

Employee investigations: choose your investigator wisely

A recent decision has shone a light on the lawfulness of employers using independent investigators to conduct employment investigations.

It is now common for employers to engage someone independent to investigate allegations of serious misconduct. This is especially the case where the allegations are either serious or complex, or where greater independence is appropriate. Most employers, for example, would not have sufficient in-house expertise, experience, or independence to investigate allegations of:

- *sexual harassment;*
- *serious bullying;*
- *fraud;*
- *conflicts of interest;*
- *serious health and safety breaches; and/or*
- *other serious wrongdoing (especially where the conduct may also constitute a crime).*

A June 2020 Private Security Personnel Licensing Authority decision (*Re D, E & C Limited* [2020] NZPSLA 007) has drawn attention to the requirement for workplace investigations to be lawfully conducted by personnel licensed under the Private Security Personnel and Private Investigators Act 2010 (the Act).

The decision followed a complaint to the Private Security Personnel Licensing Authority by an employee who had been the subject of a workplace investigation. The employee complained the investigators (part of a company that held itself out as specialising in independent investigations into workplace complaints) were providing private investigation services without the requisite certificate or licence.

The Authority determined the workplace investigators were in breach of the Act. This was because:

- a) the investigators were carrying on business as private investigators;
- b) conducting employee investigations meets the definition of "private investigator" under the Act;
- c) the investigators were therefore required to hold a licence as a private investigator; and
- d) the investigators did not hold the required licence.

The licensing regime under the Private Security Personnel and Private Investigators Act 2010 does not impose onerous licensing requirements. By and large it only requires a private investigator to certify they have sufficient training and experience to conduct investigations—and to pay the required licensing fee.

There are two important carve-outs in the licensing regime in the Act relevant to employee investigations:

1. **conducting investigations 'in house' does not meet the definition of private investigator** as the internal person is not someone who holds themselves out to the public as being able to conduct private investigator work; and
2. **lawyers (and others with relevant practising certificates, licences, permits, or other authority) are exempt from the licensing regime.** This exemption acknowledges the pre-existing ethical obligations those individuals (such as practising lawyers) are under.

Employment investigations by non-lawyer or non-licensed independent investigators may be in breach of an employer's good faith obligations. An investigation in breach of the Act is unlikely to be fair to the employee being investigated. The allegations against the employee may further not have been sufficiently investigated to meet the required justification threshold.

Employee investigations: choose your investigator wisely (Continued)

Employers should now be cautious when selecting an external investigator to investigate employment matters.

Want to know more?

If you have any questions about employee investigations, please contact our specialist [Employment](#) Team.

James Cowan previously worked in a specialist employee investigations and forensic role in the professional services industry (and held the requisite certificate under the Act to lawfully do so).

He has specialist expertise in workplace investigations involving fraud, conflicts of interest, bullying, corruption, or other serious misconduct.