

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 292/10
5156610

BETWEEN VANITHA SUBRAMANIAM
Applicant
AND SUSTAINABLE BUSINESS
NETWORK INCORPORATED
Respondent

Member of Authority: Dzintra King
Representatives: Andrew Swan, Counsel for Applicant
Richard Harrison, Counsel for Respondent
Investigation Meeting: 1 May 2010
Submissions Received 11 May 2010 from Applicant
25 May 2010 from Respondent
Determination: 22 June 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Vanitha Subramaniam, contends that she was unjustifiably dismissed by the respondent, Sustainable Business Network Incorporated (“SBN”). Ms Subramaniam was employed by the respondent on 21 January 2008 as Operations Manager. This was a new position created to accommodate the company’s growth.

Background and Finances

[2] Ms Rachel Brown, the CEO, said there were a number of factors towards the end of 2008 which pointed to a deteriorating financial situation – a change of government and the onset of a recession being the two main factors. When the National Government was elected it was clear early on that there would not be a confirmation of financial support and in November 2008 they were advised that the

government funding was likely to be withdrawn. That was given effect in February 2009. Up until then the organisation had been receiving \$200,000 a year in government funding and this would be a significant loss in revenue.

[3] The other sources of funding for the Sustainable Business Network are sponsorship and membership. After months of negotiation in September 2008 it was confirmed that they were unsuccessful in gaining two additional cornerstone sponsorships that were to provide \$200,000 a year. They were starting to lose award sponsorships along with membership. These were recession related. The situation deteriorated in a reasonably short space of time, turning around some positive growth when the organisation enjoyed government support and businesses were doing well, to a situation where the support together with the impact of the recession was withdrawn and they were facing a significant reduction in income.

[4] In November 2008 Ms Brown had discussions with Mr Chris Morrison, the Chairperson, about these challenges. They talked about the need for cost savings and as part of that looked at positions they thought could be disestablished. The duties and responsibilities of the Operations Manager were such that they believed they could be undertaken by existing positions within the organisation without having any impact on core services to members. It was a position that was not relied on for providing any member services and could integrate into other roles. The review of the Operations Manager's role was not in isolation and was just the start of a process which eventually led to a reduction of four positions in the National Office, reducing from 9 staff to 5, the closure of two regional offices reducing them from 6 to 4 and eventually reducing the SBN team by 50%.

[5] Ms Subramaniam was of the view that it was apparent by September 2008 that SBN was growing and she received a letter in September 2008 which referred to a turn around in the financial situation for the 2007 to 2008 financial year.

[6] Ms Subramaniam referred to a National Board report dated 10 November 2008 which referred to increased growth.

[7] Ms Subramaniam deposed that she was surprised at subsequent events.

Meeting Monday 15 December

[8] At 4.30pm Ms Subramaniam attended a meeting with Mr Morrison, who as well as being the chairperson was a founding member of the Sustainable Business Network Inc. Mr Morrison handed her a letter which she did not read at that stage. Ms Subramaniam said Mr Morrison did not refer to the letter by its contents but proceeded to tell her that her job was to be disestablished. She said he made it clear that the decision had already been decided and was final. He apologised for what had happened and said that he and Ms Brown had discussed this matter and concluded that there was no option but to disestablish the position. He told her that it was nothing personal, that it had not been an easy decision and that the decision made had been given a lot of thought. He mentioned economic downturn, member decline and sponsorship concerns.

[9] The letter given to Ms Subramaniam by Mr Morrison reads:

Proposal to disestablish the role of Operations Manager for SBN

The Sustainable Business Network is in the unfortunate position of having to review our staffing structure at the SBN and is not considering dis-establishing the role of Operations Manager at the SBN.

After considerable review of our financial situation we have concluded that to remain stable the SBN must reduce its running costs. The key influences have been:

- 1. the recent tough economic period which we now understand will continue for some considerable time*
- 2. a sudden slowing in membership and increase in resignations*
- 3. our inability to attract and confirm our major foundation sponsor for 2009 onwards.*
- 4. that the Operations Manager position is the only position at the SBN that can more easily be assimilated into existing roles within the organisation.*

We appreciate that this will come as a shock to you so I want to reiterate that this is in no way personal and we appreciate the good work you have done for the SBN.

I would like to ask you to come a formal meeting on Wednesday 17th with myself and Rachel. Please bring a support person with you if you wish. During this meeting we can discuss further the points above and any constructive input you may have to offer.

This meeting will be followed up with a further meeting to discuss an outcome. I suggest we make this meeting on Friday 19th.

[10] It can readily be seen from the letter that this is a proposal to disestablish the position, not a statement that the position has already been disestablished.

[11] Mr Morrison said that Ms Subramaniam was clearly upset by the news and initially did not say anything. She then asked when she would be finishing. He said that they were going through a process and referred to the meetings set out in his letter. He did not say she would be finishing, but talked about the next meeting and that they would like to involve her in the discussion.

[12] He said Ms Subramaniam did not look at her copy of the letter or refer to it. He agreed that Ms Subramaniam had raised an issue regarding the notice period in her contract. He said she asked when she would be finishing and what she would be paid out. Mr Morrison said he was not prepared for that type of discussion and did not have any answers. He did not know what was in her contract and said that she would be paid out whatever she was entitled to under her contract.

[13] At that stage Ms Subramaniam pointed that she had completed staff performance reviews and that there were letters prepared indicating wage rises for staff. He was not aware of that proposal. After the meeting he spoke to Ms Brown and mentioned the wage increases. Ms Brown said these were cost of living increases that were as a result of a process Ms Subramaniam had carried out in her function as HR Manager. Ms Brown and Mr Morrison agreed that it would not be appropriate to proceed with any increases despite these being well overdue and reasonably limited in terms of the overall cost to the organisation.

[14] Ms Subramaniam said that after the meeting she spoke to her secretary and also read the letter that had been handed to her by Mr Morrison. Although that letter stated that it was a proposal, it was not what had been conveyed at the meeting, which was that the decision had been made and it was final. At 5.47pm that evening Ms Subramaniam received an email from Ms Brown. The email says that Ms Brown is sorry about what had happened, that she would be in the office the following day and would like to talk to Ms Subramaniam. The email concluded:

I hope you found someone to talk to about this so you have the chance to think about the options before we meet on Wednesday.

16 December 2008

[15] On the morning of the 16th Ms Brown invited Ms Subramaniam for coffee to talk about things and as a follow on to her email. Ms Brown outlined the situation they were facing with the lack of success in securing the cornerstone sponsorship, the potential loss of government funding and confirmed loss of award sponsorships and the real need to cut costs. Ms Brown said she did not know whether Ms Subramaniam was listening and one of the first things she asked was when had they decided. That was when Ms Brown said they had been talking about it for a month or so, again explaining the need for cost savings.

[16] Ms Subramaniam said that Ms Brown told her she had known that she would be leaving for about a month. Ms Brown denies that. Ms Brown said she tried to be very clear that the proposal was not a done deal and they were keen to work with her to see whether there were other ways of reducing costs. She did not believe Ms Subramaniam wanted to hear that message and her next response was to ask how much she was going to get paid and then when that was going to happen. Ms Brown said she could not move her from what seemed to be a mindset that the decision to make her position redundant had been made and she wanted to know about the timing and value of payments.

[17] Ms Subramaniam said she spoke to Ms Theresa Gaire, the accountant, later that morning and asked if Ms Gaire knew about her employment finishing. She said Ms Gaire confirmed that she did.

[18] Ms Gaire disputes this. She said she first became aware at a financial meeting on 16 December of the proposal to disestablish the Operation Manager's position and that Ms Brown and Mr Morrison would be meeting with Ms Subramaniam to discuss that option and whether there was any way out of the situation.

[19] Later that afternoon 16 December, Ms Subramaniam went to see a solicitor, Mr Warren Simpson. Despite being shown the letter from SBN Mr Simpson concluded that Ms Subramaniam had been constructively dismissed on 15 December. He provided a letter for Ms Subramaniam to take along to the next meeting with SBN but did not attend himself.

[20] The letter includes the following statement:

She will on legal advice not be attending any meetings nor working out any notice period and will not otherwise be participating in the planned process.

17 December Meeting

[21] The meeting on 17 December was attended by Ms Brown, Ms Subramaniam and Mr Morrison. Mr Morrison said it was a reasonably short meeting as Ms Subramaniam did not engage in any discussion regarding the proposal. He tried to explain again that it was only a proposal and that no final decision had been made. Mr Morrison tried to emphasise to Ms Subramaniam that the purpose of the meeting was an opportunity to discuss a way forward and to get her input. She asked what he meant by input. He explained that this was to get feedback about the proposal and to look at other options for cost savings. The response was that she should not be expected to have input into how the organisation could be saved, given her position had been disestablished. He said that the position had not been disestablished and that given that she was the Operations Manager he would expect her to know what goes on within the organisation and to have some ideas about alternative ways in which cost savings could be made, but she simply refused to participate.

[22] Towards the end of the meeting Mr Morrison said they were not going to make any progress discussing the proposals and suggested they reconvene on Friday with Ms Subramaniam and her lawyer. She said she would contact her lawyer and let Mr Morrison know whether the solicitor would be available on Friday.

[23] On 17 December Mr Morrison received an email from Mr Simpson advising that Ms Subramaniam would not be attending a further meeting unless they had a settlement offer to make. Mr Morrison replied to Mr Simpson on 18 December emphasising that no final decision had been made about the proposal to disestablish the role.

Subsequent Events

[24] By this stage Ms Subramaniam had told other staff that her employment had been terminated. As a gesture of goodwill SBN offered to keep her on the payroll to allow further discussions to take place and indicated that they were willing to attend mediation or meet in another forum. They were not able to get Ms Subramaniam or

her lawyer to attend a meeting but there was an exchange of letters with Mr Simpson, who maintained that Ms Subramaniam had been constructively dismissed. SBN continued to try to arrange meetings while Ms Subramaniam remained on the payroll.

[25] Given that Ms Subramaniam and her lawyer refused to attend further meetings a decision was eventually made to disestablish the Operations Manager's role. That took effect on 16 January. Ms Subramaniam was paid out two months notice in lieu along with the holiday pay entitlement. She effectively received approximately three months pay since leaving employment on 17 December 2008, being paid through to 15 March 2009.

Decision

[26] Having looked at the correspondence and heard from the witnesses I have concluded that Ms Subramaniam was mistaken in her view as to what happened at the meeting on 15 December. Ms Subramaniam was not told that the position had been disestablished. The letter makes this very clear. It seems singularly unlikely that the respondent would go to the trouble of arranging further meetings if the decision was already a *fait accompli*. The reasons for commencing the process and the proposal to disestablish the role were for genuine business reasons.

[27] In an understandably upset state on 15 December Ms Subramaniam is likely to have heard that her job was at risk and to have interpreted that as a concluded fact when the surrounding circumstances were clearly showing that it was a proposal and nothing more.

[28] Where there are disputes about what was said I prefer the evidence of the respondent's witnesses.

[29] Ms Subramaniam was neither constructively nor actually dismissed either on 16 December at the meeting with Mr Morrison, nor on 17 December when she sent an email to staff saying that her employment had been terminated.

[30] Ms Subramaniam does not have a personal grievance.

Costs

[31] If the parties are unable to resolve the issue of costs the respondent is to file a memorandum with 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority