

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 524/10
5304890**

BETWEEN BRIAN MOXEY
 Applicant

AND WESTMINSTER PACIFIC
 (NZ) LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Mr Mann, Director of WPNZ

Investigation Meeting: 24 November 2010

Determination: 23 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Brian Moxey, claims he was employed by the Respondent, Westminster Pacific (NZ) Ltd (“WPNZ”) from 1 April 2008 until 21 May 2010 when Mr Moxey resigned. Mr Moxey claims that his resignation was a constructive dismissal as a result of the unjustifiable actions of WPNZ.

[2] Specifically Mr Moxey claims that the failure of WPNZ to pay his agreed salary over a period of two and a half months constitutes a breach of his employment agreement resulting in a loss of trust and confidence.

[3] WPNZ accepts that it has failed to pay Mr Moxey’s salary but claims that Mr Moxey resignation was as a result of his unwillingness to accept assurances given by WPNZ in relation to his salary.

[4] WPNZ further claims that Mr Moxey's resignation arose as a result of his refusal to participate in a performance management process

Issues

[5] The issues for determination are:

- Whether Mr Moxey was unjustifiably constructively dismissed by WPNZ as a result of contractual breach of the Individual Employment Agreement ("the Agreement").
- Whether Mr Moxey unreasonably refused to accept the assurances given by WPNZ as to the payment of his salary and arrears.
- Whether Mr Moxey unreasonably refused to participate in a performance management process

Background Facts

[6] 1 April 2008 Mr Moxey commenced employment with WPNZ under the Agreement. The terms of the Agreement provided, amongst other terms, for a salary, as detailed on the First Schedule to the Agreement, of \$72,000.00 to be paid monthly in arrears, and for a notice period, as set out in clause 10, of 3 months.

[7] Mr Moxey was seconded by WPNZ to Silicon Avenue Technologies New Zealand Limited ("SATNZ") which was the operating company of WPNZ. Mr Moxey's role was as General Manager of SATNZ. Mr Moxey's salary was paid by WPNZ and with effect from 1 April 2009, recharged to SATNZ. The directors of SATNZ were Mr Kevin Mann, the director of WPNZ, Mr Craig Bennett and Mr Moxey.

[8] Prior to commencing employment with WPNZ, Mr Moxey stated that he had met several times in the UK with Mr Mann to discuss the role of General Manager,

and explained to the Authority that he had made it clear to Mr Mann in those discussions that he had no sales or business development experience, although he was happy to operate as a General Manager.

[9] Mr Mann stated that he had not expected Mr Moxey to perform a sales representative type of role, but that he had expected, and believed it had been understood, that a high level of sales input was expected in the role under discussion at the meetings in the UK.

[10] In support of this position, Mr Mann pointed out that the key requirements of the job specification for General Manager, provided to Mr Moxey in July 2007, were to:

- take a proactive and aggressive approach in growing the New Zealand business of the Silicon Avenue Group;
- Quantify the competitive environment, identify potential business partners, identify channels for business development;
- Support the pursuit of a second hedge fund client in the UK for 2007;
- Identify and secure a New Zealand or Australian based client for 2008.

[11] Mr Mann explained that the reason for WPNZ not recharging Mr Moxey's salary to SATNZ in the first year of Mr Moxey's employment was due to WPNZ's expectation that SATNZ business would grow as a result of Mr Moxey's involvement.

[12] Mr Mann stated that he had not expected Mr Moxey to achieve significant business growth in his first year with SATNZ as Mr Mann explained that, from his own experience in this area, securing new large corporate clients could take up to a year. However he had expected to see growth following the first year of employment, and this did not occur.

[13] By the beginning of March 2010 Mr Mann said that the financial situation of SATNZ had become serious and he was concerned at Mr Moxey's performance as

General Manager. Consequently on 4 March 2010 he held an informal meeting with Mr Moxey in Auckland to discuss these matters.

[14] On 5 March 2010 Mr Mann sent Mr Moxey an email stating that, as discussed at their meeting, Mr Moxey's performance had been unacceptable and that he (Mr Mann) was commencing a formal performance management process to monitor Mr Moxey's progress. Mr Mann as part of this process required Mr Moxey to produce a plan detailing how SATNZ company growth was to be achieved. The plan was to outline milestones and the first part of the plan, covering the period to 31 May 2010, was to be submitted by 11 March 2010, with a further extended plan to covering the period to 30 June 2010, to be produced by 19 March 2010. Mr Moxey was also required to submit time sheets.

[15] Mr Moxey responded by way of email on 9 March 2010 to the effect that this had not been his understanding of their conversation at the meeting on 4 March 2010, in that he had believed that conversation to have been constructive and positive.

[16] At the investigation meeting Mr Moxey's evidence was that during his 23 months of employment with WPNZ there had been no performance management process undertaken, he had been set no objective goals; there had been no discussion of expectations as regards sales growth, and no performance appraisals. Consequently he had believed at the time that it had been unfair to commence a performance management process on an informal basis.

[17] Mr Mann emailed Mr Moxey on 8 March 2010 requesting a meeting on 9 March 2010 to discuss full details of the performance management process further. Mr Moxey said that he recalled this meeting but that his recollection was that while he had agreed at the meeting that he was the General Manager, he had not agreed to undertake a sales role.

[18] On 25 March 2010 Mr Mann left New Zealand to return to the UK.

[19] On 31 March 2010 Mr Moxey's monthly salary in respect of the month of March failed to be paid. On 30 April 2010 Mr Moxey's monthly salary in respect of the month of April was not paid. Mr Moxey consequently sent various emails to Mr

Mann requesting payment of the outstanding holiday payments, however no payments were forthcoming.

[20] On 13 May 2010 a letter was sent by a lawyer acting on Mr Moxey's instructions to WPNZ outlining Mr Moxey's position, being that WPNZ by their actions had breached their obligations to behave as a fair and reasonable employer, and had acted in such a manner as to potentially destroy the trust and confidence between the parties. Specifically the letter requested that WPNZ immediately cease the performance management process and undertake that Mr Moxey's job description and duties as originally discussed be maintained. Further, that Mr Moxey's outstanding salary entitlements be paid with immediate effect.

[21] On 18 May 2010 a lawyer acting for WPNZ responded by letter denying that it had breached its obligations to behave as a fair and reasonable employer, or that it had changed the requirements of Mr Moxey's job description or duties, and there was no agreement to cease the performance management process.

[22] As regards the non-payment of salary, WPNZ wrote that:

With regard to non-payment of salary, your client was responsible for preparation of the cash flows for the business at Silicon Avenue Technologies (NZ) Limited (SATNZ) and income from this business was to be paid to WPNZ to pay for his salary. The decline in income combined with other SATNZ cash being locked in loans have meant that there has been no ability for either SATNZ or WPNZ to meet all of its obligations, including your client's salary. As such, your client will understand that the company has shrunk rather than grown in the two years in which he has been general manager and as a result has no income to pay your client's salary. Our client is working on an injection of capital so that costs can be paid and it had been made clear to your client that his salary will be paid as soon as the company receives more funds.

[23] On 21 May 2010 Mr Moxey's lawyer responded to WPNZ stating that as WPNZ had made no indication that it would resolve the contractual breaches and pay Mr Moxey his outstanding salary, Mr Moxey was resigning with immediate effect on the basis of the repudiation of his employment contract and "the untenable situation" which WPNZ's actions had caused.

Determination

Was Mr Moxey unjustifiably constructively dismissed by WPNZ as a result of contractual breach?

[24] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[25] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*¹ the Court of Appeal said regarding the correct approach to constructive dismissal:²

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[26] The lawyer's letter sent on Mr Moxey's instructions on 13 May 2010 outlines two separate instances of WPNZ acting in breach of their obligations to be a fair and reasonable employer, such breaches being likely to destroy the trust and confidence between the parties and providing the basis for constructive dismissal. These breaches were set out as being:

- The instigation of a performance management process and associated unilateral changes in his position

- The non-payment of Mr Moxey's salary without justification or warning

¹ [1994] 1 ERNZ 168

² Ibid At p 172

The performance management process

[27] Mr Mann had informed Mr Moxey by email dated 5 March 2010 that he considered Mr Moxey's performance unacceptable and that he was commencing a performance management process. *The email warned Mr Moxey that "failure to achieve the progress expected could lead to dismissal from the firm on performance grounds"*.

[28] The principles governing dismissal for poor performance were set out in *Trotter v Telecom Corporation of New Zealand Ltd*³. The issues for the Authority focus on the test of justification contained in s.103A of the Employment Relations Act 2000 ("the Act") being what would a fair and reasonable employer have done in all the circumstances.

[29] The Authority must consider the actions of WPNZ to ascertain if it behaved as a fair and reasonable employer would have done in all the circumstances, specifically did WPNZ:

- (a) discuss his performance with Mr Moxey and express dissatisfaction with the level or standard;
- (b) provide Mr Moxey with a clear statement of the standard he was expected to achieve;
- (c) warn Mr Moxey of the consequences, including the possibility of dismissal should his performance not improve to the required level or standard;
- (d) provide Mr Moxey with training, supervision and other assistance needed for improvement;
- (e) give Mr Moxey a reasonable opportunity to improve; and
- (f) consider and discuss with Mr Moxey what changes had occurred and whether they met WPNZ's expectations or requirements.

[30] WPNZ was entitled to set standards for Mr Moxey's performance but the fair and reasonable employer would have given Mr Moxey clear objectives and have reviewed the attainment of these on a regular basis.

³ [1993] 2 ERNZ 659

[31] In this context I note that Mr Moxey during his 23 months of employment with WPNZ had no performance appraisals nor was he given any feedback about his performance. Consequently until the discussions with Mr Mann in March 2010, he was entitled to believe that his performance as General Manager was acceptable

[32] In addition the fair and reasonable employer would have brought any concerns about Mr Moxey's performance to Mr Moxey's attention in a timely manner. However despite Mr Mann's evidence that he first noticed Mr Moxey was not performing as expected in March 2009, his first discussion on the subject with Mr Moxey was in March the following year. I find it significant that the initiation of this process coincided with the financial situation of SATNZ having become serious.

[33] The fair and reasonable employer would have provided Mr Moxey with support in achieving those objectives. Mr Mann in the email of 5 March 2010 instructed Mr Moxey to create the plan of how he was to achieve the goals set, but offered no help to Mr Moxey in how the goals could be achieved. In fact Mr Mann left New Zealand for the UK on 25 March 2010, leaving with Mr Moxey with no support..

[34] Mr Moxey did not have a reasonable opportunity to improve prior to the contractual breach of the non-payment of his March and April salary payments occurring, which resulted in his resignation on 21 May 2010..

[35] I find that WPNZ did not act as a fair and reasonable employer in the management performance process.

Non-payment of salary

[36] As stated at clause 5.1 of the Agreement, Mr Moxey as the Employee "*will receive the remuneration and any other benefits specified in the First Schedule*". The First Schedule specifies that the Remuneration is "*\$72,000.00 per annum paid monthly in arrears*".

[37] There is no further contractual term contained in the Agreement in relation to payment of salary being dependent upon performance or the availability of funds. Mr Moxey was not paid his remuneration for the month of March, nor for the month of

April, and had still not received payment of any of the outstanding amounts of remuneration owing by 21 May 2010 when Mr Moxey resigned.

[38] The requirement to pay Mr Moxey the remuneration in accordance with the Agreement is a clear contractual term, and I find that there has been a fundamental breach in relation to clause 5.1 of the Agreement in conjunction with the First Schedule, that being the contractual term relating to the requirement to pay remuneration on a monthly basis to Mr Moxey.

[39] WPNZ had written to Mr Moxey stating that WPNZ was working on “*an injection of capital*” and that Mr Moxey’s salary would be paid “*as soon as the company receives more funds*”. However Mr Moxey did not agree to waive the breach.

[40] Following the first instance of breach at the end of March 2010, Mr Moxey emailed Mr Mann seeking payment of his March salary; following the non-payment of his April salary payment, Mr Moxey engaged a solicitor who wrote to WPNZ on his behalf requesting immediate payment of the outstanding remuneration.

[41] WPNZ’s response to this letter on 18 May 2010 did not remedy the breach by ensuring that Mr Moxey received his outstanding remuneration amount and offered no clear indication of when the breach would be remedied.

[42] The letter sent by Mr Moxey’s lawyer on 13 May 2010 states clearly that in the event of his outstanding salary not having been paid by 10 May 2010, Mr Moxey would “*have no option but to resign*”.

[43] On 21 May 2010 Mr Moxey resigned with immediate effect on the basis of repudiation of the Agreement by WPNZ.

[44] I find that it was reasonably foreseeable by the employer that there was a substantial risk of resignation if the serious breach of the contractual term relating to remuneration was not remedied.

[45] I determine that the actions of WPNZ breached its obligations to act as a fair and reasonable employer, which resulted in a corresponding breakdown in the trust and confidence between the parties and the unjustifiable constructive dismissal of Mr Moxey.

Did Mr Moxey unreasonably refuse to accept the assurances given by WPNZ as to payment of his salary and arrears?

[46] Mr Moxey had not been paid the salary payments due for March and April 2010 when WPNZ responded to the letter from Mr Moxey's lawyer of 13 May 2010. The response from WPNZ in the letter dated 18 May 2010 was quite unequivocal: *"The decline in income combined with other SATNZ cash being locked in loans have meant that there has been no ability for either SATNZ or WPNZ to meet all of its obligations, including your client's salary"*.

[47] The letter continued to make clear the fact that Mr Moxey would be paid only if WPNZ received an injection of capital. At the investigation meeting Mr Mann stated that this had not happened at that date.

[48] It was only following the receipt of this information that Mr Moxey determined that WPNZ would not remedy the breach and resigned.

[49] I determine that Mr Moxey was not acting unreasonably in refusing to accept the assurances given by WPNZ as to payment of his salary and arrears.

Did Mr Moxey unreasonably refuse to participate in a performance management process

[50] As stated, WPNZ was entitled to set the performance standards they expected of Mr Moxey.

[51] Mr Mann stated that Mr Moxey had provided the timesheets as instructed but had had not produced the detailed business growth plans as directed. Consequently Mr Moxey was in breach of a lawful direction by WPNZ under clause 8.2 of the

Agreement, which states: “*The Employee will carry out and comply with all reasonable lawful directions given by the Employee by the Company*”.

[52] Mr Moxey was to produce the first plan of how he would achieve business growth by 11 March 2010. However Mr Moxey was given no assistance with putting together this plan. I find it also significant that by this date there were no sales resources available to Mr Moxey, which would have been fundamental in the scope of such a plan.

[53] By the beginning of April 2010, as a result of the non-payment of salary to Mr Moxey, WPNZ was in fundamental breach of the Agreement, which subsequently resulted in Mr Moxey leaving their employment.

[54] I determine that Mr Moxey did not unreasonably refuse to participate in a performance management process.

Remedies

[55] I find that WPNZ breached its obligations to behave as a fair and reasonable employer and had fundamentally breached the Agreement with Mr Moxey. The decision by WPNZ to not pay Mr Moxey his monthly remuneration as required by the Agreement was not a decision an employer acting fairly and reasonably would have made in all the circumstances. Mr Moxey has been unjustifiably constructively dismissed and is entitled to remedies.

Reimbursement of Lost Wages

[56] Mr Moxey is to be reimbursed for the salary payments due to have been paid on 31 March 2010 for the month of March 2010, the salary payment due to have been paid on 30 April 2010 for the month of April 2010, and for the salary payment from 1 May 2010 up to and including 21 May 2010.

[57] Mr Moxey is also entitled to be paid his contractual notice period of 3 months, and the holiday payment applicable to these periods, in addition to accrued annual leave entitlements up to and including 21 May 2010.

[58] I make the following award:

- a. A payment of \$16,285.65 gross in respect of salary payments for the period 1 March 2010 to 21 May 2010.
- b. A payment of \$18,000.00 gross in respect of 3 months contractual notice period.
- c. A payment of \$4,828.97 gross in respect of accrued and annual leave entitlement

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[59] Mr Moxey is also entitled to compensation for humiliation and distress. I find that in respect of both matters giving rise to the unjustifiable constructive dismissal, these being the non-payment of salary and the performance management process, Mr Moxey suffered significant distress, resulting in him being medically unfit to attend work due to a stress induced condition.

[60] I make the following award:

- c) A payment under s. 123(1) (c) (i) of the Employment Relations Act 2000 for hurt, humiliation and injury to feelings in the sum of \$5,000.00.

[61] I am required under s 124 Employment Relations Act 2000 to consider the issue of any contribution that may influence the remedies awarded. I find no contributory behaviour on the part of Mr Moxey. Mr Moxey produced extensive evidence to the Authority of his attempts to obtain alternative employment. I am satisfied that Mr Moxey took adequate steps to mitigate his loss. There is to be no reduction in remedies.

Costs

[62] While costs are reserved, I note here that, subject to his submissions, Mr Moxey represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority