

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 157/10
5292358

BETWEEN RYAN VAN SPRANG
Applicant

AND CHIEF EXECUTIVE
DEPARTMENT OF
INTERNAL AFFAIRS
Respondent

Member of Authority: P R Stapp

Representatives: Graeme Ogilvie for Applicant
Joanna Holden and Stephen Rogers for Respondent

Investigation Meeting: 21 July 2010 at Wellington

Submissions received: By 5 August 2010

Determination: 1 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Van Sprang commenced employment at the Department of Internal Affairs (DIA) on 1 September 2008 as an administration assistant. Prior to that he had been employed under an arrangement to work at DIA and the agency paid him upon receipt of invoices.

[2] After 1 September 2008 when Mr Van Sprang's employment had commenced directly at DIA he received double payments from the agency and DIA for his pay. DIA discovered the discrepancy. Mr Van Sprang paid the money back to the agency. In the meantime an investigation was started by Mr John Currie, National Manager Licensing Regulation and Compliance Branch. Meetings were held, and upon

delegations being provided a disciplinary process was commenced by Mr Michael Hill, Director Gambling and Compliance Group.

[3] On 17 March 2009 Mr Van Sprang was dismissed by Mr Hill. Mr Van Sprang denied being dishonest. He is seeking reinstatement and this has been vigorously resisted by DIA. DIA has denied all of Mr Van Sprang's allegations and claims.

[4] Both parties have claimed costs. The matter has been to mediation with services provided by the Department of Labour.

Issues

[5] The broad issue to determine is whether DIA acted as a fair and reasonable employer would have acted in all the circumstances-applying s 103A of the Employment Relations Act. This test requires me to assess whether or not DIA would have dismissed Mr Van Sprang for serious misconduct on the basis of the information available at the time and whether or not it acted fairly. Also, on the basis of the information available to DIA at the time, whether or not the decision maker came to an honestly held belief that Mr Van Sprang's actions were deliberate, and whether or not DIA has sufficient proof to meet the gravity of the allegations to enable it to reach a conclusion that Mr Van Sprang had deliberately obtained a double payment for wages.

[6] There are some factual disputes. These are:

- (i) Whether or not Mr Van Sprang was told by Mr John Currie that he could submit timesheets to the agency?
- (ii) How and when did Mr Van Sprang find out his start date was 1 September 2008; at a meeting with Mr Currie in early September 2008 or from a letter from Mr Currie dated 16 February 2009?
- (iii) Was Mr Van Sprang prejudiced during DIA's investigation involving Donnah Bowes, Senior HR Advisor?

- (iv) What information did Mr Hill rely on at the time to reach a decision and did that decision involve an honestly held belief that Mr Van Sprang's actions were deliberate amounting to serious misconduct?
- (a) Was it reasonable to conclude that Mr Van Sprang would have known his start date was 1 September?
 - (b) Was it reasonable to conclude that Mr Van Sprang's information that he did not check his bank statements was plausible?
 - (c) Was it probable that he was delivered his first two DIA timesheets by Olivia McCarthy, HR Administrator?

The facts

[7] Mr Van Sprang was employed by DIA on a temporary basis from November 2007 until August 2008. An agency paid him for his work on the receipt of invoices.

[8] In September 2008 Mr Van Sprang was appointed to the permanent staff as Administration Assistant, Licensing Unit Gambling Compliance Group in Wellington. DIA became responsible for paying him.

[9] Following his appointment to the permanent staff Mr Van Sprang submitted two timesheets to the agency that administered and paid him while he was in temporary employment with DIA. The timesheets were for the weeks beginning 1 September 2008 and 8 September 2008.

[10] Mr Van Sprang queried Mr Currie over when he would be paid and not over when he was employed, I hold. Mr Van Sprang knew that he was working for DIA (documents 27, 28, 38 (page 110) and 39 (page 121) support my finding). Mr Van Sprang has changed his position from saying he did not know when he was paid to he did not know when was employed, which has emerged during the Authority's investigation. DIA's witnesses' evidence has been consistent that his date of employment was not an issue, I hold. The finding is also supported by a letter dated

18 February 2009 from the applicant which said “[W]hat date I would be paid by DIA” and “I did not know what date I would be paid from” and “exactly when I would be paid from DIA”: (document 27, page 83).

[11] I hold that it was probable that Mr Van Sprang knew that he had been employed by DIA and his start date because he had confirmed that he had checked on the internal DIA announcement of postings, which had his name and the dates 28 or 29 August 2008. He had received an offer of employment dated 14 August 2008. He had signed and accepted the offer on 22 August 2008. He also had completed a tax code declaration and provided a banking authority. His employment was subject to a short review period for any internal applicants and the permanent commencement date would commence immediately after 29 August 2008. 29 August was a Friday and a clear assumption would be that his permanent employment would commence from 1 September 2008. After that time he could reasonably have expected that he would be paid by DIA.

[12] Mr Van Sprang knew when he submitted the timesheets that he was employed by DIA because he has acknowledged that “*Ryan; I knew I was working for the Department but confused when I got paid*” (document 39 page 121).

[13] Mr Van Sprang received salary payments from DIA after his account details were verified (documents 12 and 18). Also, Mr Van Sprang received payments for services from the agency and the agency invoiced DIA with the agency’s fees added for payment (documents 11, 13, 15, 16 and 17). The double payments were not discovered for a number of months by DIA which had paid the agency. The discrepancy came to light when the invoices went through the DIA accounts payable system.

[14] On 18 September 2008 Mr Van Sprang requested a payslip and two payslips were delivered to him in person by Olivia McCarthy HR Administrator (documents 16 and 17). I accept her evidence because it was clear and certain about her communication with Mr Van Sprang and providing him with the pay slips he had requested. However, this was information that Mr Hill did not have at the time as the decision-maker.

[15] In early February Mr Currie and Mr Van Sprang had a discussion about the possible overpayment. They dispute what each other said at that time and what was to be done. The next development was that Mr Currie wrote to Mr Van Sprang on 16 February outlining the problem and the need to meet.

[16] On 18 February 2009 Mr Van Sprang attended a meeting and took his brother to discuss the matter with Mr Currie and Donna Bowes Senior Human Resources Advisor. He supplied a written statement and provided oral responses to a number of questions (documents 27 and 28). At the meeting Mr Van Sprang confirmed that he was aware his start date was 1 September 2008. He confirmed that he had submitted two timesheets claiming payment from the agency because he said that he was unsure when he would be paid by DIA. It also emerged during the meeting that the two timesheets were photocopies of previously signed timesheets. Mr Van Sprang claimed he had done this with the approval of his team leader, Jon Teare, and that Mr Teare had approved all his timesheets including the two in September 2008.

[17] Mr Currie followed up those claims with Mr Teare after the meeting. Mr Teare confirmed that on occasion he allowed photocopied timesheets, but had always visually approved them before they were despatched and that he would not have approved the two September timesheets because he knew that Mr Van Sprang had become an employee of the DIA (documents 30 and 31).

[18] Mr Mike Hill then took over the disciplinary process. He had been briefed by Mr Currie and Ms Bowes on the issues concerning the two timesheets. He decided that there was potentially a serious matter and he initiated a formal process to further investigate the facts.

[19] Mr Hill obtained a delegation to deal with the matter, including if necessary to determine any disciplinary outcome, which included dismissal if that was appropriate (document 32, delegation).

[20] On 5 March 2009 Mr Hill met Mr Van Sprang and Mr Van Sprang's lawyer, John Tannahill. Mr Hill put Mr Van Sprang on notice of the seriousness of the matter. He used a pre-prepared list of questions, which he used to ask Mr Van Sprang questions and he made handwritten notes. Mr Van Sprang had an opportunity to reply

and explain. The issues covered were what and if Mr Van Sprang knew his start date, why Mr Van Sprang sent timesheets to the agency, and the practice of using photocopied timesheets agreed between him and Mr Teare. Mr Van Sprang provided a copy of his bank statement and explained that he would not have seen the money in the account because he used internet banking. He accepted that he had not paid back any money at that stage. The meeting adjourned.

[21] Mr Hill then met with Jon Teare to clarify the information he had provided to John Currie (documents 30 and 31). He considered Mr Teare's explanation of the timesheet checking procedure. Mr Hill then deliberated over a decision. He found that he had no reason to disbelieve Mr Teare, that he felt during the meeting on 5 March Mr Van Sprang had been vague and his explanations lacked credibility (of being confused), that Mr Van Sprang's story was unbelievable, and that Mr Van Sprang must have known he had "*double dipped*" and had done nothing to try and rectify the problem.

[22] There was another meeting held on 17 March 2009. The purpose of this was to enable Mr Hill to go through the considerations he had reached, gave Mr Van Sprang and his lawyer an opportunity to respond, and after a further break Mr Hill informed Mr Van Sprang that he was guilty of serious misconduct and terminated his employment. He gave Mr Van Sprang a letter (document 46) confirming his dismissal.

Submissions

[23] The applicant's representative has made submissions that the dismissal can not be justified because the payment of the wages involved nothing more than an overpayment that could be corrected and the matter put right. On its own the matter would not be deserving of a dismissal. Next the facts did not support the applicant knowingly and deliberately submitting two time sheets. He relied on:

- (a) Mr Van Sprang's employment with DIA was continuing employment where there was no change to work undertaken by Mr Van Sprang. The overpayment was the employer's responsibility, and in any event had been paid by the

agency, not DIA. There was no follow up by DIA. DIA's justification of the dismissal is based on an argument inconsistent with Mr Currie's evidence that he "*suggested*" that Mr Van Sprang contact the agency.

- (b) Mr Van Sprang did not disclose the payment when he did not know about it.
- (c) The offer of employment did not refer to a start date.
- (d) A memo dated 27 February 2009 from John Currie never mentioned a start date. The context of the memo means they never discussed which day of the week was pay day. It was not until February 2009 that Mr Van Sprang says he learnt his start date was 1 September 2008.
- (e) That Mr Currie confirmed the payment would be fixed involving Mr Van Sprang getting any invoice from the agency for any overpayment. Thus it would be understandable why Mr Van Sprang would have done nothing more about it, and indeed forgot.
- (f) August timesheets had already been submitted and any discussion in September could not have been about those.
- (g) Mr Van Sprang did not recall receiving any pay slips. This was never raised at the time. DIA accepts that, but at the time Mr Van Sprang informed DIA that he had not contacted pay roll.
- (h) A questionable system of approving timesheets had been in place. In any event Mr Van Sprang's supervisor had moved on by September and that is why he approached his manager, Mr Currie.

- (i) The intranet did not show any start date. The start date would not be obvious.
- (j) The DIA's action does not fall within the Fraud Policy applied by the department.

[24] I have not needed to go into any detail on the respondent's submissions as my determination will make those obvious.

Determination

[25] At the time of Mr Van Sprang's offer of appointment to a permanent position there was no documentary reference made to a start date and that John Currie only knew approximately when Mr Van Sprang would start. Indeed the evidence is that at that time no one from DIA referred to an actual start date. The DIA concluded that Mr Van Sprang would have reasonably known it was 1 September 2008. I have accepted that for the reasons I have relied on earlier. Having accepted that the applicant would have known that he had been employed by DIA from at least that date and that the queries he was making of Mr Currie were about when he would be paid, leads to whether or not DIA reached an honestly held belief that Mr Van Sprang acted deliberately.

[26] DIA's justification of the dismissal has been based on its findings that Mr Van Sprang deliberately and knowingly put in timesheets for pay from the agency at the same time he was paid by DIA. He was paid twice. He did not immediately pay the money back because he says he did not know until February 2009 when Mr Currie raised it. However, the applicant's position is not supported by the evidence of an earlier conversation where Mr Currie put it to him to contact the agency and when he did not do so because it had slipped his mind. The first suggestion that he put through the timesheets because he was not sure whether he was then an employee did not get raised until a letter dated 22 September 2008 sent to DIA from his representative (document 53). He says he did not know he had been paid by DIA because he did not always check his bank account and had an overdraft facility. Mr Currie made a detailed analysis of Mr Van Sprang's banking arrangements and account (paragraphs 27 and 28 of the written statement). Mr Hill the decision maker confirmed that he

was given a bank statement, he understood Mr Van Sprang used internet banking and discussed payslips with Mr Van Sprang. During their conversation Mr Hill recalled Mr Van Sprang saying he was not looking for his pay in the bank account and that he probably did have a look at the payslips. Mr Van Sprang's claim that he was told by Mr Currie to submit the timesheets has been made even more recently. Indeed it was raised for the first time in his evidence for this investigation and there is an issue about the timing of their conversation. Mr Hill preferred Mr Teare's explanation at the time and that Mr Teare was aware that Mr Van Sprang was directly employed by DIA. Mr Hill had to then decide on Mr Van Sprang's behaviour and his credibility. Mr Hill decided that Mr Van Sprang had been vague and his explanations lacked credibility (of being confused), that Mr Van Sprang's story was unbelievable, and that Mr Van Sprang must have known he had "*double dipped*" and had done nothing to try and rectify the problem. In conclusion Mr Hill's findings were based on:

- a. Mr Van Sprang being familiar with office procedures. Mr Van Sprang could not have been confused, which Mr Van Sprang was relying on at the time.
- b. Mr Van Sprang knew his timesheets had to be processed with Mr Teare actually seeing them.
- c. Preferring Mr Teare's information because he was consistent with the information he had given to Mr Currie.
- d. Mr Van Sprang had received an offer of appointment in writing and could have checked his payslips electronically.
- e. Mr Van Sprang completed a tax code declaration and banking authority that confirms employment commencing with DIA.

- f. Two full weeks involved and not just an overlap of one or two days.
- g. Mr Van Sprang's banking withdrawals were consistent with him having some knowledge about how much was in his account and not solely reliant on an overdraft.
- h. Mr Currie's information that any repayments for overpaid wages would have related to the period before 1 September 2008 (27 February 2009 memorandum).

[27] Also, I find that Mr Van Sprang's written statement prepared at the time (27 in the bundle) confirmed he had become a permanent employee on 1 September 2008 and Mr Currie would have known that because of the letter of offer and appointment. Mr Van Sprang's first explanation related to being confused and there being a miscommunication. However, Mr Van Sprang's evidence has to be balanced with Mr Currie raising the matter with him and then Mr Van Sprang submitting two time sheets in September knowing that he had been employed by DIA. Another point is that Mr Currie's explanation about the timing of any conversation would not have been about timesheets submitted in September and Mr Van Sprang probably would have been talking about timesheets already submitted and not timesheets that he was intending to submit. Secondly Mr Van Sprang says he forgot to contact the agency when Mr Currie suggested he should do so. Finally Mr Van Sprang contradicted his evidence that Mr Currie told him to contact the agency with another comment that he says he never was told by Mr Currie to contact the DIA's payroll team and or the agency and to check his bank account.

[28] I accept that this was not a matter of just simply an overpayment as it has been submitted on Mr Van Sprang's behalf. Mr Van Sprang made a conscious decision to put in two timesheets to the agency when he would have known that DIA would pay him and that moves had been taken to pay him. He knew he had been employed directly by DIA at that time considering the offer of appointment. Thus, it must follow that his motive would have been scrutinised by DIA. Having come to the

decision that he acted deliberately and knowingly a fair and reasonable employer would characterise such behaviour as a matter of serious misconduct going to the core of the relationship. It described this as a lack of integrity and a breach of trust and confidence.

[29] The credibility issues between Mr Van Sprang and Mr Currie have arisen over evidence in their written briefs of evidence, and about a conversation about any overpayment and submitting timesheets. As such Mr Currie attended the meeting held on 5 March and the issues were not central at that time. Matters have since been raised for instance that he put through the timesheets because he was not sure whether he was then an employee. This was raised in the letter dated 22 September 2008 which was sent to DIA from his representative (document 53). Also, Mr Van Sprang said that he was told by Mr Currie to submit the timesheets, which Mr Currie has denied. Mr Teare was not in the Compliance team and any conversation with Mr Currie has to be considered in the context of the timing, I hold.

[30] Even if I am wrong and Mr Van Sprang had genuinely not known that he had been paid twice and genuinely believed that if there was a problem he could wait for an invoice, Ms McCarthy's evidence that he had been contacted in regard to his bank account and he had requested pay slips that she had given him, would have raised an issue about his contribution. As such it would have been open to me to conclude he had deliberately put in the two timesheets and he would have known the planning was in place to be paid by DIA. His contribution would have had a profound impact on any remedies. In such a case where Messrs Hill and Currie have resisted any reinstatement I would have found, based on Ms McCarthy's evidence of providing the timesheets to Mr Van Sprang, that it would be impracticable to reinstate him.

[31] I now turn to the procedure. There was no predetermination because Mr Hill was an independent decision maker. He had a delegation, and although it was not a perfectly written delegation by any means, I accept that it was written on the basis of an investigation to occur, and to be followed by any disciplinary meeting. Mr Hill was the sole decision maker. I also accept that following the meeting on 5 March he had a letter prepared, he did not finalise his decision until Mr Van Sprang had an opportunity for any final input, comment and anything else to say and or explain, and before signing the letter off. Mr Hill's involvement in meetings on 5 and 17 March

makes it probable that he had not predetermined an outcome because of the matters he raised and the opportunity given to Mr Van Sprang to comment and reply before any decision was announced. Mr Hill reviewed the facts from the information available at the time, talked to people involved and gave Mr Van Sprang an opportunity to reply, comment and or explain. Mr Van Sprang had been put on notice to comment on any possible outcome.

[32] The final matter is the allegation from Mr Van Sprang's brother that Ms Bowes harassed and bullied Mr Van Sprang during DIA's investigation involving Mr Currie, and Mr Tannahill's claim that the meetings where the allegations apparently occurred were not fair because there was an absence of a lawyer. The details of any such allegations were not made until these proceedings. Mr Tannahill did not provide any details in his letter dated 4 March. Even although Mr Tannahill at the time was critical of the meetings Mr Van Sprang was not prejudiced because Mr Hill took on the responsibility of conducting his own enquiry and making his own decision and Mr Tannahill was present at the meetings in March. Thus, I hold that there was no prejudice to Mr Van Sprang and his brother when they met with Mr Currie and Ms Bowes, without a lawyer.

Orders of the Authority

[33] The applicant's claim is dismissed.

[34] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority