

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY WELLINGTON OFFICE**

BETWEEN Gordana Vukomanovic
AND Sportzone Sports Limited (First Respondent)
Anthony Morrison (Second Respondent)
REPRESENTATIVES Gordana Vukomanovic on her own behalf
Mike Gould for the Respondents
MEMBER OF AUTHORITY Gregory Wood
INVESTIGATION 18 July 2006
MEETING
DATE OF 7 August 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Mrs Vukomanovic claims that she was unjustifiably dismissed by the first respondent, Sportzone Sports Limited (Sportzone). She claims reinstatement, reimbursement of lost remuneration, costs and a penalty against Sportzone. She also seeks a penalty against the second respondent, Mr Morrison, for instigating, aiding and/or abetting Sportzone's breaches of the employment agreement.
2. Sportzone accepts that the procedures it adopted in dismissing Mrs Vukomanovic were not those that a fair and reasonable employer would have taken, but considers that it had good cause to dismiss Mrs Vukomanovic. Furthermore, it resists reinstatement because it can not afford to re-employ her and because the relationship between her and Mr Morrison has broken down. It does not consider that any penalty is necessary in the circumstances of the case, although it accepts wrongfully withholding certain payments from Mrs Vukomanovic.

3. For his part, Mr Morrison claims that he acted at all times as a director of Sportzone and therefore should not be subject to a penalty.

The Facts

4. Sportzone is a small private company owned and operated by Mr Tony Morrison. Mr Morrison's number one pastime outside of his profession is soccer. He set up Sportzone as a business outlet for his passion for developing soccer in the Wellington area, essentially as what he called a "hobby" company.
5. Mr Morrison uses Sportzone to disseminate information about soccer, as well as to run soccer tournaments for adults and children. In order to do so, he hires contractors to act as referees and tournament officials. Revenue is gained from fees paid by those participating. While not successful in financial terms, Sportzone has been successful in generating large numbers of players involved in its tournaments. While Mr Morrison was keen to encourage the tournaments and the revenue that followed it, he was also conscious that he personally did not have enough time available to do all the work required.
6. Sportzone also sought to increase its revenue through advertising and sponsorship, particularly community and local and central government funding. To this end, it contracted marketing specialists to find alternative revenue streams, but unfortunately this initiative was not successful.
7. Sportzone also decided to launch a regular newsletter, which became available in hard copy and electronic form. Through a later approach to the Mature Employment Services in Lower Hutt, Mr Morrison was able, in February 2005, to get assistance with it from Mrs Vukomanovic. Her work at this point was part-time and she was paid a small retainer. Mrs Vukomanovic was very pleased to be able to take up this work after seven years of being in New Zealand and not having a job, despite being registered with the Ministry of Social Development.
8. The relationship developed to the point in April 2005 that Mrs Vukomanovic was formally employed in a permanent position, as a project leader for Sportzone, for which she was paid \$10 per hour. The key focus was to be on developing

fundraising proposals for community and government-funded projects. Mrs Vukomanovic primarily worked from home and worked on a number of such proposals. Unfortunately none of them were to result in successful bids for funding for Sportzone. At the same time, Mrs Vukomanovic became closely involved in many of the tournaments run by Sportzone.

9. While by November 2005 the fundraising efforts remained unsuccessful, though many were still in train, Mr Morrison was sufficiently pleased with Mrs Vukomanovic's efforts that he agreed with her that she should be appointed on a more permanent basis at a higher salary. Accordingly, Mr Morrison signed, on behalf of Sportzone, a letter to the Immigration Service, prepared by Mrs Vukomanovic, confirming her future employment status. (Mrs Vukomanovic was in the process of applying for permanent residence in New Zealand, which she still is. Mrs Vukomanovic gave evidence that \$30,000 per year appears to be a level of income of some significance to the Immigration Service when assessing permanent residence applications).
10. I set out the letter below, in full, as sent to the Immigration Service:

"3 November 2005

Department of Immigration; Immigration Service New Zealand

SportZone Sports Ltd and me Tony Morrison personally are glad to let you know that we have extended our current employment arrangement-agreement with Ms Gordana Vukomanovic, address 19/2 Waiwhetu Road Lower Hutt, at the position "Project Leader" for the next ten years. Her payments from January 2006 should be yearly \$30,000 or by month 2,500.00 (tax on her income is obligation that belong to SportZone Sports Ltd as that was SportZone Sports Ltd obligation until now; and we are keeping as valid all other obligations we have under employment agreement already signed; subject of change are period of employment and salary)

Mrs Gordana Vukomanovic has been successful until now on this position. She performed tasks with easy showing creativity and understanding of New Zealand position talking about sport and role that soccer as a sport has for New Zealand.

SportZone Sport Ltd has already extended its program (NEWS ARE corporate tournaments; promotions with Wellington Chamber of Commerce, BIZ, IMB; Nursery grade starts at Crawford park – Wellington; Soccer for Lunch at Kelburn); as well as we have stronger National and International involvement thanks to Gordana's help.

For the further development of the SportZone Sports Ltd and the soccer game further promotion Nationally and Internationally we consider and agreed that Mrs Gordana Vukomanovic involvement and support are essential.

So we have signed

Kind regards SIGNED

SportZone Sports Ltd

Director Mr. Tony Morrison Mrs Gordana Vukomanovic Project Leader”

11. Mr Morrison agreed at the investigation meeting that the letter sets out his intentions on behalf of Sportzone at the time. In this regard he notes that the letter states that payments from January 2006 should be yearly \$30,000. That never took effect because Mrs Vukomanovic was dismissed in January.
12. Mr Morrison did, however, hold some concerns about Mrs Vukomanovic's performance. He had received negative feedback from a number of people associated with Wellington Soccer about some communications they had had with Mrs Vukomanovic. He did not raise any of the concerns raised with him about Mrs Vukomanovic's behaviour with her at any time during her employment.
13. The most important reason for Mrs Vukomanovic's later dismissal, according to Sportzone, had its genesis in an incident that occurred on 22 October 2005. Mr Morrison had to drive Mrs Vukomanovic to many of the soccer venues they attended. On one occasion he swapped cars with a representative of Wellington Soccer.
14. In the car were a dozen or so cards that appeared to Mr Morrison to be Wellington Soccer season passes, which were worth approximately \$80 each. When Mrs Vukomanovic saw the cards, she asked Mr Morrison what they were and he replied that they were season passes worth about \$800 and that she should put them back, which Mr Morrison assumed she did. In fact the cards were not season passes but merely business cards. Mr Morrison made nothing of this event at the time.
15. As is understandable for someone whose sole income is based on payment at \$10 per hour, Mrs Vukomanovic had difficulties making ends meet. She sought additional finance from Sportzone accordingly, during a meeting with Mr Morrison on 17 December. Mr Morrison agreed on behalf of Sportzone to pay Mrs Vukomanovic \$200 extra leading up to Christmas. Mrs Vukomanovic then mentioned, I find, something about the cards described on 22 October by Mr Morrison as season passes.

It is Mr Morrison's view that Mrs Vukomanovic commented that she had kept these 'season passes' and they could be sold by Sportzone. Mrs Vukomanovic vehemently denies making any such suggestion.

16. This is a very serious allegation against Mrs Vukomanovic and therefore evidence in support of it must accordingly be of a sufficiently serious nature, *Honda NZ Ltd v. NZ (with exception) Shipwrights etc Union* [1990] 3 NZILR 23 applied.
17. While I am satisfied that the cards in question were mentioned in this conversation, there is insufficient evidence for me to conclude that Mrs Vukomanovic did in fact deliberately seek to profit from the property of Wellington Soccer, as alleged by Mr Morrison, and I decline to make such a finding accordingly. On the other hand, I do not accept Mrs Vukomanovic's evidence that there was no discussion about that issue and that Mr Morrison was lying to the Authority on that point.
18. Rather, while I accept that the cards were referred to in the conversation, such were the communication difficulties between Mr Morrison and Mrs Vukomanovic that I can not conclude what the gist of that conversation was. In any event, Mr Morrison, while later relying on this conversation to justify Mrs Vukomanovic's dismissal, never raised the matter with her at the time, or indeed at all prior to her dismissal. He did not even seek to clarify what, if anything, was being proposed about the cards, or to get possession of any of them, if they were in Mrs Vukomanovic's possession. Instead he simply changed the subject and never took any further action until mid-January. Even then, Mr Morrison made no queries of Wellington Soccer whose property the cards were, or of the Police, and he provided no evidence to the Authority from any other person to support his allegations.
19. After Christmas, Mrs Vukomanovic sought to have her salary increased, to the rate suggested in the letter to the Immigration Service. Mr Morrison told her that Sportzone could not afford to pay her any more at that time.
20. Mr Morrison had become very concerned about Mrs Vukomanovic's behaviour, albeit that he had never raised any of these issues with her. The alleged behaviour included his concerns over the potential use of the cards, interactions she had had

with other people in Wellington Soccer and Mrs Vukomanovic's desire to work from a proper office rather than her own home.

21. Mr Morrison came to the conclusion, again without involving Mrs Vukomanovic, that she should be dismissed and sought the assistance of his business mentor in how to effect the dismissal. The advice Mr Morrison received was that Mrs Vukomanovic was in breach of her agreement because of the alleged dishonesty, which was categorised in the employment agreement as serious misconduct justifying summary dismissal. Accordingly, Mr Morrison prepared a letter of dismissal dated 13 January 2006. The letter states:

"Hello Gordana,

It is very distressing for me to have to write this letter but as from this date, I am giving you two weeks notice to terminate your employment.

There are a number of issues, especially in the employment contract under clause 13.2, which cause me to do this.

However I am prepared to pay you for the two weeks in order for you to look for another job but I must advise you that this is on the understanding that all information and equipment belonging and relevant to SportZone Sports is returned."

22. Mrs Vukomanovic gave evidence that she did not in fact receive the letter until 31 January. In any event, Mr Morrison, on behalf of Sportzone, had sent a taxi driver friend around to Mrs Vukomanovic's residence on 17 January to collect the materials referred to in the letter, but no material was returned. In fact, Mrs Vukomanovic made a complaint with the Police later about what had occurred that day.
23. From 13 January onwards, Sportzone did not pay Mrs Vukomanovic, which was an obvious pointer to a serious issue between the parties.
24. It therefore seems clear that from 17 January 2006 onwards, even although Mrs Vukomanovic may not have received the dismissal letter, she knew that something was seriously wrong with her employment. Hence she arranged for a meeting with Mr Morrison, through an intermediary, which was to take place at the end of January.
25. In fact, Mrs Vukomanovic's final two weeks pay and her holiday pay were withheld by Sportzone until after mediation, despite it being put formally on notice by Mrs Vukomanovic's former representative that this was contrary to law.

26. Despite mediation, and further attempts at settlement between the parties, who both have an interest in promoting Wellington Soccer, this matter has remained unresolved. Mrs Vukomanovic has been unable to find any alternative employment and in any event has been genuinely seeking reinstatement. The matter has some urgency in that Mrs Vukomanovic's work permit is soon to expire and her application for permanent residence is presently before the Immigration Service.

Determination

27. Mrs Vukomanovic has some difficulties communicating in English, as might well be expected as it is not her native language. That is apparent both in written and spoken language. This has no doubt contributed to the difficulties which Mr Morrison and Sportzone have had, but are not justification for her dismissal. Rather, this dismissal is clearly unjustifiable. Even Sportzone now accepts, having received specialist advice, that this is so, at least on procedural grounds, because there is an absence of any of the procedural steps required of an employer. Sportzone simply failed on every possible count, as it never raised any of the issues of concern about Mrs Vukomanovic with her before she was dismissed.
28. Similarly, I can find no substantive ground that would have led a fair and reasonable employer to dismiss Mrs Vukomanovic. The serious allegations made against Mrs Vukomanovic about the business cards have not been made out on the evidence, for reasons given above.
29. The issues of communication were ones that should have been worked through between the parties, but again Mr Morrison, on behalf of Sportzone, chose not to do so. In any event, those particular matters were ones for counselling of Mrs Vukomanovic and/or performance management, if the problems were to be found to be at Mrs Vukomanovic's behest.
30. It follows that Mrs Vukomanovic has been dismissed unjustifiably on the grounds of both procedure and substance. She seeks reinstatement. I find, however, that in all

the circumstances of this case, reinstatement would be impracticable (*NZEI v. Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243).

31. The reasons for this are clear. Sportzone cannot afford to continue with Mrs Vukomanovic's employment. Its financial position is one of indebtedness; it is supported only by personal loans of some significance to Sportzone by Mr Morrison. These are designed to bridge Sportzone's debts, which total a five figure sum. This will continue for some time, at the very least until the income from summer soccer tournaments allows Sportzone to meet those debts directly.
32. Sportzone has also concluded, as it is entitled to do, that after two separate unsuccessful attempts at trying to obtain community and government funding, such an approach is no longer worth pursuing and thus the position held by Mrs Vukomanovic can not be sustained.
33. Put simply, Sportzone can not afford a full-time employee. I accept Mr Morrison's evidence that reinstatement would be to lead to the financial collapse of Sportzone.
34. Mrs Vukomanovic also seeks payment for lost remuneration, although she was clear throughout that she did not wish to damage Wellington Soccer or the activities conducted by Sportzone in so doing, her focus being on reinstatement.
35. In all the circumstances of this case, I consider an appropriate period for compensating Mrs Vukomanovic for lost income is the period of three months remuneration set out in s.128(2) of the Act. That takes into account the fact that Mrs Vukomanovic has not worked since her dismissal and is seeking reinstatement, but also that her efforts to find alternative employment appeared focused on the sporting industry (which is a very narrow field of work) and that she had not returned to the Ministry of Social Development for their assistance to find work.
36. While in the ordinary course of events Mrs Vukomanovic expected to be paid at the rate of \$30,000 per annum by January 2006, this never in fact occurred. One of the reasons was because events had moved on since the letter was signed in November. In particular, all of the applications Mrs Vukomanovic prepared on Sportzone's

behalf had by then been declined and therefore it did not have the additional income streams the parties had expected.

37. I find therefore that the intention of the parties in November that payments would increase to \$30,000 per annum, as evidenced by the fact that payments “should be yearly \$30,000”, never came into effect, because it was an implied condition between the parties that Mrs Vukomanovic’s applications would have borne financial fruit by then.
38. I therefore order the respondent to pay Mrs Vukomanovic three months pay at her existing rate of remuneration, i.e. the amount she was paid for the last three months of her employment. Leave is granted to the parties to revert to the Authority on this point, in the event that the parties can not agree on the appropriate sum.
39. Mrs Vukomanovic also claims compensation for humiliation, loss of dignity and injury to her feelings. I accept that this has been a very difficult period for Mrs Vukomanovic. This job was very important to her. She put her heart and soul into it, only to lose it without any opportunity to defend herself. Any communication difficulties between the parties could not be described as blameworthy behaviour and therefore there is no requirement for any deductions for contributory fault or actions by Mrs Vukomanovic.
40. On the other hand, account must also be taken of the financial position of Sportzone and the benefits it provides to the soccer community (as Mrs Vukomanovic has acknowledged throughout), see for example *Northern Clerical etc Union v. Beachlands Engineering Ltd* [1991] 3 ERNZ 1023.
41. Taking all these considerations into account, I find an appropriate amount of compensation is \$2,500.
42. It is clear that Sportzone did breach its duty to Mrs Vukomanovic by not paying her final pay and holiday pay even after formal notification from Mrs Vukomanovic’s then representative. Penalties, as a matter of public policy, are normally paid to the Crown. In the particular circumstances of this case, however, I find that no good purpose would be served to require Sportzone to pay a penalty to the Crown for this

clear breach, as it already has to make substantial reparations to Mrs Vukomanovic and I am satisfied that Sportzone has learned its lesson about making unlawful deductions from workers' pay.

43. I dismiss the claim against Mr Morrison personally. Mr Morrison was acting in all times as a director and manager of Sportzone and there is no reason for him to pay a separate penalty to the Crown. The situation may well have been different if Mr Morrison had been on notice, before the money was paid, that he personally may have been liable for a penalty.
44. Mrs Vukomanovic also seeks costs for expenses associated with her representation by a lawyer, who attended mediation on her behalf and then filed the statement of problem with the Authority. Other than the filing fee, I do not accept that there are other costs or expenses in this matter that Sportzone should meet. Mrs Vukomanovic's former representative's involvement was only up to the stage of mediation and filing. There were no legal costs incurred by Mrs Vukomanovic in preparation for the investigation meeting. It therefore follows that the only expense she can claim from Sportzone is the \$70 filing fee.
45. I therefore order the respondent, Sportzone Sports Limited, to pay to the applicant, Mrs Gordana Vukomanovic, the sums of \$2,500 in compensation, \$70 in expenses and three months lost remuneration.

G J Wood
Member of Employment Relations Authority