

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 56/10

File Number: 5166248

BETWEEN Paul Gordon
Applicant/Respondent

AND Student Management Software
Solutions Limited
Respondent/Applicant

Member of Authority: Denis Asher

Representatives: Graeme Ogilvie for Mr Gordon
Paul McBride for the Company

Investigation Meeting Wellington, 9 March 2010

Submissions Received 24 March 2010

Determination: 31 March 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] There are two issues between the parties: did the respondent company (“SMSS”) justifiably dismiss Mr Gordon? And, has Mr Gordon misappropriated a code belonging to SMSS? If so, should he be required to return it, delete any copies he may have, pay damages and be subject to a penalty?

[2] Mediation on 29 July 2009 did not resolve the parties’ employment relationship problem.

The Investigation

[3] During a telephone conference on 25 November 2009 the parties agreed to an investigation in Wellington on 9 March 2010 and a timetable for filing witness statements and the provision of an agreed bundle of documents.

[4] I note here that, despite agreeing to do so, the parties failed to provide the Authority with an agreed bundle of documents for its investigation: given the volume of documentation in this matter, that failure unnecessarily lengthened the time taken to undertake the investigation and issue this determination.

Background

[5] SMSS is a small incorporated company carrying on the business of developing computer software applications, support of those applications for its clients and related services. It is owned by a number of tertiary educational institutes through a not-for-profit registered charity. Its role is that of supporting educational institutes through the development and maintenance of software to manage their student data.

[6] SMSS employed Mr Gordon as a senior developer/analyst, commencing on 2 October 2006.

[7] He was responsible for the initial and ongoing development of software applications developed and maintained by SMSS.

[8] After becoming aware shortly beforehand of what it regarded as a credible threat to the security of its business (in particular that Mr Gordon and others were intending to leave SMSS, taking its property), SMSS convened meetings with him and other employees on 19 February 2009. At these meetings Mr Gordon was provided with written advice of the initial allegations; his views were sought as was his comment was sought as to the possibility of suspension. Shortly afterward, Mr Gordon was suspended on full pay pending the outcome of SMSS' investigation.

[9] The written advice to Mr Gordon also contained notice of the risk of dismissal if serious misconduct was established.

[10] By letter dated 19 March SMSS advised Mr Gordon of the outcome of its investigation and sought his response. Mr Gordon replied by letter dated 25 March. The parties then met again on the following day.

[11] By letter to Mr Gordon dated 6 April SMSS set out its preliminary findings, in particular that his actions amounted to serious misconduct and, because his actions had eroded the trust and confidence required of the employment relationship, its preliminary view was that summary dismissal was appropriate. Mr Gordon's views were sought.

[12] Mr Gordon replied by letter dated 9 April saying he had been advised not to respond to the letter of 6 April.

[13] Two other employees being investigated resigned on 27 March and 9 April.

[14] By email on 17 April SMSS advised Mr Gordon he may have attempted to remotely access its server which, if correct, would be in breach of the direction to him of 19 February not to do so. Mr Gordon was again advised of the seriousness of the issue if it were established.

[15] The parties met on 21 April in order for Mr Gordon to respond to SMSS preliminary views. During that meeting Mr Gordon acknowledged he was not to access the server but had done so out of "*idle curiosity*" (par 2.25, statement in reply).

[16] After that meeting and reviewing all of the evidence available to it, SMSS summarily dismissed Mr Gordon by letter dated 22 April 2009. The primary reason was a finding of conflict of interest, that – in breach of the terms of his employment agreement to recognise his duties to SMSS – Mr Gordon undertook secondary employment. His grievance followed by letter dated 26 May 2009.

[17] The parties attended mediation on 29 July 2009.

[18] Mr Gordon's statement of problem was filed on 28 October 2009.

[19] Early into the Authority's investigation Mr Gordon withdrew his request to be reinstated.

[20] Later into the investigation Mr Gordon offered to gift to SMSS the data validation tool that he says is his and that SMSS says belongs to it.

Mr Gordon's Position Summarised

[21] Mr Gordon denies any conflict of interest and says his activities were permitted by the terms of his employment agreement and he enjoyed the permission of his manager.

[22] Mr Gordon seeks remedies of lost wages and bonuses, \$10,000 compensation for humiliation and costs.

The Company's Position Summarised

[23] Mr Gordon was engaged in a senior role within SMSS. He was directly responsible for the development of its software and thereby the success of the business.

[24] His terms and conditions of employment required Mr Gordon to devote his efforts to SMSS and the development of its software: he could not engage in activities contrary to his primary duties but in fact that is what occurred.

[25] Mr Gordon was dismissed following a full and fair investigation.

[26] He was dismissed for: undertaking substantial tendering work for his own company in work time and using the respondent's systems and equipment; encouraging and facilitating other SMSS staff doing the same, for his company's benefit; using the respondent's software code for his own company's work, and also using the products of his tendering work for his company in the respondent's core application; representing on a website that the respondent was connected with his own company and another business linked to his company, in order to benefit them both at the respondent's expense; developing and using key code for the respondent's

software while maintaining the code was his own property; and failing to comply with an acknowledged direction not to access the respondent's system which he admitted repeatedly doing.

[27] SMSS concluded the Mr Gordon's serious misconduct meant it could no longer have trust and confidence in him, and dismissal was appropriate.

[28] SMSS has recently sought access to the source code of one part of the work done for it by Mr Gordon, namely a data validation tool. It can no longer locate the code. If it is not returned SMSS will not be able to address issues arising and this loss has the serious potential to affect SMSS' future business. SMSS believe Mr Gordon has misappropriated the code and seeks a compliance order that it be returned, that Mr Gordon delete permanently any copies of the code in his possession or control. SMSS seeks damages for losses arising and a penalty against Mr Gordon in respect of his actions.

[29] The evidence presented to the Authority, in particular that of Mr Roberts', was significantly different from the evidence available to SMSS at the time it made the decision to dismiss Mr Gordon: his dismissal was justified on basis of his then position in respect of out of SMSS work activities/boundaries or his then admitted repeated intentional breach of lawful and reasonable directions.

[30] There can be no credible issue of condonation where there was no knowledge of particular matters, let alone any waiver of them.

[31] There is no basis, even before contribution, for any lost remuneration or any other remedy sought by Mr Gordon.

Discussion and Findings

[32] Per s. 103A of the Employment Relations Act 2000, the relevant question of whether the dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[33] In *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[34] By way of applying this test, consistent with my findings set out below, I am satisfied that – objectively reviewed – SMSS’ decision to dismiss Mr Gordon was not what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[35] The basis of the decision to dismiss Mr Gordon is set out in SMSS’ letter of 22 April 2009. The decision to dismiss rests, primarily, on a finding of conflict of interest (i.e. undertaking secondary employment) and attempting, remotely, to access SMSS’ computer system while suspended and directed not to, and comment he made to a SMSS client.

[36] In coming to my decision I place significant weight on the written and oral evidence provided the Authority by James Roberts, SMSS’ general manager from July 2007 until early 2009. The thrust of his evidence was to confirm Mr Gordon’s evidence set out from pars 6 to 12 of his witness statement, i.e. that the bulk if not all of his activities outside of SMSS were known to him, and were not only condoned but strongly encouraged by him, and that he – Mr Roberts – had ‘gifted’ the disputed data validation tool to Mr Gordon.

[37] Mr Roberts confirmed that Mr Gordon had properly advised his predecessor of these activities before commencing employment with SMSS; he told Mr Roberts also. The latter actively encouraged these activities, seeing them as of benefit to SMSS (e.g. Mr Gordon having access to computer tools and components that SMSS did not have, but which he applied to SMSS’ benefit), and that Mr Gordon’s skills were thereby updated and he remained a highly skilled, motivated and effective employee.

[38] It is clear from Mr Roberts’ successor’s perspective, Amanda Santos-Trew, that – in the weeks between her appointment on 26 January 2009 and her decision to first suspend and then dismiss him – she neither accepted the credibility of Mr

Gordon's claims as to the condoning of his secondary employment activities nor that it was actively encouraged so as to provide benefit for SMSS itself. That conclusion was unfortunate because, objectively measured, it was plainly wrong. This mistake occurred because Ms Santos-Trew failed to inform herself of the true nature of SMSS' relationship with Mr Gordon. The mistake resulted from Ms Santos-Trew's initial inquiry, focused as it was on a threat that another employee in particular, and Mr Gordon with others, were intending to leave SMSS, taking its property (see SMSS' letter of termination dated 22 April, 2nd par, p 3). The concerns about conflict of interest came to light as a result of Ms Santos-Trew's initial inquiry.

[39] Notwithstanding clear answers from Mr Gordon, the error was compounded by Ms Santos-Trew seeing no need to directly interview Mr Roberts herself, or the general manager before him, and measure through them the veracity of Mr Gordon's defence. Ms Santos-Trew did not put Mr Gordon's claim of condonation before Mr Roberts. Had she done so Ms Santos-Trew would surely have obtained the evidence Mr Roberts provided the Authority. Questions put to Mr Roberts focused instead on the credibility of the threat to SMSS (which I note he downplayed – see SMSS' doc 7).

[40] While Mr Roberts was interviewed by other representatives of SMSS, the questions put to him did not focus directly on the matters for which Mr Gordon was later dismissed, but related in particular to the activity of another employee (who subsequently resigned).

[41] What Mr Roberts explained to the Authority was that, notwithstanding the express terms of Mr Gordon's employment agreement, he actively encouraged Mr Gordon and other employees (and as is made clear in SMSS' doc 7) to maintain other work interests outside of SMSS, and the resulting active cross-pollination.

[42] I do not accept that the scope of that secondary work was as narrow as SMSS claims.

[43] I find from the extent of the historical exchange that it suited both parties to purposefully blur the lines between Mr Gordon's duties for SMSS and his secondary employment.

[44] I do not accept that SMSS made a decision to dismiss Mr Gordon based on evidence provided by Mr Roberts which he then changed before the Authority: that is because there is no evidence of SMSS putting to Mr Roberts what Mr Gordon had put to it – that he enjoyed authority to undertake secondary work. As set out above, the evidence instead is of SMSS questioning Mr Roberts in respect of Mr Gordon and, in particular, another employee and the likelihood of them walking out with SMSS' core business (SMSS doc 7). Even there, the evidence is clear that Mr Roberts allowed his staff considerable flexibility to 'do their own thing'.

[45] Having failed to test Mr Gordon's defence, SMSS had no fair and reasonable basis to conclude he was acting in breach of his obligations to it.

[46] Mr Gordon enjoyed an impeccable working history with SMSS. Ms Santos-Trew failed to properly take that record into account in rejecting his untested explanation.

[47] Mr Gordon's conduct, when measured against the condoning and active encouragement of his employer, prior to Ms Santos-Trew's appointment, could not amount to a conflict of interest.

Other Matters

[48] I do not accept that Mr Gordon's attempts to remotely access the SMSS network or his communication with a client amount to serious misconduct. The former was, predictably, a matter that would become known to SMSS. And it did not result in any damage to its property, or any breach of security of its systems (as Mr Gordon's ability to access the network had been withdrawn).

[49] It was nonetheless a foolish initiative, unnecessarily alarmed Ms Santos-Trew, and is properly dealt with below by way of contributory fault. Mr Gordon's communication with a client was borderline inappropriate behaviour and does not amount to action justifying his dismissal.

[50] Both behaviours should also be measured in light of Mr Gordon's situation, his suspension and then dismissal, and – what no doubt would have been to him – the

astonishing turn around by his employer in respect of behaviour it previously condoned.

Remedies

Lost Remuneration

[51] Mr Gordon seeks lost wages and bonuses. The latter can be disposed of promptly: Mr Gordon has no contractual basis to claim what is anyway a most uncertain bonus.

[52] Mr Gordon has given compelling evidence of his unsuccessful attempts to find employment in a specialist field, one much affected by the current recession and – of course – his loss of reputation. He has had some fixed term work.

[53] I am satisfied that, given his efforts, it is appropriate Mr Gordon be awarded lost income from the time of his dismissal to the date of the investigation, less his earnings during this time. Leave is reserved to the parties if agreement is not forthcoming as to this amount.

Compensation for Hurt and Humiliation

[54] Mr Gordon seeks \$10,000 compensation under this heading. The evidence from Mr Gordon in this regard is compelling: the effect of his unjustified dismissal on himself and his family was profound and far reaching. The effects on his family in turn impacted Mr Gordon. That evidence was not disputed by SMSS.

[55] In all the circumstances I accept the sum sought as appropriate and order SMSS to pay \$10,000 to Mr Gordon under s. 123 (1) (c) (i) of the Employment Relations Act 2000 (the Act).

Contributory Fault

[56] Mr Gordon acknowledged he attempted to access the SMSS network despite an instruction not to do so: I am therefore satisfied his actions – albeit to a modest

extent – contributed to the situation that gave rise to the personal grievance. In all the circumstances I am satisfied the remedies awarded Mr Gordon should be reduced by 5%.

SMSS' Claim

[57] SMSS said the data validation tool is its, that Mr Gordon misappropriated it and (as advised at the investigation, and by way of predicted but uncertain replacement costs) sought \$27,000 damages for losses arising from his actions, as well as a penalty.

[58] I am satisfied from the evidence of Mr Gordon and Mr Roberts that the former produced it in his own time via tools and components the SMSS did not possess, for the latter's benefit. I am also satisfied that, because of and consistent with the relationship, Mr Roberts 'gifted' the tool to Mr Gordon.

[59] SMSS' claim is therefore dismissed.

[60] However, I record here Mr Gordon's undertaking to provide the tool to SMSS.

[61] Because of the effective merging of Mr Gordon's secondary activities with SMSS' interests it is appropriate, in good faith and as it entails no financial cost to him, that he do so. I am confident compliance action will not be required by SMSS to see Mr Gordon honour that undertaking.

Determination

[62] SMSS is to pay Mr Gordon lost income from the time of his dismissal to the date of the investigation, less his earnings during this time.

[63] SMSS is also to pay Mr Gordon \$10,000 (ten thousand dollars) compensation for hurt and humiliation. Both amounts are to be reduced by 5%.

[64] Costs are reserved.

[65] As indicated to the parties during the investigation, subject to their submissions and any without prejudice save as to costs offers, I can indicate a costs award of \$3,000 to the successful party.

Denis Asher

Member of the Employment Relations Authority