of a bank where she had previously worked.

[12] I have listened to the recording of the conversation between Mrs D and Mr M. Nowhere in that recording does Mr M swear or threaten Mrs D. He appears calm and professional throughout despite some provocation with Mrs D interrupting and talking over the top of him. It was Mrs D who volunteered the information that she used to work in finance, and it was only then Mr M referred to a particular bank. This was not said in a threatening way. When Mrs D asked Mr M how he knew that, he replied that he thought he recognised her from there.

[13] The recorded conversation also establishes that Mrs D did not try and diffuse the situation nor did she ask Mr M to go back to the house to see confirmation of the payment or for a cup of tea or a beer. No such request was made. To the contrary she repeatedly told Mr M to go away and come back on Monday and she also told him to "take a chill pill and think about it".

[14] Mrs D also claimed that when she returned to where the transport vehicle was parked Mr M swore at her, told her he knew all about her and where her father lived. He then told

the excavator driver to put strops around her husband's truck to move it as it was blocking the truck on which the excavator needed to be loaded.

[15] Mr M denied ever having any further conversation with Mrs D. He denied swearing at her, making threats or saying he knew where her father lived. He said he does not even know Mrs D' maiden name and does not know her who her father is.

[16] Mr M's evidence is supported by Mr Prestney, who stated that Mr M was polite in his dealings with Mrs D and did not make any implied threats or mention Mrs D' father. He also says he was never asked to move Mr D' vehicle with a strop.

[17] No one else who as present at the time appeared to hear Mr M threatening Mrs D. I did not find Mrs D recollection of events particularly reliable. Some of her evidence was not supported by the documentary or other independent evidence. She frequently either exaggerated or minimised what happened.

[18] When questioned about established inconsistencies in her evidence she tended to dismiss the issue as irrelevant. I accept that the issues may not have been relevant to the key issue in dispute, but they are relevant when it comes to assessing the reliability of her recollection of events and her general credibility.

[19] I have already outlined some instances where the recording disproves Mrs D recollection of events and what she claims was said. Other examples of the unreliability of her evidence include:

- Mrs D stated in her initial statement that they got the excavator back the following week. However, the excavator was not returned until over four weeks later. Her explanations about the delay in having the excavator returned were also inconsistent.
- Mrs D said that one of Mr M's witnesses had told her that he had been bankrupted twice. He however had never been bankrupted and denied every advising Mrs D that he had. What he had told her was that he had also had something repossessed. He also refuted Mrs D's evidence that he did not know it was a repossession job and would not have taken the job on if he had.
- Mrs D told Mr M several times that she had already paid the amount outstanding when she was talking to him and she repeated this in her statement and at the hearing. However, her bank statement records the money as being paid at 7:35pm on 19 March which was after the recorded conversation with Mr M in which she claimed the payment had been made.

[20] I conclude that Mr M did not swear at Mrs D or threaten her in any way other than saying they would be removing the excavator as it had already been repossessed. Therefore, this ground of the complaint is not established.

Driving at Mr D causing him to jump out of the way and ran over his foot

[21] Mr D claims that Mr M was guilty of misconduct by driving at him causing him to jump out of the way and ran over his foot. This is denied by Mr M. Mr Prestney, who was a passenger in the vehicle when it is alleged this incident happened, says that Mr D was standing on the passenger side of Mr M's vehicle. He says Mr M neither drove at Mr D, nor was the vehicle driven so close to Mr D that he jumped out of the way.

[22] I do not accept Mr D evidence that Mr M drove straight at him or ran over his foot. Mr Prestney would have seen this if it had happened. In addition, if Mr M had driven towards

him and run over his foot Mr D would have told the Police when they later arrived on the scene.

Smashing a gate and 3 fences

[23] While Mrs D alleged that Mr M smashed a gate and three fences there is only evidence that he took one gate off its hinges and that the excavator ran over two fences when it was being removed. This has always been accepted by Mr M. He said after no one was at the house he found the gates into the forestry road that allowed access to the property locked. He took the gate off the hinges to access the property. There is no evidence of any damage to the gate, and I accept Mr M's actions were reasonable in the circumstances.

[24] After Mr M located the excavator one of the D' workers started driving it back towards the transporter which was parked on the public road. After Mr D was notified of the situation on the 2-way radio things escalated and Mr D arrived and blocked a gateway out with his vehicle. When Mr D was asked to move his vehicle, he advised Mr M he was not going to move and that he would block him in until Monday. Mr M then advised Mr D that if he did not move his vehicle, he would have no option but to drive through the fence.

[25] After he went through the first fence Mr D then moved a vehicle to another gateway to block the next exit way. It was then that Mrs D arrived. It is clear from the recorded conversation with Mrs D that Mr M has warned Mr D about the consequences of blocking the way out.

[26] I do not accept that Mr D only blocked the gates to stop the horses getting out. This explanation was not in Mr D witness statement and was raised for the first time at the hearing. His explanation is not logical as if he wanted to stop the horses getting out, rather than moving his vehicle from one gate to another after the first fence had been driven over, he would have got out and moved the horses to another paddock. In addition, Mr D also had a vehicle parked to prevent the excavator being loaded onto the transporter and another parked across the road to prevent access in and out.

[27] I accept that Mr D wilfully obstructed Mr M in exercising his legal right to repossess the excavator. Mr M repeatedly warned Mr D of the consequences in continuing to do this. In the circumstances Mr M had little option but to have the excavator drive through the fences. Therefore, his actions neither amount to misconduct, nor were they negligent.

Summary & conclusion

[28] None of the complaints against Mr M have been established. He is not guilty of misconduct, unsatisfactory conduct or gross negligence when repossessing the excavator on 19 March 2021. The complaint is accordingly dismissed.

DATED at Auckland this 18th day of October 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 crest 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