

IN THE MATTER OF

A complaint under s 73 of the Private Security Personnel and Private Investigators Act 2010 against **DX and DX LTD**

DECISION

1. Complaint upheld.
2. DX is reprimanded.

REASONS:

- [1] JK has laid a complaint against DX and his company DX Limited (DXL) regarding his conduct in a workplace investigation against her. The parties have agreed for the complaint to be considered on the papers.¹
- [2] The grounds for the complaint are that Mr DX failed to apply the principals of natural justice, was not impartial, thorough, nor objective in his investigation, and came to an erroneous outcome in his report. Because of this alleged negligence, Ms JK says she has suffered hurt and humiliation, and the damage done to her reputation is beyond measure.
- [3] In response Mr DX submits that Ms JK has not filed her complaint in good faith and is vexatious and/or frivolous. As such he says the complaint should be dismissed.
- [4] I address these matters separately as follows. However, before I do I note that considerable submissions and documentation have been filed in these proceedings. It has all been considered but as it would be impractical to do so, it has not all been referred to in this decision. I thank the parties for their patience while they awaited this decision.

Background

- [5] Mr DX has held an individual license in the class of private investigator since 2020. DXL has held a company license in the same class since 2021.
- [6] Ms JK volunteered and worked at the HG and had done for many years. In particular she was a member of HG's Committee (the committee).
- [7] In July 2022 HG engaged the [redacted] to undertake an investigation into allegations of workplace bullying and harassment. The RMA subsequently engaged DXL to investigate the allegation against Ms JK. The complaint was made by an employee of HG, [redacted], the Chief Executive Officer (CEO). The

¹ Pursuant to section 77(8) of the Act

complaint was concerning Ms JK in her role as committee member and was regarding her behaviour on the committee, in particular during a committee meeting on [redacted].

[8] Mr DX was instructed to answer the following questions:

- [i] Does the complaint have substance?
- [ii] Is the complaint supported by fact?
- [iii] Has workplace harassment occurred?

[9] Mr DX's investigation report (Mr DX's report) concluded, among other matters that:

- (i) Ms JK's behaviours could reach the threshold of being deemed as workplace bullying and harassment.
- (ii) Ms JK's actions may be deemed to have been inappropriate.
- (iii) There is risk of potential liability for HG if [redacted] pursued legal action.

[10] Mr DX then went on to suggest some possible resolution options for HG.

[11] As a result of the investigation, Ms JK was directed by HG to write a letter of apology and undertake not to engage in similar behaviour again. When she refused to take this action, she was dismissed from the committee.

[12] Ms JK subsequently instructed her own independent review by Ms QK. Ms QK findings (Ms QK's report) are, (summarised)² that Mr DX's report was not impartial, thorough nor objective, leading to an erroneous outcome because of failures to:

[a] Provide evidence relied on. In particular:

- [i] Relevant evidence was omitted from the report; and
- [ii] Explanations of findings were not provided; and
- [iii] The evidence relied upon could not reasonably have been relied upon to come to the finding made.

[b] Thoroughly report and objectively assess facts. In particular:

- [i] Ms JK was not given an opportunity to respond to all of the information Mr DX had access to.
- [ii] Ms JK was not provided with the opportunity to respond to the report before it was finalised as there are differences between the draft and final reports. In particular further statements were obtained after the draft was provided to her which she was not offered opportunity to respond to.
- [iii] Mr DX misled Ms JK by telling her that he had asked all committee members to provide evidence when he had only asked some of them.

² I have not discussed every point Ms QK made as that would be inefficient given its length and ambit, however I have dealt with those I consider most pertinent.

- [c] Interview relevant witnesses and obtain relevant documentation. In particular:
 - [i] Not all committee members who were present for the relevant meeting were interviewed.
 - [ii] His questions and follow ups were limited.
 - [iii] Relevant information was not considered, such as recordings of meetings and emails.
- [d] Keep to the terms of reference.

[13] Accordingly, Ms JK submits that Mr DX is guilty of gross negligence and/or misconduct and as such his COA should be cancelled.

Jurisdiction

[14] The Private Security Licensing Authority's jurisdiction is to consider whether Mr DX has breached the Private Security Personnel and Private Investigators Act 2010 (the Act). In particular whether he has been guilty of misconduct, unsatisfactory conduct or gross negligence in the course of carrying out his investigative work.

[15] 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.*

[16] 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*".

[17] It is not specifically the Authority's place to assess the findings Mr DX made, in other words conduct a parallel investigation. The Authority can however review the documentation provided to ascertain whether it is a balanced summary of what the investigation disclosed and that it generally supports the conclusions reached. The Authority has not been provided with all the evidence Mr DX and Ms QK were privy to and as such the findings in this decision are limited to the information provided by the parties for the purposes of this complaint.

[18] It has previously been held by the Authority³ that a failure to follow best practice in workplace investigations, does not amount to unsatisfactory conduct or misconduct. Private investigators utilise different practices and as such, provided they are generally thorough and transparent, i.e., reasonably competent, they are entitled to employ their own practice and procedure.

[19] Pursuant to section 73 of the Act a member of the public may file a complaint against a licensee with the leave of the Authority. However, the Authority must refuse such leave if satisfied that the complaint is not made in good faith and/or is frivolous and/or vexatious.

[20] The standard of proof required in these proceedings is the civil standard of the balance of probabilities, which put another way, is what is more likely than not.

Should leave be granted?

[21] Mr DX's counsel submits that Ms JK's complaint is frivolous and/or vexatious. His submission is that this complaint was only lodged as Ms JK does not agree with the findings of Mr DX's report. He says she only held a voluntary position on the committee and did not suffer loss or detriment as a result of the investigation because the initial result was only a direction to write a letter of apology and undertake not to engage in the behaviours again.

[22] I am satisfied that Ms JK does have an interest, greater than that of the public generally, in the subject matter of the complaint⁴ given it is regarding an investigation into her behaviour.

[23] I am also satisfied, given the findings of Ms QK's report, that the complaint is made in good faith. Accordingly leave is granted to progress the complaint.

The grounds of complaint

[24] Ms JK submits that Mr DX is guilty of gross negligence and/or misconduct because of the way he conducted his investigation. In particular she submits that he:

- [i] Failed to apply the principals of natural justice in his investigation.
- [ii] Did not provide her with all the available evidence upon which to comment before he made his findings.
- [iii] Was not impartial and in particular made findings outside the terms of reference.
- [iv] Was not objective as shown by the emotive language he used.
- [v] Was focussed on finding the outcome his employer's wished him to find.
- [vi] Misled and lied to Ms JK.
- [vii] Was not thorough as he failed to interview important witnesses, failed to take proper notes, failed to consider concerns raised about the report failed to consider all evidence available to him.
- [viii] Came to an erroneous outcome.

[25] I discuss the grounds separately below.

Was Mr DX's process inadequate?

³ DM v ST [2022] NZPSPLA 023

⁴ Section 73(3) of the Act

- [26] Ms JK submits that Mr DX's process was inadequate. She has alleged many examples of this including that he simply did not have sufficient evidence to come to the conclusion he did. This she says is evidenced by the fact that he failed to articulate how he justified his conclusion. Further, he did not specify the actual behaviour that was bullying.
- [27] I am satisfied that Mr DX did sufficiently explain⁵ that the behaviour he considered potentially inappropriate was the manner in which Ms JK conducted her interactions with [redacted], particularly at the relevant meeting. It was not necessarily what she said, but how she said it. Therefore, although he was brief, I find that he did reference the behaviour of concern.
- [28] Mr DX's findings primarily rest on the events of the meeting on 28 February and the response of other committee members to the way Ms JK was communicating with [redacted], thereby taking the perspective of how the 'reasonable bystander' would interpret the behaviour. There is nothing improper about utilising this approach.
- [29] His findings were that there *could* be liability and Ms JK's behaviour *could* be assessed as inappropriate. This is not determinative but indicative only. It is important to be cognisant of the nature of the report. It was only a fact-finding investigation; it was not determinative. The only true test of the behaviour would have been for [redacted] to have lodged a personal grievance against HG on the basis of Ms JK's behaviour. This has not been done.
- [30] Ms QK's report further states that for an allegation of bullying to be met, a repeated pattern of behaviour must be established that was objectively unreasonable.⁶ Here she points out that Mr DX only noted the possibility of inappropriate behaviour at the relevant committee meeting, therefore a finding of bullying could not reasonably have been made even if it was accepted that the behaviour at the meeting was inappropriate. I agree that Mr DX has not applied the legal definition of the term bullying specifically and in detail to the facts.
- [31] Ms QK also raises issues with [redacted]'s credibility which she does not consider were traversed sufficiently by Mr DX. None of these issues were raised or discussed in Mr DX's report therefore it is unclear whether he considered them at all. Again however, he was tasked with considering Ms JK's behaviour of which he had direct evidence being the recording of the meeting, rather than [redacted]'s behaviour.
- [32] Having assessed the plethora of evidence before me I am not satisfied that there was any significantly fundamental flaw in the process of Mr DX's investigation. He used a different process to that which Ms QK would have and as a result has come to a different finding than she did. I do not have sufficient evidence before me to establish that he was not entitled to come to the finding he did, and I discuss this matter further below.

⁵ Finding g page 9

⁶ Paragraph 6.5.4

[33] I do find that the report was relatively simple and basic, did omit some information⁷ and did not apply the legal term bullying appropriately. Accordingly, I am satisfied that the evidence has established that whilst Mr DX's investigation was adequate, his report was not sufficiently thorough. I discuss this ground below in the summary.

Did Mr DX stray from the instructed terms of reference?

[34] Ms JK submits that Mr DX amended the terms of reference. In particular he was asked whether workplace *bullying* had occurred and in his report he re-states that question as whether workplace *harassment* has occurred.

[35] Mr DX's counsel makes the point that semantic differences have no regard to the investigation and findings as it was the nature of the behaviour that was important.

[36] I find that Mr DX did amend the terms of reference from bullying to bullying and harassment without instruction to do so. This is not a semantic difference but a widening of his ambit. The terms have very different legal meanings. His findings on harassment were also not justified in the report as the term bullying was focussed on. I make specific findings on this ground below in the summary.

[37] Ms JK also submits that Mr DX went outside of his terms of reference in making findings and then recommendations. This is because he made recommendations as to what HG could do in light of his findings, rather than just providing his findings.

[38] Mr DX's counsel submits that it was his responsibility to provide a report that would be useful to HG in the circumstances.

[39] The letter of instruction does in fact request recommendations which Mr DX has provided. He was attempting to assist HG as far as he could and ultimately it was up to HG to act in whichever way they deemed appropriate upon receipt of his report. I do not find it established that Mr DX strayed from his instruction here.

Did Mr DX fail to apply the principles of natural justice in his investigation?

[40] Ms QK's report considered that Mr DX failed to apply the principals of natural justice as his report was not impartial, thorough nor objective and his process was not transparent, which led to an erroneous outcome.

Was Mr DX impartial?

[41] Ms JK viewed the inclusion of [redacted]'s "witness report" as irresponsible saying it is unsubstantiated and inflammatory, and she uses this as an example of Mr DX's bias. I am satisfied that Mr DX was entitled to consider this letter however I

⁷ such as [redacted]'s background

would have expected that he gave it the relevant (little) weight it was due. The fact that he considered it does not mean it was determinative.

- [42] Ms JK also says that given she was a member of the employing committee, Mr DX owed her a duty of care as well as that which he owed to the specific committee members who contracted him. Mr DX was not employed by Ms JK and her argument that he owes her the same duty of care he owes his employer is nonsensical. He was employed to investigate her, accordingly his relationship with her was different to that of the committee as a whole. This submission is dismissed.
- [43] Ms JK makes the further submission based on Ms QK's report that certain evidence was excluded that was pertinent, which indicates a persuasion towards a finding the Committee apparently wanted. In particular Ms QK says that Mr DX placed insufficient weight on Mr [redacted] opinion that Ms JK's behaviour was appropriate which, when seen in the light of his extensive background in bullying allegations, was weighty.
- [44] I agree that this information was important and should have been provided in the report. I make no finding as to whether it was determinative as I consider Mr DX potentially did have the evidence available to him to make the finding he did. As discussed elsewhere in this decision I consider the evidence available could have led to a determination either way. This was a fact-finding venture and not determinative, therefore an opinion regarding one way of interpreting the situation was open to him.
- [45] I do not find it established in evidence that Mr DX knowingly omitted evidence in an effort to come to a finding that HG wished him to. There is no evidence that his findings were pre-determined or directed.
- [46] With respect to the submission that Mr DX's emotive language is an indication that he was bias in presenting this report, I do not find this established. Emotive language is included however only when it has been quoted from a witness. Mr DX did not use such language in his conclusions.
- [47] There is no evidence that Mr DX was not impartial in this investigation. There is also no evidence he had any particular allegiance either way. Ms QK found that he may have been unconsciously biased in favour of [redacted] given the connection between his employee and Ms [redacted], but there is no evidence to substantiate that suspicion.
- [48] Mr DX formed an opinion about a possibility, as requested, and it is that opinion that Ms JK fundamentally disagrees with. Accordingly, this ground is dismissed as I do not find foundation for it.

Was the process transparent?

- [49] Mr DX references a history between [redacted] and Ms JK's husband in his report. He notes that it was just background however it is referred to at length. I do not find it established that this information was relevant to the investigation.
- [50] Ms JK's submission is that she requested, on multiple occasions, the audio recordings Mr DX had been provided with and was relying on, in order that she could respond.
- [51] Mr DX's counsel advises that she was provided with the recordings by Ms [redacted] given Mr DX did not have them in a format that could be provided to her. Therefore, she did have them to comment on. I accept this submission and find no failure in Mr DX's actions established here.
- [52] Ms JK was only provided with summaries of the meetings Mr DX had with other witnesses rather than recordings or transcripts, she therefore did not have complete information upon which to respond but she had the substantive information. I do not find this failure material and consider it, again, a matter of process choice.
- [53] I do find it established that Ms JK was not provided with the information that Mr DX obtained after 26 November when he gave her the draft report. It was inconsistent with the investigation and with the principal of transparency to prevent her comment on this information.
- [54] Further, she was not provided with information regarding off the record discussions in order to provide comment, and those discussions were referenced in the final report. Accordingly, I do not find that the process was as transparent as it could have been and address this issue below.
- [55] Ms JK also says she was not given the opportunity to respond to the final version of the report, only the draft version, which was subsequently amended. I do not find it incumbent on an investigator to provide parties with all draft versions of a report until it is finalised. That would be impractical and nonsensical. Mr DX provided Ms JK the opportunity to comment on the draft and was entitled to take her responses as he thought appropriate. Again, this issue is about his procedure, which he was entitled to control.

Did the investigation breach the Bill of Rights Act?

- [56] Section s 27 of the New Zealand Bill of Rights Act 1990 (BOR) requires that all decisionmakers, empowered to make determinations affecting a person's rights or interest, observe the principles of natural justice. Ms JK considers that Mr DX has breached the BOR.
- [57] Section 27 of the BOR refers to the rights people have when decision makers in tribunals or public authorities make decisions concerning them. I am not satisfied that this section is relevant in this situation. Mr DX was making recommendations and was not a decision maker. Further, his role was not on a tribunal or public authority. Accordingly, this ground is dismissed.

Did Mr DX lie or mislead Ms JK?

[58] Ms JK alleges that Mr DX lied or misled her in the following ways:

- [i] He contradicted himself regarding whether he did or did not give advice to Ms [redacted] and Mr [redacted].
- [ii] He said he would interview all committee members but in fact he did not.
- [iii] He said he would do a comprehensive investigation, but he did not.
- [iv] He indicated to her that there was no substance to the allegations.

[59] Mr DX's counsel makes the following submissions in response:

- [i] His statements have been taken out of context and misinterpreted.
- [ii] Mr DX's evidence is that he invited all committee members to engage with the investigation however not all did. They were not compelled to respond. Mr DX therefore did not mislead Ms JK when he said he intended to interview them.
- [iii] He did conduct a comprehensive investigation about Ms JK's behaviour, but he was not entitled nor instructed to go further than that.

[60] Having carefully reviewed the submissions and audio recordings, I find that Ms JK has misinterpreted some statements made by Mr DX in their meeting and subsequently. In particular:

- [a] That he provided differing information as to whether he was 'advising' HG or not. I do not find his statements as referenced conclusive. This was a conversation and in the context of Ms JK and her support people challenging Mr DX regarding HG's decisions, which were not for him to comment on.
- [b] That he would interview everybody. In fact, he said he would interview *some* people involved, and he did just that. Accordingly, this was not a misleading statement.
- [c] In no way do I find that Mr DX's failure to interview members who did not wish to be interviewed amounts to negligence or otherwise. With respect to whom Mr DX interviewed, I do not find fault with his procedures. He was only requested by HG specifically to interview Ms JK and [redacted]. He did also however provide opportunity for all other committee members to comment should they wish.
- [d] With respect to his decision to not interview the members who provided written statements, I agree that this may have limited his investigation. Ultimately, he disclosed this and therefore their evidence was provided to HG with that background.
- [e] That he indicated to Ms JK that the complaint had no substance. I do not interpret Mr DX's comments this way. Essentially, he was keeping an open mind during the investigative stage, as he should have.
- [f] That Mr DX's Counsel indicated their acceptance that there was equal treatment at some stages of the process and not necessarily at others. I accept their submission that this was not what they intended.

- [61] A further concern Ms JK has is that Mr DX failed to investigate what she terms as “the boys club”. Specifically, the way certain men at HG treated her. This was not in fact what Mr DX was authorised to be investigating. He was investigating Ms JK’s behaviour only. This issue would be for Ms JK to make her own complaint about other members’ behaviour to be separately investigated.
- [62] Essentially Ms JK has her own concerns with HG and the members of it, in particular [redacted]. Her concerns were not however the subject of this investigation. Mr DX’s role was to establish whether Ms JK’s behaviour was potentially inappropriate, and he did that.
- [63] Finally, the impact on Ms JK of the report is not a factor the Authority can consider. The report provided information for HG which they took in conjunction with other information they had, such as legal advice. Ultimately HG made their own decisions on the basis of Mr DX’s report and legal advice, and Ms JK made her own decisions on the basis of their actions. None of these decisions can be nor should be scrutinised by the Authority.
- [64] The evidence provided has not substantiated the claim that Mr DX lied to or misled Ms JK. Accordingly, this ground is dismissed.

Summary

- [65] Ms JK submits that Mr DX’s actions were a ‘reckless disregard of his legal duty and of the consequences, resulting in gross negligence, and any reasonable person would also find his actions to be not only reckless but disgraceful and wilful which meets the criteria of misconduct’. I do not accept this submission on the evidence I have.
- [66] I have however made the following findings:
- [i] Mr DX misinterpreted the definition of bullying when applying it to his investigation. Further, he has not discussed the definition of harassment nor applied it to these circumstances despite making a finding that allegations of harassment could be substantiated. There is therefore a lack of clarity around his conclusions.
 - [ii] Mr DX widened the terms of reference of his instruction without request to do so. This was improper.
 - [iii] Mr DX could have provided Ms JK with all relevant information upon which to comment and he did not, his process was therefore not fully transparent.
 - [iv] Mr DX did not discuss all relevant information in the report and did discuss some irrelevant information. The evidence has not established that this was intentionally done to drive the investigation a certain way, however it is relevant to consider.

[v] On the basis of the evidence Mr DX had, I, to the extent that I can on the limited evidence I was provided with, am satisfied that he could have made the finding he did, but also it was open to him to make an opposing finding. This is because this was a fact-finding investigation rather than a determination, and I was not privy to all the information Mr DX was.

[67] Based on these findings, I do not consider Mr DX is guilty of misconduct or gross negligence.

[68] However, I am satisfied that Mr DX's conduct in this investigation was negligent as it was not a sufficiently thorough process, and therefore meets the definition of unsatisfactory conduct.⁸

[69] Upon a finding of unsatisfactory conduct, section 81(1B) of the Act sets out the available sanctions. In light of the relatively low-level findings I have made, I consider it appropriate to uphold the complaint and reprimand Mr DX. I trust that he will take the relevant learnings he can from this process and apply them in future investigations he undertakes.

[70] Pursuant to section 96C of the Act, this decision is to be published. I consider it in the public interest that standards applied to private investigators be available for public scrutiny. I accept Mr DX's submissions as to suppression orders, in particular that:

- (i) Reputational harm would be caused to Mr DX and the [redacted] by the publication of Mr DX's name which would be disproportionate to the Authority's findings.
- (ii) The nature of the complaint contains sensitive details regarding the complainant and Ms JK.

[71] Accordingly, the decision of 15 March is to be published with adequate suppression to protect the identify of all persons named in this decision.

DATED at Wellington this 2nd day of March 2024



K A Lash
Deputy Private Security Personnel Licensing Authority

⁸ Section 4 of the Act