

EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT
HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT
AT NAPIER**

**CIV 2017-041-25
[2017] NZDC 14986**

UNDER s 102 of the Private Security Personnel
and Private Investigators Act 2010

IN RE GRACE HADEN
Appellant

IN THE MATTER Of an appeal against a decision of the
Private Security Personnel Licensing
Authority to refuse a Certificate of
Renewal in the class of Private
Investigator
Defendant

Hearing: 28 April 2017

Appearances: Appellant in Person
Mr C R Stuart as Amicus Curiae

Date of Decision: 10 July 2017

RESERVED DECISION OF JUDGE GA REA

[1] In a decision delivered on 11 January 2017 the Private Security Personnel Licensing Authority refused to renew the Appellant's Certificate of Approval as a Private Investigator. The Appellant appeals against that refusal.

The History

[2] For some years the Appellant had a Certificate of Approval in the class of Private Investigator under both the Private Security Personnel and Private Investigators Act 2010 (the Act) and its predecessor. Her latest Certificate of Approval expired on 16 August 2016. Prior to that date the Appellant applied to the Licensing Authority for a renewal. On 8 August 2016 the Licensing Authority refused the renewal.

[3] The Appellant appealed that decision. On 2 November 2016 in an oral decision I allowed the appeal and referred the matter back to the Licensing Authority for reconsideration.

[4] On 14 December 2016 the Licensing Authority issued a Minute to the Appellant setting out the material the Licensing Authority would rely upon when considering the Application for Renewal afresh. The Minute invited the Appellant to respond to the information provided and she did so on 19 December 2016.

[5] The Licensing Authority considered the Application on the material before him without directing an oral hearing and on 11 January 2017 the Licensing Authority once again refused the Appellant's Application for Renewal. On 18 January 2017 the Appellant filed the current Notice of Appeal against the Licensing Authority's decision. At the same time she made an application for interim relief to allow her to continue working as a private investigator pending the outcome of the appeal. On 7 February 2017 Judge Mackintosh granted a stayed of the Licensing Authority's decision of 11 January 2017 and that stay was to remain in place until final determination of the appeal by this Court.

Grounds of Appeal

[6] In her Notice of Appeal the Appellant sets out the following grounds:

- (a) S 13 of the New Zealand Bill of Rights Act 1990 (BORA) – freedom of thought, conscience and religion;
- (b) S 14 of the BORA – freedom of expression;
- (c) S 27 of the BORA – right to justice; and
- (d) Article 10 of the United Nations Convention against corruption – public reporting.

Decision of the Authority

[7] In arriving at a decision to decline the Renewal the Licensing Authority considered the following matters which had involved the Appellant:

- (a) *Wells v Haden* – a decision of Judge Joyce QC in the District Court at Auckland on 30 July 2008 where there was a finding in relation to a of defamation case against the Appellant.
- (b) *[Complainant 1] Complaint, Department of Internal Affairs Report and Licensing Authority decision* – this dealt with a complaint to the Licensing Authority from a solicitor. There was a report completed by the Department of Internal Affairs which concluded that the conduct of the Appellant did not necessarily reach the threshold of misconduct and therefore the complaint was dismissed. The Licensing Authority was, however, highly critical of the Appellant describing her as “unprofessional, discourteous, ill-directed and bullying”.
- (c) *[Complainant 2] complaint, Department of Internal Affairs Report and Licensing Authority decision* – another complaint to the Licensing Authority which was dismissed on the basis that her behaviour did not infringe the Act because she was not being paid for her services. The Licensing Authority was once again concerned about the aggressive and unpleasant way the Appellant behaved.
- (d) *[The victim] v Haden* – on 9 October 2015 Judge Tuohy granted a restraining order against the Appellant for two years in favour of [the victim] under the Harassment Act 1997.
- (e) The *McQuilter* statement – a statement provided by Mr Ron McQuilter, at the time the Chairman of the New Zealand Institute of Professional Investigators dated 5 December 2016 which was very critical of the Appellant.

(f) *Police File 12051/6819* – a purported Police warning to the Appellant on a potential charge of blackmail against her occasioned during the course of her work as a private investigator.

[8] The essence of the Licensing Authority's decision appears at paragraphs [69] and [70] of his decision those paragraphs read as follows:

“[69] When taken as a whole, the evidence being considered presents a clear picture of behaviour which must raise significant doubts as to the applicant's ongoing suitability to continue as a licensed private investigator.

[70] Besides issues of defamation, harassment and blackmail these documents appear to present an overall picture of the unduly aggressive bullying and threatening approach which the appellant takes in her investigative activities both paid and unpaid.”

[9] The Licensing Authority also had this to say:

“[79] The applicant appears to hold very strong views on many matters and she is adamant that there is some form of conspiracy afoot, but in the absence of any evidence to support this theory it appears to boil down to a long held obsession which can only harm her ability to carry out her duties as a private investigator in a rational and professional manner.

[80] As a private citizen she is entitled to hold very strong views but it is not appropriate that she also promotes herself as a licensed private investigator, presumably to give some credibility to the views which she is espousing and which so often appear to have limited basis and fact.”

[10] Having considered all of the material before him and after considering the submissions of the Appellant the Licensing Authority concluded that she could not be regarded as a suitable person to hold a Certificate of Approval as a Private Investigator and he therefore declined to renew her Certificate.

The Approach on Appeal

[11] Pursuant to s 102(1(a) of the Act the Appellant has the right to appeal to the District Court against a decision of the Licensing Authority refusing her Renewal Application. On hearing an appeal such as this the Court may confirm, vary or reverse the decision appealed against or refer the matter back to the Licensing

Authority with direction for him or her to reconsider the whole or any specified part of the matter.

[12] There are no issues arising in this case that the Licensing Authority was better placed than I am to consider the merits of the case and to conclude whether the decision to refuse the Renewal was correct. This is not a case where the Licensing Authority had the benefit of hearing any evidence and neither are there any issues of specific expertise that need to be factored in deciding the Appeal. The Supreme Court in *Austin Nichols and Co Inc v Stichting Lodestar*¹ outlines the way general appeals in cases such as this should be approached. As the Court said in the last two lines of [5]:

“On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.”

[13] Then again at [16]:

“Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment.”

Who Can Obtain a Certificate of Approval or a Renewal Thereof:

[14] Section 56 of the Act provides that unless cancelled earlier, a Certificate of Approval expires five years from its date of issue. Section 59 allows for a Certificate of Approval to be renewed and such a renewal is to be treated for all purposes as a new Certificate.

[15] As stated previously the Appellant’s Certificate of Approval expired on 16 August 2016 and her application to the Licensing Authority was for a Renewal for the five year period provided for in the legislation.

[16] As far as the Appellant is concerned whether she is granted the renewal is dependent on s 53(3) of that Act. That sub-section provides that the Licensing Authority must grant the application unless he or she is satisfied, based on any other evidence provided to the Authority relating to the character, circumstances, or

¹ *Austin Nichols and Co Inc v Stichting Lodestar* [2008] 2 NZLR 141

background of the Applicant, that the person is not suitable to be responsible employee of that class.

[17] It is mandatory that the Licensing Authority grant the Application unless he or she concludes based on evidence that because of the character, circumstances or background of the Appellant she is not suitable to be a responsible employee.

[18] In determining whether or not a particular applicant is unsuitable the Licensing Authority must also be entitled to consider the purpose of the Act set out in s 3. That section provides as follows:

“[3] Purpose

The purpose of this Act is to ensure that persons offering specified private security and investigation services for hire, and personnel providing those services,—

- (a) are suitably qualified to carry out that work; and
- (b) do not behave in ways that are contrary to the public interest.”

Matters Disregarded for Purposes of this Decision

[19] Of the matters taken into account by the Licensing Authority in arriving at his decision I will not be taking into account or placing any weight on three of them. The decision in the defamation case *Wells v Haden* was given by Judge Joyce QC on 30 July 2008. That significantly predates the current Certificate of Approval or Renewal thereof and I do not consider it would be fair to take into account the Judge’s comments on this application.

[20] Neither do I intend to take into account Mr McQuilter’s report. The Appellant has significant criticism of that report and any consideration of it does not assist with the decision that I have come to.

[21] I am also not prepared to take into account a possible Police warning of blackmail against the Appellant. There is some dispute, at least as far as the Appellant is concerned, about what actually transpired in relation to that matter. The

Act allows the Police to oppose a Renewal Application such as this. They have not done so and I consider it would be unfair to the Appellant to place any weight at all on that aspect of the case.

[The victim] v Haden

[22] I consider that this case is pivotal to the outcome of this appeal. In a reserved decision dated 9 October 2015 Judge C N Tuohy, having considered all of the evidence before him, was satisfied that a restraining order under the Harassment Act 1997 should be made against the Appellant in favour of the applicant in that case. It is necessary to record the circumstances as found by the Judge and the reasons he gave as to why a restraining order was required. Rather than paraphrasing or outlining my own conclusions from the Judgment it is preferable that I let the Judge's words speak for themselves where possible and therefore I am including a number of paragraphs from the decision directly into this Judgment.

[23] At the start of the Judgment the Judge stated that a Notice of Defence and Supporting Affidavit had been filed by the Appellant. He noted that shortly before the hearing date a memorandum was filed to the effect that the Appellant consented to the orders sought by the parties if the Court was satisfied that there had been harassment and that an order was necessary to protect the Applicant from further harassment. The Judge expressed the view that he did not consider that the concession before him amounted to a genuine consent and therefore he declined to vacate the fixture and went ahead and heard the matter.

[24] There a number of specific steps required before the Court has power to make a Restraining Order under the Harassment Act. In his Judgment the Judge set out those steps as follows:

“[5] The Court's power to make a restraining order is governed by ss 16 and 17 of the Act, the first step of which requires the Court to be satisfied that the respondent has harassed, or is harassing, the applicant. A person harasses another person, if he or she engages in a pattern of behaviour directed against that other person that includes the doing of a specified act to the other person on at least two separate occasions within 12 months, or which includes doing any specified act which is one continuing act carried

out over any period. A continuing act includes a specified act done on any occasion that continues to have effect over a protracted period².

[6] “Specified acts” are defined in s 4(1) as including:

4 Meaning of specified act

(1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:

...

(d) making contact with that person (whether by telephone, correspondence, electronic communication, or in any other way):

(e) giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:

(ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person:

...

[7] The last of those was added to the list of specified acts in s 4(1) as from 3 July 2015 by virtue of s 33 of the Harmful Digital Communications Act 2015 which also expanded the definition of harassment to include continuing acts. An example provided in the section itself is where offensive material about a person is placed in any electronic media and remains there for a protracted period. Those amendments give statutory recognition to the decision of Harvey DCJ in *Brown v Sperling*³ that the posting of material on electronic media is capable of amounting to harassment under the Act.

[8] Further requirements which need to be established are –

- the behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and
- that behaviour would cause distress, or would threaten to cause distress to a reasonable person in the applicant’s particular circumstances; and
- in all the circumstances, the degree of distress caused, or threatened by the behaviour justifies the making of an order; and
- the making of the order is necessary to protect the applicant from further harassment.

² Section 3 of the Act.

³ [2012] DCR 753

[25] The Judge then went on to outline what the allegations of harassment were and the effect that had on the applicant in that case. He said:

“[9] The applicant relies on a number of acts deposed to in his affidavits to establish harassment. These are:

- on 9 June 2015, the respondent sent an email to the applicant which contained a number of defamatory allegations about his conduct;
- on 3 July 2015, the respondent sent an email to the applicant containing similar allegations;
- on 4 July 2015, the respondent sent an email to the Court, copying the applicant, containing a number of similar allegations;
- on a date prior to 10 July 2015 the respondent posted on her blog website a statement containing a number of defamatory allegations about the applicant and his law firm. The applicant accessed the site on 10 July 2015;
- prior to 24 July 2015 the respondent posted two similar statements on her blog website which the applicant accessed on 24 July 2015;
- on 27 July 2015, the respondent sent an email to the applicant containing threats to publish further defamatory statements about the applicant;
- on 27 July 2015, the respondent sent the applicant another email which contained defamatory statements about him;
- on 27 July 2015, the respondent sent the applicant a further email containing implicit threats;
- on 18 August 2015, the respondent contacted the applicant’s parents by telephone and made defamatory statements about him to them;
- on 19 August 2015, the respondent sent an email to the applicant’s supervising partner which contained a threat to complain to the Law Society about his conduct;
- prior to 27 August 2015, the respondent posted on her website a further statement about the proceeding which mentioned the applicant’s father. The applicant accessed this on 27 August 2015.

[10] These various emails and web postings do exhibit a pattern of behaviour directed against the applicant. That pattern of behaviour exhibits a number of recurring features:

- allegations that he is an accessory to fraudulent conduct committed against the litigant she is supporting;

- express or implicit threats to damage the applicant’s professional reputation by publishing allegations about him if he does not comply with her demands in respect of the litigation;
- publication of the allegations about him to the world at large on her website;
- contacting persons whose regard is important to him (his parents and his employers) and making the allegations to them for the purpose of coercing him to comply with her demands in respect of the litigation.

[11] All of the individual acts referred to in [9] are specified acts either under paragraphs (d), (e) or (ea) of s 4(1) of the Act. The emails to the applicant fall under (d). The allegations against him in emails to other people and in postings on her website were intended to be made known to him. That it is obvious because their purpose was to coerce him to act as the respondent wanted him to act. The content of the emails and postings qualify as “*offensive material*” in terms of s 4(1)(e) and (ea)⁴.

[12] I am satisfied, therefore, that the respondent has harassed the applicant.

[13] I have no doubt that the behaviour of the respondent which constitutes the harassment has caused the applicant distress. His evidence is that it has and there is no reason to doubt that evidence. By the same token, that behaviour would cause distress to a reasonable person in the applicant’s circumstances. He is a person in the early part of his career in a profession where reputation is very important. The respondent’s behaviour was calculated to specifically damage that reputation. It went beyond mere threats to do so, extending to attempts to actually damage his reputation in order, no doubt, to show the threats were credible. While most lawyers involved in contentious litigation at some point in their careers have the unpleasant experience of facing abuse or unfounded assertions of personal dishonesty or malpractice from opposing litigants, the respondent’s conduct goes beyond that.

[14] I have no doubt either that the considerable degree of distress caused by the respondent’s behaviour justifies the making of the order.”

[26] The Judge then went on to determine that a Restraining Order was necessary and he commented on the Appellant’s behaviour. He said:

[15] The final matter is whether the making of an order is necessary to protect the applicant from further harassment. I have no doubt that it is. The respondent’s harassment of the applicant has been determined and persistent. The evidence before the Court shows that the respondent is convinced of the rightness of her client’s cause, convinced also that the behaviour of the applicant’s clients is not only wrong, but dishonest and even criminal and that by acting as their lawyer in the litigation the applicant is an accessory to their behaviour. It is also clear from the history that the respondent will not

⁴ See *Brown v Sperling* (supra)

be deterred from continuing her behaviour except by legally enforceable and credible restraint. That is apparent also from her approach to the applicant's parents, which shows either a lack of understanding or a disregard for the boundary between professional and personal areas.

[18] The respondent made no secret of her purpose in her communications to the applicant. It was to coerce the applicant to either comply with her demands as to the conduct of the litigation, or withdraw as lawyer for his clients. To seek to achieve that by threatening to damage or actually damaging a lawyer's reputation is not a lawful purpose."

[27] The Judge determined that a Restraining Order should be made and in that regard he said:

"[20] Accordingly, I am satisfied a restraining order should be made. The standard conditions should be sufficient to cover any recurrence of any of the types of specified acts which I find have been established here. If there is any material extant on the respondent's website or elsewhere, leaving it there after the date of this order will itself constitute a specified act and therefore a breach of this order.

[21] The duration of this order will be two years. It is to be hoped that the litigation which is the only connection between the parties will be completed by then."

[28] On 4 November 2015 the Appellant made an application to Judge Tuohy to set aside or vary the Judgment or to recall it. The Judge was unsure about the exact nature of the application so he treated it as an Application for Recall or in the alternative an Application to Set Aside or Vary the Judgment. Having considered all of the material before him Judge Tuohy refused the Application and directed submissions as to costs. As far as I am aware the Appellant has not sought to appeal or to review either the decisions given by Judge Tuohy.

[29] The Appellant's behaviour that led to the making of the Restraining Order arose as a result of her work as a private investigator. The way that she behaved was totally contrary to the public interest and the circumstances as set out in the Judgment make it clear that her character is such that she is not suitable to be a responsible employee and to have her Certificate of Approval renewed. I consider that the way she conducted herself in the *[the victim's]* case is consistent with the Licensing Authority's finding in both [complainant 1's] complaint and [complainant 2's] complaint. Her conduct is described as "unprofessional, discourteous, ill-directed and bullying" in one of the cases and "unacceptable to say the least" in the

other. These are conclusions that were open to the Licensing Authority and in my view accurately encapsulate the Appellant's behaviour in both of those cases.

[30] For completeness I wish to note that I do not overlook the fact that the Appellant's Certificate of Approval was not cancelled by the Licensing Authority during its currency. Pursuant to s 83(e) the Licensing Authority may cancel a Certificate of Approval if the Certificate holder has been guilty of misconduct or gross negligence in the course of carrying out the work to which the Certificate relates. Misconduct means conduct by a Certificate holder that a reasonable person would consider to be disgraceful or conduct that contravened the Act or any regulations made under it. As Mr Stuart recognises in his submissions the test for cancellation is fundamentally different and more stringent than the assessment required on a Renewal. On a Renewal the Licensing Authority must consider all of the relevant evidence and determine whether the character or background of the Applicant, or the circumstances in which the application is made, means that the person applying is not suitable to be a responsible employee of that class.

[31] When that question is asked in this case, even considering the [*The victim*] matter alone, I find that the Licensing Authority was quite correct in determining that the Appellant's Certificate of Approval should not be renewed and therefore this appeal is dismissed.

[32] Since the four grounds of appeal put forward by the Appellant related either to the New Zealand Bill of Rights Act 1990 or the United National Convention Against Corruption it is necessary to say that this decision, as with the decision of the Licensing Authority before it, has nothing to do with the Appellant's rights as to freedom of thought, conscience, religion or freedom of expression nor to her right to justice or to public reporting. This decision is based solely on the way that she has behaved during the currency of the Certificate of Approval and how she has not met the standard required of her under s 53(3) of the Act.

G A Rea
District Court Judge