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Pollard v Fuji Xerox New Zealand Limited (Auckland) [2017] NZERA 267; [2017] NZERA Auckland 267 (4 September 2017)

Last Updated: 7 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 267
3017852

BETWEEN GAVIN POLLARD Applicant

AND FUJI XEROX NEW ZEALAND LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Bridget Smith for Applicant

Marie Whisker for Respondent

Investigation Meeting: 31 August 2017

Determination: 4 September 2017

PRELIMINARY DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. Mr Pollard's application for interim reinstatement is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Pollard was dismissed from his employment on 9 August 2017. He has lodged a personal grievance in the Authority claiming his dismissal was unjustified and has made an application for interim reinstatement until his substantive issues are determined. An application for urgency was granted.

[2] In his statement of problem Mr Pollard also applied for non-publication orders. No submissions or evidence has been provided to the Authority in relation to that application. This was raised with Ms Smith (Counsel for Mr Pollard) during the submissions hearing. Ms Smith made no submissions on the application.

[3] Fuji Xerox New Zealand Limited (FXNZ) denies Mr Pollard was unjustifiably dismissed and opposes his application for interim reinstatement.

[4] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this preliminary determination has not recorded all the evidence and submissions received from Mr Pollard and FXNZ but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

FXNZ company structure

[5] FXNZ is a New Zealand registered company wholly owned by a company registered in Singapore, Fuji Xerox Asia Pacific Pte Limited (APO Singapore). The majority shareholder of APO Singapore is Fuji Xerox Co Limited, a Japanese company (Fuji Japan).

[6] Fuji Japan is owned 75% by FujiFilm Holdings Corporation (FujiFilm Japan), a Japanese listed company, and 25% by Xerox Corporation, a United States listed company.

[7] APO Singapore controls the activities of FXNZ. It prepares policy documents that FXNZ must comply with and imposes sales targets on FXNZ's senior management team. The Managing Director (MD) for FXNZ reports to the CEO of APO Singapore.

Background

[8] Mr Pollard started working for FXNZ in its sales division in April 2002. In

2012 Mr Pollard was appointed to the role of General Manager National Sales Operations (GM Sales), a role he held until 1 April 2015 when he was appointed to the role of MD.

[9] As GM Sales Mr Pollard reported to the then MD, Mr Neil Whittaker. In April 2015 Mr Whittaker relocated to Fuji Xerox Australia (FXAU). Mr Pollard was appointed to the role left vacant by Mr Whittaker's move to Australia.

[10] Throughout his employment, including as MD, Mr Pollard's employment agreement included incentive payments by way of commission on achievement of sales targets.

[11] On 8 July 2015 an email sent from "Tony Night" (a nom de plume) to the Deputy President of Fuji Japan identified cases of inappropriate accounting practices at FXNZ. Following an internal audit the Deputy President concluded that the situation set out in the email was correct and that revenues were being overstated due to the use of inflated Managed Service Agreement (MSA) target volumes. Under the MSA, FXNZ calculated annual print volumes on which a fee for the client is then struck. The higher the target volumes the cheaper the fee.

[12] A report released by an Independent Investigation Committee (IIC) set up to investigate the appropriateness of FXNZ's accounting practices relating to sales transactions occurring between 2013 and 2015 found that these findings were concealed from the President when the Deputy President reported:

No accounting irregularities or cases of overstated revenue such as had

been indicated in [Tony Night's] email were uncovered.

[13] An audit report issued on 20 March 2017 to FXNZ's board of directors highlighted the possibility of fraudulent activities relating to transactions occurring prior to the end of the 2016 financial year. FXNZ's financial year was from 1 April to 31 March.

[14] Fuji Japan established the IIC in April 2017.

[15] In its report published in June 2017 the IIC found there were multiple causes and background circumstances that conceivably resulted in the inappropriate accounting practices prevalent in FXNZ. The IIC found that the inappropriate accounting would not have occurred at the scale it did if, at the time Mr Whittaker was MD, MSA's that lacked minimum payments clauses had not been agreed and if lease transactions in which actual volume which fell significantly short of target volume had not been overly used.

[16] The IIC also found that short-comings in APO Singapore's management of FXNZ was a major contributor to the situation that arose at FXNZ.

[17] The way sales were reported and from which the accounting practices arose took place when Mr Pollard was part of the executive management team as GM Sales

between 2012 and 2015. Mr Pollard refers to himself as being "number 2" in the company after Mr Whittaker.

[18] The Japanese language version of the IIC report was released on the Fuji Japan website in June 2017.

[19] Mr Graham Ford is a director of FXNZ. He was undertaking the role of Chief Financial Officer (CFO) for FXNZ following the departure of Mr Mark Allright in January 2016. He was advised by APO Singapore that the IIC report had been released and that Mr Pollard may have been involved in the inappropriate financial practices identified in the report. It was decided to meet with Mr Pollard and advise him that the IIC report had raised some serious concerns.

[20] Sadly, Mr Pollard's mother passed away during the weekend 17/18 June 2017. A meeting planned for 19 June 2017 did not take place. Instead through FXNZ's lawyer and Mr Pollard's lawyer an agreement was reached whereby Mr Pollard would take

a period of personal leave and the parties would hold without prejudice discussions. A meeting was arranged for 4 July 2017 for this purpose.

[21] On 3 July 2017 FXNZ advised Mr Pollard that it did not wish to hold without prejudice discussions but instead wanted to hold a disciplinary meeting. Later that day Mr Pollard was given notice of a disciplinary meeting to discuss six allegations which FXNZ considered might constitute serious misconduct. The allegations included:

- a) that Mr Pollard may have, for his own personal benefit, breached internal policies and actively participated in inappropriate accounting practices in relation to five client deals;
- b) being a key decision maker between April 2015 and June 2015 in the amendment of a number of negotiated deals to avoid, what would otherwise have been, a material impact on reported revenue;
- c) approved an overstatement of approximately \$305,000 in revenue in the 2015 financial statements despite knowing this was a breach of internal policy;
- d) approved and signed off on inflated target volumes and approved actions leading to inflated revenue;
- e) transactions approved by Mr Pollard that led to significant losses; and f) a failure to reimburse overpayment of commissions of \$22,112.84.

[22] FXNZ provided Mr Pollard with copies of the documents held by FXNZ and which related to each of the allegations.

[23] A disciplinary meeting took place on 28 July 2017. Prior to that date Mr Pollard had also been provided with a full copy of the English version of the IIC report. Mr Pollard denied the allegations and told FXNZ that he was not the true GM Sales but that Mr Whittaker had a number of sales managers reporting directly to him and not to Mr Pollard.

[24] Following the disciplinary meeting and after providing Mr Pollard with notification of its preliminary findings Mr Pollard was dismissed from his employment.

Interim application

[25] In accordance with the usual procedure, the evidence before the Authority for the purpose of determining this application has been presented in affidavit form by witnesses and is untested. Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[26] An injunction involves the exercise of discretion. The basis on which applications for interim orders are to be decided are summarised as follows:

a) Mr Pollard must establish that there is a serious question to be tried. In a claim such as this the questions of whether there is a serious question to be tried raises two sub issues:

i. Is there an arguable case that Mr Pollard was unjustifiably dismissed?

and

ii. Is there an arguable case in relation to the claim for permanent reinstatement?

b) Consideration must then be given to the balance of convenience, and the impact on the parties of the granting of, or the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise.

c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

Is there an arguable case the dismissal was unjustified?

[27] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.¹

[28] The test for assessing whether a dismissal was justifiable is set out at s 103A of the Act. It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[29] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Pollard being treated unfairly.

[30] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.²

[31] The Authority's task is to examine objectively the employer's decision making

process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer.³

¹ *X v Y Ltd and the New Zealand Stock Exchange* [1991] NZEmpC 48; [1992] 1 ERNZ 863.

² *A Ltd v H* [2016] NZCA 419 at [46].

³ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

[32] The thrust of Mr Pollard's submissions is that there were serious deficiencies in the process used by FXNZ to reach its conclusions that dismissal was an appropriate penalty and it failed to take into account the disparate treatment Mr Pollard received compared to Mr Whittaker and Mr Allright.

[33] At the disciplinary meeting on 28 July 2017 Mr Pollard accepted he had signed off on a number of the deals in question but that others had also signed off on them including Mr Whittaker and Mr Allright. He denied having any financial accounting training and claimed he had a lack of knowledge of the deals set out in the letter dated 3 July 2017 or the policy relating to residual values and signed off on the deals as requested. Mr Pollard says he was following Mr Allright's recommended course of action.

[34] Mr Pollard explained that he understood that when he signed off changes to deals following the end of the financial year in 2015 that it was a standard year end process and was done to ensure the company's rules were complied with. Mr Pollard denied he was responsible for the 2015 year-end financial results as these results related to the period prior to him being appointed MD.

[35] Mr Pollard denied producing any contracts with excess target volumes and that roll overs of contracts were always permitted. The IIC report found that contracts were being rolled over prior to the end of the contract and that the revenue for the roll overs were used to "gap fill" shortfalls in revenue for month end targets.

[36] On 2 August 2017 FXNZ set out in writing its preliminary decision (2 August

2017 letter) to dismiss Mr Pollard and the reasons for its decision. FXNZ advised Mr Pollard that it accepted aspects of his explanations but that it still held concerns regarding his conduct which fell into two main categories:

a) that whilst GM Sales and then as MD, Mr Pollard may have participated in various breaches of internal policies, inappropriate accounting practices, and inappropriate decisions from which he received personal benefits;

b) that whilst GM Sales Mr Pollard approved transactions that created significant exposure and loss to the company.

[37] In finding aspects of the allegations proven, FXNZ found that a factor in Mr Pollard's conduct was his close relationship with Mr Whittaker. FXNZ raised with Mr Pollard in the 2 August 2017 letter concerns that Mr Pollard had received commission payments on transactions that were outside FXNZ policy. These transactions included deals that had been signed off by Mr Pollard and which had a higher residual value than 10%. The residual value in a contract is the value of the equipment at the end of the lease period. APO Singapore had set a maximum residual value of 10%. A number of the deals under which Mr Pollard received commission payments had residual values ranging from 30% to over 100%.

[38] FXNZ was also concerned that Mr Pollard had been involved in re-engineering deals with high residual values to meet the 10% threshold for the 2015 year end results and at the same time, re-engineered other deals to include a residual value where none had previously been included.

[39] When Mr Pollard received a copy of the 2 August 2017 letter he requested additional time in which to provide a response. Mr Pollard was given until 8 August

2017. On that day Mr Pollard requested additional documents relating to the information provided in the 2 August 2017 letter.

[40] The additional information related to the documentation underlying the deals referred to in the 2 August 2017 letter as well as copies of the commission pay plans referred to in the letter and which FXNZ had reviewed as part of its further investigation.

[41] FXNZ's response to the request for further information was to confirm its decision to dismiss Mr Pollard effectively removing any further opportunity he had to provide any additional explanations or have input into the decision to dismiss him.

[42] FXNZ says it had already granted Mr Pollard an extension of time in which to respond to its 2 August 2017 letter and rather than focus on responding to the contents of the letter, Mr Pollard preferred to focus on settlement proposals.

[43] FXNZ formed the view that Mr Pollard's requests made at the eleventh hour were designed to delay the final decision from being made and were not of any substance.

[44] Mr Pollard had requested copies of the documents relating to the deals set out in the 2 August 2017 letter. The deals were different to those set out in the 3 July

2017 letter. FXNZ determined that it had provided sufficient information in a spreadsheet given to Mr Pollard and that he did not need the underlying documents.

[45] In relation to the request for the commission pay plans which FXNZ had reviewed as part of its further investigation following the disciplinary meeting on 28

July 2017, FXNZ advised Mr Pollard that the commission pay plans did not identify any specific transactions for which he received commission, instead they confirmed the category of transactions.

[46] Section 4(1)(c) of the Act requires an employer who is proposing to make a decision which will, or is likely to, have an adverse effect on “the continuation of employment”, to provide the affected employee with “access to information, relevant to the continuation of the employee’s employment, about the decision” and must provide an opportunity to comment on that information.

[47] Arguably FXNZ had an obligation to provide Mr Pollard with the underlying documents and to allow him the opportunity to comment on the information. Instead, FXNZ proceeded to make its decision to terminate Mr Pollard’s employment without any further opportunity for him to respond.

[48] A factor in the decision by FXNZ to proceed to confirm its preliminary decision was its view that Mr Pollard had chosen to focus on settlement discussions rather than respond to the 2 August 2017 letter.

[49] If settlement discussions were taking place in the six days (two of which were weekend days) between 2 and 8 August 2017 then it makes sense that both sides were involved in those discussions. Given that, it would not have been unreasonable to extend the timeframe for a response on the basis that no further settlement discussions would occur. That would have allowed Mr Pollard the opportunity to focus on responding to the 2 August 2017 letter.

[50] Mr Pollard says he was treated disparately from Mr Whittaker who was able to enter into an agreement with Fuji Japan to leave the organisation with a significant payout. He says he was the “last man standing” and became a scapegoat given that both Mr Whittaker and Mr Allright had already left Fuji Xerox at the time the report was released. He says he has been dismissed for financial decisions that were well

outside his control and for his perceived close relationship with a man who caused significant harm to the company when no such relationship existed.

[51] Mr Whittaker left the company after moving to Australia. The circumstances surrounding his exit were not included in the affidavit evidence. I am unable to assess whether an arguable case exists in relation to Mr Pollard’s claim for disparity.

[52] On the basis of the untested affidavit evidence and the documents lodged with the Authority, I am satisfied Mr Pollard has an arguable case, that the process used by FXNZ was flawed. In applying the test in section 103A of the Act, it is arguable that FXNZ’s refusal to provide the documents relating to the transactions referred to in the

2 August 2017 letter is not what a fair and reasonable employer could have done in all the circumstances at the time.

Is there an arguable case for permanent reinstatement?

[53] There are difficulties in terms of Mr Pollard’s case for permanent reinstatement.

[54] Mr Pollard says he really had no option but to take the MD role when it was offered to him and that he was coerced into accepting the role. There does not seem to be a dispute that Mr Pollard’s background is sales based and that he had received no formal training in any other business functions such as finance, accounting or management.

[55] Mr Pollard says he did not aspire to the role of MD and was surprised to be offered the role given his lack of accounting, financial and management experience. He felt he could not reject the offer of the role without offending his Japanese employers. He denies any wrongdoing on his part and says that at all material times decisions were made by Mr Whittaker and/or Mr Allright.

[56] A barrier to permanent reinstatement is that the role of MD requires the holder of the position to also be a director of the company. It is a working director role. Mr Pollard has been removed as a director and the untested affidavit evidence from a shareholder of FXNZ is that the shareholders will not agree to Mr Pollard being returned as a director.

[57] FXNZ says it has lost trust and confidence in Mr Pollard due to his actions in signing off on deals that resulted in an overstatement of revenues, which in turn led to

Mr Pollard benefiting personally through significant commission payments. Further, Mr Pollard was involved in signing off the

2015 financial accounts in circumstances where Mr Pollard knew, or ought to have known, that the accounts were not a correct reflection of actual business achievements.

[58] FXNZ submitted that the conduct of Mr Pollard (and others) has resulted in significant financial consequences. It submits that this was not a case of a single transaction but was a systemic approach to sales which breached FXNZ's internal policies over a significant period during a time when he was the leader of the sales department.

[59] FXNZ says it lacks the requisite trust and confidence required to return Mr Pollard to his position. In their affidavit evidence senior executive witnesses have attested to the need for trust and confidence in the MD especially in respect of leading the employees of FXNZ. Mr Ford says that due to the historical deals, which are now well known to employees of FXNZ it will be difficult for Mr Pollard to motivate employees to the level needed to take the company forward.

[60] My assessment at this early stage is that while Mr Pollard has an arguable case that he was unjustifiably dismissed his case for permanent reinstatement is weak.

Where does the balance of convenience lie?

[61] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the likely impact on Mr Pollard to be weighed against the potential impact to FXNZ and the extent to which such risks might be managed or minimised.

[62] Mr Pollard says that his reputation, career and credibility will be undermined if he is not reinstated on an interim basis. Mr Pollard has worked exclusively in the industry his whole career and he is concerned that due to the issues being out in the public arena he will not be appointed to another senior position in the industry. Mr Pollard maintains he is innocent of the wrongdoing alleged against him and his dismissal has serious consequences which cannot be altered except by being reinstated.

[63] Mr Pollard says that he has had to take out an overdraft in order to meet his expenses as he is the sole wage earner in his family. He has provided a spreadsheet showing his monthly outgoings. He says he will not be able to be adequately compensated if his dismissal is subsequently held to be unjustified. Mr Pollard also points to a one year restraining provision in his employment agreement which prohibits him from working in the industry.

[64] FXNZ submitted that reinstatement will have no effect on Mr Pollard's reputation. There has been significant media interest in the events at FXNZ and the link between Mr Pollard and the IIC report. The intense media and public interest in FXNZ arising out of the release of the IIC report has, on the balance of probabilities, already tainted Mr Pollard's reputation.

[65] It is known in the wider arena that Mr Pollard was the GM Sales and the "number 2" at the time of the events in question and is known to have been involved in the MSA contracts that have contributed to problems identified in the IIC report. Further Mr Pollard was at the helm when FXNZ had to restate its accounts due to the inappropriate financial accounting for sales

[66] I have reviewed some of the media coverage relating to the issues at FXNZ and note that Mr Pollard was linked to the issues and named specifically in at least one article. That article was published in September 2016, before the IIC report was released and prior to Mr Pollard's dismissal. On 10 August 2017 a further article was published that informed the public that Mr Pollard had left his employment.

[67] FXNZ says Mr Pollard has access to a significant amount of money through his company superannuation scheme and in April 2017 he received a cash payment of

\$284,000 as a result of the winding up of a Plan B superannuation scheme.

[68] At the submissions hearing FXNZ advised the Authority and Mr Pollard that it will waive the non-compete provisions contained in the restraint of trade clause contained in his employment agreement. This means Mr Pollard is able to seek alternative employment within the industry without the fear of further action against him.

[69] The substantive matters will likely be heard during the week commencing 16

October 2017. This is just over a month from today. Even if an oral determination is not practicable, a prompt determination can be expected. Given that, justification or otherwise for the dismissal is likely to be resolved promptly.

[70] I have not accepted Mr Pollard's claim that he cannot be adequately compensated. The Act makes provision for remedies in the event that an action is found to be unjustified. This is an issue the Authority is well used to grappling with including addressing any damage to reputation. I am satisfied FXNZ is in a position to pay any such remedies if it becomes necessary to do so.

[71] I find the balance of convenience weighs against the grant of an order for interim reinstatement. Mr Pollard will be unable to fulfil the duties associated with being the MD due to him being removed as a director and given the lack of trust and confidence held in him by senior executives (with whom he will be required to work closely) and the shareholders of FXNZ.

Where does the overall justice lie?

[72] Standing back and having regard to all aspects of the matter, including the particular factors I have discussed, I find that the overall interests of justice follow the balance of convenience.

Non publication orders

[73] As set out earlier Mr Pollard's statement of problem included an application for non-publication orders. I have heard no submissions or evidence on this point from Mr Pollard and have therefore declined the application.

[74] FXNZ has applied for orders regarding the publication of client names. I advised the parties at the outset of the submissions hearing that I would not publish the names of the clients in my determination as there was no need to do that. In that case non-publication orders are not necessary.

Costs

[75] Costs associated with this preliminary determination are reserved and will be dealt with when dealing with costs relating to the substantive matters.

Vicki Campbell

Member of the Employment Relations Authority

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